



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAROK
CRIMINAL APPEAL NO. 39 OF 2017

GEOFFREY OGETO ALIAS JAYMAX.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in the Chief Magistrate's court at Narok, in criminal case No. 1811 of 2014, R. v. Geoffrey Ogeto Alias Jaymax)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 30 years imprisonment in respect of rape contrary to section 3(1)(a) as read with section 3(b) and (3) of Sexual Offences Act 3 of 2006. In count 2, he has appealed against his sentence and conviction of assault contrary to section 251 of Penal Code (Cap 63) Laws of Kenya in respect of which he was sentenced to 3 years imprisonment. In count 3, he has appealed against his conviction and sentence of 3 years imprisonment in respect of the offence of stealing contrary to section 268 as read with section 275 of the Penal Code, which sentences were ordered to run consecutively.

2. The state supported both the conviction and the sentence of the appellant. The appellant was convicted on the recognition evidence of Rebecca Chebet (PW 2). She testified that the appellant whom she knew before went to her 'Siku Hizi Lodgings' and rented a room for the night which was christened 'Kajiado' for Ksh.250/=. In the morning when PW2 went to check the room of the appellant, she found that the appellant was not there. She further found that her beddings including bed sheets, covers and blankets had been stolen. Furthermore, PW 2 testified that she learned that her stolen properties from that lodging were with E M N(PW1).

3. PW1 testified that while she was asleep in her grass thatched house in the night of 31/10/2014, she heard someone calling her at the door in Kiswahili, "Gogo nifungulie. Nimetumwa nilale hapa."(Grandmother open for me. I have been sent to sleep over at your house). She then asked the person to identify himself. This person told her that he was his grandson. PW1 refused to open the door and told that person that it was too late. After telling that person to go away, she took her panga and armed herself just in case that person gained access into her hut. As she was inside her hut, she heard that person climbing the grass thatched roof. Thereafter, she heard that person dropping into her room from the roof. As a result PW1 opened the door and walked out to escape. That person followed quickly and caught up with her and tripped her to the ground. That person then punched her head, and on her face and chin and in the process of the assault she lost 2 teeth.

4. Furthermore, PW1 testified that that person got hold of her and dragged her back into the grass thatched house and stripped her naked before placing saliva on his male organ. After that he proceeded to have forced sexual intercourse with her. She further testified that after that person was satisfied, he fell

asleep on her bed and slept that way until a late hour. It is at that point in time that PW1 got a chance and escaped from the hut and slept in the maize plantation next to her hut. In the following morning, that person left her hut in haste leaving behind his luggage that comprised beddings wrapped in a bed sheet. When it was clear in the morning, PW1 emerged from her hideout in the maize and met her relatives to whom she narrated the story. Thereafter, she reported the matter to the police and was also taken to hospital for examination and treatment.

5. It was also the evidence of PW1 that when the police recovered the luggage they also recovered her clothes from the scene of crime.

6. Rebecca Chebet (PW2) also testified that when she went to check her '*Kajiado*' room in '*Siku Hizi Lodgings*' at Enabelbel, she found that the lodger had left and upon checking she discovered that the lodger had carried away the lodging beddings comprising of bed sheets and blankets. Thereafter, she learned that an old lady (PW1) had reportedly been seen with the beddings wrapped in a bed sheet. PW 2 then proceeded there and found that the luggage consisted of her bed sheets, covers and blankets that were stolen from the lodging. It is then that she explained and described the lodger as the man in the Centre, who used to smoke cigarettes with the lit end inside his mouth. It is this description that led to his arrest because he was known to smoke cigarettes in that manner.

7. The complainant (PW1) was escorted to hospital by her daughter (PW3). Meanwhile, AP Police Corporal Michael Ndege attached to Enabelbel AP Camp got information that a certain suspect was being beaten by an angry mob and was requested to go to his rescue. The person rescued from the angry mob was the appellant. Corporal Ndege then re-arrested the appellant who was eventually charged with these offences. No. 89839 PC Constable Lydia Wanja (PW 5) of Ntulele Police Station received the appellant and the complainant (PW 1) who had been brought to her station by Administration Police officers. The complainant narrated the rape ordeal to her. The complainant told her that in the morning she alerted neighbours and relatives who came and she showed them the luggage left behind by the appellant. She produced the stolen beddings and blankets as prosecution exhibit 5. She also produced a blouse, a skirt, a lesa and jacket which were put in evidence as prosecution exhibit 1, 2, 3 and 4 respectively.

8. The appellant after being put on his defence, made an unsworn statement. He testified that Jaymax is his nickname. He further testified that on 31/11/2014 he woke up and went to his place of work as usual. He met 2 men who alerted him that the chief had called a baraza to distribute fertilizer. He joined them and then they went to the chief's baraza. While in that baraza, a woman arrived in the scene and said that the suspect looked like him. It was at that point in time that one man started to assault him and was then arrested and charged falsely with these offences. In short his defence was that of an alibi.

9. The appellant originally raised 16 grounds of appeal, which he later amended by reducing them to 4 grounds. In ground 1, he has faulted the trial court both in law and fact for convicting him on the contradictory evidence of the prosecution. In this regard, I find the evidence of the complainant PW2 was cogent and did not contradict herself.

10. The complainant in count 1 testified as to how she was raped by the appellant. She also testified as to how the appellant assaulted her before the rape. The second complainant PW2 testified as to how the appellant rented a room christened '*Kajiado*' in '*Siku Hizi Lodgings*', only to find that in the following morning the appellant had disappeared with her beddings. I do not find any contradiction in the evidence of (PW 2). I find from the evidence of PW 2 that she had known the appellant before the commission of this offence as a person who smokes cigarettes with the lit end in his mouth. In the circumstances, I find that PW 2 positively recognized the appellant, because there was plenty of electricity light at those lodgings. In the circumstances, I find no merit in this ground of appeal and I hereby dismiss it.

11. In ground 2 the appellant has faulted the trial court both in law and fact for convicting him when the evidence presented did not prove the offence charged beyond reasonable doubt. I have found from the evidence of PW2 that the appellant was positively recognized during the material night as the person who hired a room christened as '*Kajiado*' at '*Siku Hizi Lodgings*'. In the circumstances I find that the evidence produced during the trial showed that the offence was proved beyond reasonable doubt. In ground 3, the

appellant has faulted both the trial court in law and fact for relying on the P3 form (prosecution exhibit 1) which was incomplete. Exhibit 1 was prepared by Hillary Kiptoo (PW 6). It detailed the injuries sustained by the complainant. The only complete parts relate to the parts in respect of the male complainant, who was not examined by Hillary Kiptoo (PW6), who was then stationed at Narok County Referral Hospital. In the circumstances, I find that this ground is lacking in merit and is hereby dismissed.

12. In ground 4 the appellant has faulted the trial court both in law and fact for dismissing his plausible defence. In this regard I find that the evidence of Rebecca Chebet PW2 was credible in that she positively recognized the appellant as a person who stole the beddings from her “*Siku Hizi Lodgings.*” In the circumstances, I find that his defence of an alibi was rightly considered and rejected.

13. Furthermore, the evidence in count 1 and 2 is circumstantial in nature. It consists of the evidence of E M N (PW1). She did not identify the appellant, because the offence was committed at night. It is the recovery of the stolen beddings of PW 2 in the premises of PW 1 that pointed the appellant as the person who raped PW1. There is medical evidence from Hilary Kiptoo (PW6) that the complainant complained of pain on her face. Upon examination he found PW1 to have a bruise on the left index finger. He also found that both her knees had bruises. Furthermore, he found she had lacerations and bruises on her labia menora and had a discharge from her vagina. Laboratory tests showed blood in her urine. He concluded that penetration had taken place meaning she had been raped. He then put in evidence in the P3 form as prosecution exhibit 1, laboratory tests results as exhibit 2(a) and treatment notes as exhibit 2(b). This is a first appeal. As a first appeal court according to *Okeno v. R. (1972) E. A 32 and Peters v. Sunday Post Ltd (1958) E. A 424*, I am required to scrutinize the evidence produced at trial court and come to my own conclusions. I have done so and have come to the conclusion that the appellant was convicted on sound evidence in respect of stealing in count 3. The evidence of PW 1 that she lost 2 teeth is not borne out by the medical evidence. The report of the P3 form showed that she did not lose her 2 teeth. Furthermore, when she was attacked she never raised an alarm to alert her neighbours. She ran in the morning to hide in the maize plantation and not to her neighbours for assistance. Furthermore, the report of the P3 form clearly indicates that she was raped by a person known to her. In the circumstances I find that her evidence is not credible. I therefore quash the conviction and sentence in counts 1 and 2 which charged rape and assault. The appellant’s appeal succeeds in count 1 and 2.

14. I find that there is overwhelming evidence to support the charge of stealing in count 3. I therefore confirm both the conviction and sentence recorded in count 3.

15. In the light of the foregoing, the appellant’s appeal is hereby dismissed in count 3 and the sentence of 3 years imprisonment is hereby confirmed.

Judgement delivered in open court this 28th day of February, 2017 in the presence of the Appellant and Mr. Mukofu for the Respondent.

J. M. BWONWONGA

JUDGE

28/2/2017