



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 11 OF 2017

ROBERT PETER KAZAWALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. A. Alego (PM) in Eldoret Chief Magistrates' Court Criminal Case No. 2766 of 2012 on 1st July, 2014)

JUDGEMENT

1. Robert Peter Kazawali was convicted of rape and sentenced to serve 10 years in prison. Aggrieved by the conviction he lodged this appeal on grounds that:

- i. The trial magistrate erred in law and fact in convicting the appellant on contradictory, inconsistent and insufficient evidence.***
- ii. The trial magistrate erred in convicting the appellant on evidence of prosecution witnesses who were not credible.***
- iii. The trial magistrate erred in convicting the appellant on evidence that did not link the appellant to the charge.***
- iv. The trial magistrate erred in convicting the appellant on prosecution evidence which was not proved beyond reasonable doubt.***

2. The appellant pleaded not guilty to the charge and was put to trial. It was the prosecution case that the complainant JC (PW1) was asleep with her children W and E in her house on 25th June, 2012 when at around 1.00 am, the appellant went to her house and woke her up. He initially indicated to PW1 that he wanted the phone he had given her. On opening the door, the appellant who had a panga told her that he had not come for the phone but for her. He then dragged her into the house and to bed and threatened to kill her if she raised alarm. Margaret Chirchir (PW2) heard a commotion and heard appellant's and PW1's voices. She called Mary Kangongo and Mary's husband Protus Kangongo (PW3) and they answered to the distress call. PW1 opened the door and the three searched PW1's house using a torch wherein they found the appellant under the bed. He came out holding a panga and his trouser on his hand. He threatened them but they wrestled and overpowered him. He however cut PW3's finger. He was handed over to Kapsoya Police Station. Corporal Richard Mbithi (PW5) received a report on 26th June, 2012 that a minor had been defiled. He booked the report and issued a p3 form which was duly filled and returned. He took the witness statements and requested for age assessment which revealed that PW1 was 18 years of age. He produced the age assessment report as P. Exhibit 2. Dr. Yatich a medical officer at Moi Teaching and Referral Hospital who worked with Dr. Jaguga who examined PW1 was called to produce the p3 form.

3. The appellant's defence was that he was asleep at 11.00 p.m. when he heard a knock and suddenly he was pounced on and asked for money. He gave out KShs. 135, 875/-. Everything was taken away from him and he was bundled into a motor vehicle and taken to Kapsoya Police Station and charged.

4. This being a first appeal, this court is under duty to re-evaluate the evidence afresh with a view of arriving at its independent conclusion bearing in mind that it did not have the benefit of seeing the witness(es) demeanor. I have given due consideration to this appeal and find that the following issues fall for determination:

- i. Whether or not the appellant was convicted on contradictory, inconsistent and insufficient evidence.***
- ii. Whether or not the prosecution evidence linked the appellant to the charge/offence.***

5. In his submissions, the appellant pointed out inconsistencies in the prosecution evidence among them, the variation in the date of the ordeal, thus 24th and 25th June as per PW2, 25th June, 2012 as per PW3, 24th June, 2012 as per PW4 and 23rd to 24th June, 2012 as per PW1; that PW1's evidence was that PW2 entered the house, asked her for the phone and searched before calling PW3 and his wife while PW2

stated that she heard a commotion, called PW3 and his wife and went to PW1's house and that there was no evidence that PW3's finger was cut. In regard to the said inconsistencies, he submitted that it was not safe for the trial court to convict where there existed such inconsistencies. In support of his case, the appellant cited **John Chemengich Wache v. Republic HCCR Appeal No. 69 of 2003** where it was held that a conviction should not lie where there is any doubt in the prosecution case. From PW1's evidence, the incident occurred in the night at around 1.00 am. From the record, PW1 stated that the incident occurred on 25th June, 2012 while PW2 stated 24th and 25th June, 2012 and PW3 stated 25th June, 2012. Considering that the incident was said to have occurred at around 1.00 am in the night, the variation of the date between 24th and 25th June, 2012 is in my view not fatal to the Respondent's case. On the exact occurrences whether or not PW2 first went to PW1's house before calling PW3 and his wife or otherwise. I still find that the said inconsistency was not material since inconsistencies are common in criminal cases due to lapse of memory such as in this case where a year had lapsed before trial. In this regard, I find my bearing in the Court of Appeal's holding in **Philip Nzaka Watu v. Republic [2016] eKLR** where it was stated:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In DICKSON ELIA NSAMBA SHAPWATA & ANOTHER V. THE REPUBLIC, CR. APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

The main contradiction that the appellant complains about relates to the time when the offence was committed. The prosecution witnesses were clear that they were not testifying to the exact time. They were approximating, to the best of their abilities as common rural folk. The witnesses mentioned various times, ranging from 6.30 pm, 7.00 pm, 7.30 pm and 8 pm. The only exception was the evidence of PW1 where the time is recorded as 6.30 a.m. Granted the consistency of the estimates of the other witnesses, we cannot rule out the possibility that the reference to 6.30 a.m. was in fact a typographical error in the record. The trial court was satisfied that the offence was committed between 6.30 pm and 7.00 pm and we have no basis for concluding that there was material contradiction in the prosecution evidence to warrant interference with the conclusion of the trial court. In any case, the time when the offence was committed is a question of fact, which the two courts below determined.”

and the holding in Uganda Court of Appeal in **Twehangane Alfred v. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6** quoted with approval by the Court of Appeal of Kenya in **Erick Onyango Ondeng' v. Republic [2014] eKLR**. The Uganda Court of Appeal held:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

That ground therefore fails.

6. The appellant further submitted that PW4's evidence did not link him to the offence and that the prosecution evidence was fabricated since there was no mention of the alleged PW1's one-month old baby. That none of the prosecution witnesses gave an account of what happened to the baby during or after the incident. The appellant herein was charged with the offence of rape. Section 3 (1) of the Sexual Offences Act provide:

“A person commits the offence termed as rape if-

- a. He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;***
- b. The other person does not consent to the penetration; or***
- c. The consent is obtained by force or by means of threats or intimidation of any kind.”***

7. It emerged from PW1's evidence that the appellant tricked PW1 and entered the house. He then dragged PW1 to bed and raped her. The said evidence was corroborated by PW2 and PW3's evidence. It further emerged from PW's evidence that on examination, hymenal remnants were found on PW1. PW2 corroborated PW1's evidence that she was forced bearing in mind that she screamed. The hymenal remnants are further an indication that she was penetrated. The two having been established, I find that the prosecution case was proved beyond reasonable doubt. The Appellant was found red handed holding his trouser by the hand inside the house of the complainant. The complainant did not consent to the sex. I find all the ingredients of the offence proved against the appellant beyond any shadow of doubt. The appellant's defence did not shake that of the prosecution.

8. In the result I find the appeal lacks merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

D. K. KEMEI

JUDGE

Delivered at Eldoret this 22ND day of **November, 2018.**

O. SEWE

JUDGE