



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 64 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL GICHERU MBURU.....ACCUSED

(Arising from the conviction and sentence by Hon. A. M. Maina Principal Magistrate in Gatundu PMCC 51 of 2013)

JUDGMENT

A. INTRODUCTION

1. Michael Gicheru Mburu (“Appellant”) was arraigned before the Gatundu Senior Resident Magistrates’ Court and charged with one count of rape and an alternative charge of indecent assault. The particulars of the main count were as follows:

Charge: Rape contrary to Section 3(1) (a) of the Sexual Offences Act No. 3 of 2006

Particulars of the offence: On the 23rd day of January 2013 in Gatundu South district within Kiambu County, intentionally and unlawfully did an act which causes penetration with his genital organ namely penis into the genital organ namely vagina of F N aged 19 years without her consent.

2. The alternative charge read as follows:

Alternative Charge: Committing an indecent Act contrary to Section 11(6) of the Sexual Offences Act No 3 of 2006.

Particulars of the Offence: Michael Gicheru Mburu: On the 23rd day of January 2013 in Gatundu South district within Kiambu County, intentionally and unlawfully touched the buttocks and vagina of F N with your penis.

3. After a fully-fledged trial, the Learned Trial Magistrate convicted the Appellant on the main count and sentenced him to ten years imprisonment. The Appellant is aggrieved by both the conviction and sentence and has preferred the present appeal. He filed six grounds of appeal. Most of them are not fully comprehensible but he seemed to focus on three grounds during the oral hearing. I will analyse them below.

4. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

C. THE EVIDENCE PRESENTED IN THE TRIAL COURT

6. The evidence that emerged from the Trial Court was as follows. The Complainant testified as PW1. She was 19 years old at the time of the incident. She testified that on 23/01/2013, she had been sent by her mother to cut grass for the cows in the farm the mother has leased. The farm is a little far from their home – about half-a-kilometre away (as per the testimony of PW5). As she was cutting the grass, at around 11:00am, the Accused, who was known to her appeared on the scene. At first, she testified, the Accused asked her if she had seen another girl by the name M. The next thing, the Complainant testified, the Accused forcibly covered her mouth, reached down and removed her biker shorts and in the process tore them. The Complainant testified that the Accused then pulled down his trousers and pants down to his knees, forced the Complainant down on her back and raped her for about two minutes. After the ordeal, the Accused attempted to give the Complainant Kshs. 10/- but she refused to accept the money. The Accused then left the scene.

7. The Complainant then rose and went straight to report to her mother what happened. The mother, L M, testified as PW2 and her testimony picks up from where that of PW1 ends. She testified that on the material day she had sent her daughter, the Complainant, to get cow feed from the shamba but she came back at around 11:30am crying. She also had dust all over her body and her clothes were soiled. The Complainant then showed PW2 her torn biker shorts and reported that she had been raped. The Complainant told her mother that she could point out the person who had raped her to the mother – so they walked towards the shamba where the incident had occurred.

8. It was PW2's testimony that they found the Accused as he was coming from the shamba and she asked the Accused if he had sexually assaulted the Complainant. The Accused apparently became enraged and PW2 feared he would attack them so he left him and went to report the rape instead. He later accompanied the Complainant to Gatundu District Hospital where the Complainant was examined and treated.

9. Josephat Githinji Mwaura ("Mwaura") testified as PW3. His narrative was that he was at home on the material day at around noon when PW2 told him that the Complainant had been raped by Gicheru (the Accused Person). Since Mwaura knew Gicheru, he joined a group of other people in searching for the Accused. They eventually found the Accused, arrested him and handed him over to the Police.

10. The Investigating Officer in the case, Corporal Marion Chogo testified as PW5 and confirmed that a rape report was made at the Gatundu Police Station at around 3:45pm. The report was made by the Complainant who was accompanied by her mother. In material detail, Cpl. Chogo testified about the Complainant's narrative about how she was raped and it tallies with the narrative given by the Complainant. Cpl Chogo testified that she then escorted the Complainant to the hospital where the Complainant was examined and treated.

11. Finally, Dr. Eunice Muguero testified as PW4. She did not examine or treat the Complainant. It was a Dr. Mwaura who did that. However, Dr. Mwaura had, by the time of the trial, gone for further studies in India. He would be away for the next 5 years so the Prosecutor applied for the Court to permit Dr.

Muguero to produce the medical notes and P3 form filled by Dr. Mwaura. The Accused had no objection to the production of the documents by Dr. Muguero. At the trial, Dr. Muguero explained that she was familiar with Dr. Mwaura's handwriting and then produced the documents. The treatment notes narrate a story that tallies with that of the Complainant. However, the P3 form is inconclusive on the question whether there was forcible penetration since the doctor did not find any bruises or tears on the vagina. It is conclusive that the Complainant's hymen was no longer intact. It also records that the doctor found a milky discharge in her vagina.

12. Against this Prosecution evidence, the Accused, when put on his defence, gave a direct denial. He testified that he did not rape the Complainant as alleged. According to his narrative, on the material day, he was harvesting avocados until lunch time when he stopped by a restaurant in Kang'oo for lunch. While there, a certain man approached him and in the guise that he had avocados to sell, the man tricked the Accused to accompany him on a motor cycle towards Gatei. However, on getting to River Marige, they found a large crowd which arrested him and handed him over to the Police.

13. The Accused complained that the man who had played this central role in his arrest never testified. His theory was that it was the Complainant's mother who had put her up to the story as the Complainant had initially said she does not know the Accused.

D. GROUNDS OF APPEAL

14. The Appellant listed a cocktail of grounds of appeal – seven initially – and then added at least two more in his Written Submissions. As stated above, some of the Grounds are hard to comprehend but I did my best to make sense out of them. Briefly, the first seven grounds listed on the first page of what the Appellant has fashioned “Amended Supplementary Grounds of Appeal” are as follows:

- a. Ground 1 alleges that the Prosecution had not discharged its burden of proof and seeks to found its argument on section 107 of the Evidence Act.
- b. Ground 2 cites section 163 of the Evidence Act and, essentially, argues that PW should have been impeached as a witness.
- c. Ground 3 is based on identification evidence.
- d. Ground 4 is based on section 124 of Evidence Act and argues that there was no corroborative evidence in this case.
- e. Ground 5 argues that the language used was not understandable to the Accused and no translation was provided to him.
- f. Ground 6 argues that the Trial Court failed to understand that the case was based on circumstantial evidence.
- g. Ground 7 (listed as Ground 8 since what is listed as ground 7 (an argument that the High Court has jurisdiction) is not a ground of appeal) expresses a grievance against the sentence imposed.

15. In his Written Submissions, the Appellant adds at least two additional grounds:

- a. He argues that there was no evidence of penetration which is a mandatory ingredient of the offence of rape.
- b. He also argues that the Prosecution case was riddled with contradictions and inconsistencies and that it was unsafe to convict on it.

16. I have re-arranged and re-grouped the complaints raised by the Appellant into four:

- a. First, was there sufficient evidence to convict the Accused Person?
- b. Second, was the conviction unsafe for failure to call an essential Prosecution witness?
- c. Third, was the trial unfair because the Accused Person was unable to follow the proceedings due to a language barrier?
- d. Fourth, was the sentence imposed illegal or excessive?

E. COMPLAINTS BASED ON SUFFICIENCY OF EVIDENCE

17. The Appellant raises five complaints on the issue of evidence:

- a. First, he bases his argument on section 107 of the Evidence Act to argue that the Prosecution did not discharge its burden of proof.
- b. Second, he inexplicably bases another argument on section 163 of the Evidence Act to impugn the credibility of the Complainant. In fact, his argument is simply that the Complainant was not a believable witness.
- c. Third, he relies on section 124 of the Evidence Act to argue that the evidence of the Complainant was not have been received.
- d. Fourth, the Appellant argues that there was no evidence of penetration.
- e. Fifth, the Appellant argues that the evidence on record was riddled with contradictions and inconsistencies and was insufficient to warrant a conviction.

18. The first three complaints are better analysed together. Section 107 and 163 of the Evidence Act are really inapplicable in the sense that the Appellant wishes to deploy them. However, I understand his overriding complaint to be that the Prosecution did not discharge its burden of proof and that the Complainant was not a credible witness. He supplements this argument with his argument on section 124 of the Evidence Act by arguing that there was no corroboration of the Complainant's story.

19. Suffice it to say that section 124 of the Evidence Act was inapplicable here since the Complainant was not a child of tender years. The Complainant was 19 years old at the time of the incident. In any event, the Appellant does not really say why the Complainant should not have been believed – other than his complaints against alleged inconsistencies in her testimony which I analyse below. In the end, therefore, nothing comes out of this complaint.

20. There is probably a little more to the complaint that there was no proof of penetration. The Appellant's arguments in this regard is twofold: First, he says that the medical evidence presented did not prove penetration and neither did the testimony of the Prosecution witnesses. Second, the Appellant argues that Dr. Muguero could not have testified about the rape because she never examined the Complainant.

21. As I understand it the first argument by the Appellant in this regard is that the medical evidence indicated that there were no bruises or tears on the vagina of the Appellant. The P3 form reads: "Normal outer genitalia. No tears. No bruises. Hymen was broken. No anal injuries."

22. The Appellant's argument here is inaccurate. The fact that there was no physical injury or vaginal trauma is not necessarily inconsistent with the Complainant's allegation that she was raped. Vaginal trauma demonstrated through bruises or abrasions or tears to the vagina is not necessary to prove rape; only penile penetration is.

23. The Appellant had impugned the medical evidence on the ground that the testifying doctor was not

the one who examined him. He also complains that he was also examined but the results of his examination were not presented in court.

24. The circumstances under which Dr. Muguero produced the P3 form and medical treatment notes on behalf of Dr. Mwaura, who examined and treated the Complainant, are that Dr. Mwaura had, by the time the trial was held, traveled out of the country to study in India. He was not expected in the country until after 5 years. The Prosecution applied, and the Court permitted, in the absence of any protestations – indeed, with the concurrence of the Appellant – that Dr. Muguero could produce the evidence. Dr. Muguero laid the basis by testifying that she was familiar with the Dr. Mwaura’s handwriting but the Appellant says now that Dr. Muguero should have demonstrated how she was familiar with Dr. Mwaura’s handwriting. I note that the Appellant did not cross examine Dr. Muguero at all on this aspect. It was perfectly reasonable for the Court to accept her testimony. In these circumstances, nothing can really come out of the Appellant’s complaints.

25. As to the argument that it was an error not to present the Appellants’ medical examination results, there was no such requirement if the results were not useful for either him or the Prosecution’s case. Of course the Appellant was at liberty to have the results put in as evidence as part of the Defence case.

26. Next, the Appellant argues that there was no evidence of penetration which is a mandatory ingredient for the offence of rape. He pegs his argument on the fact that the Complainant never used the word “penetrate” in her testimony – but used the word “rape” instead. Suffice it to say that a Complainant is not required to use any magical or talismanic words to prove rape. All she is required to do is to testify credibly that there was sexual assault.

27. Was the prosecution evidence sufficient to prove the charge beyond reasonable doubt? The Appellant argues that it was not. First he says the evidence was full of contradictions and inconsistencies. The key problems the Appellant sees with the evidence is as follows:

- a. He says that if it is true that the Complainant knew him (the Appellant) before the incident, then she could have mentioned him by name to her mother (PW2) when she first reported the rape.
- b. Whether the Complainant raised alarm (as testified by PW4) or the Appellant covered her mouth with his hand so that the Complainant could not scream.
- c. Whether the Appellant was arrested and taken to the Police Station after the Complainant had been taken to the hospital.

28. After carefully reviewing the evidence on record, I have come to the conclusion that the inconsistencies and contradictions referred to by the Appellant were not such that one can conclude that they raise reasonable doubt about the sexual assault. In making this conclusion, I am guided by the fact that the threshold in criminal cases is for the Prosecution to prove its case beyond reasonable doubt – not beyond every shadow of doubt. Hence, the Prosecution is not required to prove every aspect of the case to an absolute certainty but to a high degree of probability. See **R v Bracewell (1978) 68 Cr App R 44 at p 49** which states the English position which is in accord with ours.

29. I will briefly address the two inconsistencies raised by the Appellant to demonstrate that no reasonable doubt could arise from them:

- a. First, the Appellant complains that the Complainant did not mention him by name when she first reported the incident to her mother (PW2). What is on record is the following:

“[Complainant] showed me her underpants which were torn. She told me that she had been raped. She told me to accompany her to go and show the person who had raped her. We met with the Accused coming from the shamba where the Accused had been working. The Accused was coming from a shamba we had leased. The Accused whether is the one who had raped [Complainant](sic).”

Later on in cross-examination, PW2 says: “I knew your name after you were arrested. I was told your name at the Police Station.”

It would thus appear from the evidence on record that, indeed, the Complainant did not mention the Appellant’s name at first blush to her mother. However, this is not an inconsistency. It only raises the question whether the initial non-mention of the Appellant’s name when she first reported the incident is inconsistent with her telling the truth about the incident. I do not think it does. As I have analysed before, the Complainant was a perfectly credible witness. The context explains why it might have been unnecessary for her to mention the Appellant’s name: First, she offered to go show the mother her assailant and, indeed, did so. Second, the mother did not know the Appellant so mentioning the name might have been pointless. It would have seemed a lot more useful to walk to the scene and point out the assailant which is what the Complainant did.

b. The Appellant also raises the discrepancy in the testimonies of the Complainant and PW4 about whether the Complainant raised alarm during the assault. The Complainant testified that she did not because the Appellant covered her mouth with his hand; PW4 testified that she raised the alarm but no one came to her rescue.

In my view, this inconsistency is minor and not material and can be explained: PW4 was merely repeating what she could remember the Complainant reporting to her; while the Complainant testified about her actual experience. It follows that the version of the Complainant is the superior one since she experienced the assault. It is perfectly possible for a Police Officer to forget details of an account of a sexual assault more than a year after it was reported to her.

30. In my view, after carefully reviewing the record, the Learned Trial Magistrate was not in error to ignore these inconsistencies as minor and immaterial. Inconsistencies are common in criminal trials both because of lapse of memory as well as other factors especially when there has been a substantial lapse of time between the event and the date of the testimony.

31. As noted by the Uganda Court of Appeal in *Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6* it is not very contradiction that warrants rejection of evidence – see *Erick Onyango Ondeng’ v Republic [2014] eKLR CRIMINAL APPEAL NO. 5 OF 2013*. As the court put it:

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.

32. The inconsistencies in question here are not material at all. Hence, the case turns on whether to believe the narrative given by the four Prosecution witnesses. The Learned Trial Magistrate believed them and I find no reason to fault her analysis and conclusions.

33. Lastly under this head, I will address the Appellant’s complaints that the Complainant was not a credible witness and that her evidence was that of a single testifying witness which was uncorroborated and should, therefore, not have been enough to warrant a conviction.

34. I begin by noting that the Complainant gave straightforward narrative about what happened to her on the material day. On cross-examination, the Complainant’s evidence remained remarkably consistent and unshaken despite having recently suffered from a bout of epilepsy. The Trial Magistrate who heard and saw her believed her.

35. Secondly, as pointed out above, in all material aspects, the Complainant’s story was quite consistent with that of the mother and other contextual evidence – including the fact of immediate reportage, the medical evidence, the conditions of the Complainant’s clothes and appearance, and the presence of the

Appellant in the proximity of the scene of the crime. All these, in my view, are clear pointers and provide a base of facts from which a Court can reasonably conclude that the Complainant was telling the truth about the sexual assault.

36. One last issue of evidence that the Appellant raises is an assertion that the case was based on circumstantial evidence and the Trial Court did not take the care and caution that is called for in relying on circumstantial evidence. The Appellant is correct in his statement of the law. However, the rule has no application to this case: The Prosecution case was not based on circumstantial evidence. The Complainant gave straight evidence about what happened to her – identifying the Appellant as the perpetrator. This was direct not circumstantial evidence. It is corroboration of the Complainant’s narrative that is furnished by circumstantial evidence.

37. Overall, while the Appellant has attacked the sufficiency of the evidence and the credibility of the Complainant, I find that the evidence on record was sufficient to sustain a conviction.

F. WAS IT FATAL THAT THE PERSON WHO LED IN THE ARREST OF THE APPELLANT WAS NOT CALLED TO TESTIFY?

38. The Appellant complains that the man who led in his arrest was not called to testify. The Appellant testified that a man had gone to Kangoo Centre and tricked him into accompanying him saying that he had avocadoes to sell. That man, however, led him to members of the public who were searching for him and arrested him. He is persuaded that the man would have shed light on the circumstances of his arrest and, presumably, lead to the conclusion that he was not guilty. It is not clear how the testimony of that man would have helped the Appellant. Suffice to say that the witness was not essential to the Prosecution case and therefore there was no need to call him. If the Appellant was of the opinion that the evidence of that man was exculpatory, he would have called him as a Defence witness or sought the assistance of the Court to call him. The duty of the Prosecution as enunciated in *Bukenya & Others Vs Uganda (1972) EA 549* is to call all the witnesses necessary to establish the truth even if their evidence may be inconsistent. The rule in the case is that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case.

39. However, in this case, there is no sense in which the evidence of the man who helped arrest the Appellant can be described as “essential” in any meaningful way. Evidence of the arrest had already been led by PW3 and the “Prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.” See *Keter V Republic [2007] 1 EA 135*.

G. WAS THE TRIAL CONDUCTED IN A LANGUAGE WHICH THE ACCUSED PERSON DID NOT UNDERSTAND AND NO TRANSLATION PROVIDED?

40. The Appellant also questions whether the language used during the trial was understandable and whether the Trial Court played its role to ensure that language was understandable to the Appellant. His complaint does not seem to be that he did not understand the proceedings but rather that the Court did not fastidiously record which language was used in the proceedings.

41. I have looked at the proceedings and noted that when plea was taken, the Appellant informed the Court that he understood Kiswahili. As a result, the charges were read to him in Kiswahili. I have also noted that he testified in Kiswahili. There is, therefore, no question at all that the Accused Person understood Kiswahili. I have also noted that all the witnesses except Dr. Muguero testified in Kiswahili. That much is recorded in the proceedings. Consequently, it is obvious that the testimonies of these witnesses was given in a language that the Appellant said he was fluent in and understood – indeed, his preferred language. It is to stretch formalism to absurd levels to now state that the failure of the Trial Court to record during each sitting that there was English-Swahili translation renders the proceedings a mis-trial. Here, the Learned Magistrate clearly indicated the language in which the witnesses testified and I think this is sufficient.

42. There is a question whether the testimony of Dr. Muguero was translated into Kiswahili for the Appellant. Suffice it to say that even if it was not, the evidence was a formal kind as she did not examine the Complainant. She produced the treatment notes and the P3 form. The appellant cross-examined her. I have also had an opportunity to review the evidence she presented in light of the attack by the Appellant and come to an independent conclusion about its utility and veracity.

43. APPEAL AGAINST SENTENCE

44. The Appellant complains that the Court did not take into account the mitigating circumstances in sentencing him and, therefoRe, ended up imposing an unduly harsh and excessive sentence.

45. I note that the Court recorded the Appellant's mitigation but pointed that it was imposing the minimum sentence for the offence convicted. Ten years imprisonment is the minimum sentence for the offence of rape. That is the sentence imposed on the Appellant. Neither the Trial Court nor this Court can impose a lower sentence.

46. Consequently, I will leave the sentence imposed intact.

H. CONCLUSION, DISPOSAL AND ORDERS

47. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

- a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.
- b. The sentence imposed by the Trial Court of ten (10) years' imprisonment is affirmed.

48. Orders accordingly

Dated and delivered at Kiambu this 20th day of January, 2017.

JOEL NGUGI

JUDGE