



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 135 OF 2014
PHILLIP SHIVACHI JOHN.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction in Criminal Case No. 396 of 2014

in the Senior Resident Magistrates Court at Kabarnet by G. Adhiambo,

Ag. Senior Resident Magistrate dated 5th August 2014]

JUDGMENT

1. The appellant was convicted for *rape* contrary to section 3 (1) (a) of the Sexual Offences Act. He was sentenced to *fifteen years* imprisonment.
2. The particulars were that on 9th February 2014 at K. *[particulars withheld]* village within Nandi County he intentionally and unlawfully caused his penis to penetrate the vagina of R.I. *[particulars withheld]* without her consent.
3. The appellant has appealed against his conviction and sentence. The original petition was filed on 19th August 2014. On 24th November 2016, the appellant was granted leave to amend the grounds of appeal. The *amended grounds* are seven. They may be condensed into *six*. First, that the evidence of the complainant was inconsistent and unreliable; secondly, that medical evidence did not corroborate her evidence; thirdly, that material exhibits were not produced in court; fourthly, that a key witness was not summoned to the court; fifthly, that the defence tendered by the appellant (including allegations of a grudge) were dismissed off-hand. In a synopsis, the appellant's case is that the charge was *not* proved beyond reasonable doubt. At the hearing of the appeal, the appellant relied wholly on his hand-written submissions.
4. The Republic contests the appeal. In a nutshell, the case for the State is that the appellant was positively identified from the moonlight. In addition, the ordeal took about an hour. The learned Prosecution Counsel submitted that there was corroborating evidence establishing the culpability of the appellant. I was accordingly urged to *dismiss* the appeal.
5. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the

witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

6. PW1 was the complainant. On 9th February 2014 at 9:00 p.m., she was heading home from Nandi Hills. She said the appellant approached her from behind and held her by the neck. He was armed with a knife. He demanded sex. He threatened to kill her if she resisted his advances. She testified that the appellant dragged her into his house near the road. The door was ajar. He then penetrated her and ejaculated into her vagina.

7. PW1 said there was moonlight; and, that the appellant used a beam of light from his cell phone when they entered the house. He then switched it off. The complainant said she did not scream because there was a funeral meeting nearby; and, because the public would have thought she was wailing in grief. After the appellant released her, she met her brother (PW2). She narrated to him what had transpired.

8. They contacted A M (PW3). He is the village elder. He gathered a number of young men. They went back to the appellant's house. They arrested him and took him to Nandi Hills Police Station. The complainant was issued with a P3 form. It was filled out the next day at Nandi District Hospital. She also received treatment at the hospital.

9. Upon cross examination, she confirmed there was no one else in the appellant's house. The learned trial magistrate noted on the record that the testimony of the complainant was *divergent* from her *original* statement to the police.

10. PW2 is a brother of the complainant. He was with the complainant before the attack. He stopped at the shops to buy paraffin. The complainant proceeded alone on the way home. When PW2 arrived home, the complainant was not there. He found it unusual. He tried to reach her on the cell phone. She did not answer. An hour passed. He went back to the point where they parted ways. He then saw the complainant approaching. She was crying. She told him about the rape. PW2 called his brother L. The three of them reported the matter to the village elder. PW2 did not know the appellant before the incident.

11. PW3 was A M. He is a village elder. He was informed by one S A that the appellant had raped the complainant. Stephen did not take to the stand. That evidence was classic hearsay. When PW3 went to the appellant's house, he refused to open the door. He said the appellant claimed that the sex was consensual but the complainant refused to spend the night in his house. The appellant claimed that he took back the Kshs 200 from her and that is why she was crying. PW3 and the public broke down the door and arrested the appellant.

12. PW4 was Francis Yatich. He is a clinical officer. He carried out the examination on 10th February 2014. The complainant's clothes were not torn or stained. There were no visible injuries on the vagina. He said there were no tears or bruises on the vagina. The hymen was broken. There was a colourless fluid around the vagina. HIV, VDRL and pregnancy tests were negative. The vaginal swab and urinalysis test revealed spermatozoa. The patient was treated for *post exposure prophylaxis*. She was given antibiotics and an emergency pill. He concluded that there was penetrative sex. He produced the P3 form, treatment notes and *post rape care* form [exhibits 1 (a) (b) and (c)].

13. PW5 was Police Constable Manya. He recorded the complaint and took down witness statements. The appellant was brought to the station under citizen arrest. He issued the complainant with the P3 form and referred her to the hospital. He also visited the scene but did not make any recoveries. That marked the close of the prosecution's case.

14. The accused made an unsworn statement. He denied committing the offence. He repairs shoes. He referred to an earlier incident on 31st January 2014 when PW3 had issued threats to him. He reported the matter to the police and was given an O.B. number. He said that on 8th February 2014, he went to his rural home. He returned on 9th February 2014, the material date. It was a Sunday. He went to mend shoes as usual. At 10:00 p.m., PW3 and other people knocked on his door. When he refused to open, they broke

the door. He was arrested and taken to the police station.

15. I have re-appraised the evidence. The first key issue is *identification*. PW1 and PW2 did *not* know the appellant before the incident. The incident took place at *night*. PW1 said it was happened at 9:00 p.m. She said there was *moonlight*. The complainant said she was attacked from *behind* and strangled. She was then dragged into the appellant's house. It was *dark* inside. But she said that the appellant used a beam of light from his *cell phone* when they entered the house. He then switched it off. It is not clear about the *intensity* of the light or its direction.

16. From that evidence, I *cannot* say with confidence that the appellant was *positively* identified by the complainant. See Wamunga v Republic [1989] KLR 424, Republic v Turnbull & others [1976] 3 All ER 549, Kiarie v Republic [1984] KLR 739, Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. Obwana & Others v Uganda [2009] 2 EA 333.

17. The next key question is whether the appellant had *unlawful carnal knowledge* of the complainant. Subject to section 111 of the Evidence Act, the legal burden of proof rested throughout with the prosecution. There is no room for presumptions in a criminal trial. See Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] E.A. 332, Abdalla Bin Wendo and another v Republic (1953) EACA 166, Kaingu Kasomo v Republic, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

18. Section 3 (1) of the Sexual Offences Act defines rape as follows:

“A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.”

19. PW1 said that the appellant garroted her; and, threatened her with a knife before he raped her. The knife was never recovered. The appellant did *not* scream. She said there was a funeral meeting nearby; and, the public would have thought she was wailing in grief. I do *not* doubt her. I am also alive that under section 124 of the Evidence Act her evidence did not require *corroboration*.

20. But there are *four* gaps or *material* inconsistencies in the evidence. First, the learned trial magistrate noted on the record that the testimony of the complainant was *divergent* from her *original* statement to the police. Secondly, I find that her injuries were *inconsistent* with *non-consensual sex*. True, there was *penetrative sex*. Doubt is removed completely by the vaginal swab and urinalysis test. They both revealed spermatozoa. But there lies the third gap: there was *no* medical evidence confirming the spermatozoa was from the appellant.

21. Fourthly, and, more importantly, the *presence* of spermatozoa *alone* or the *absence* of it in the vagina is *not* conclusive proof of *rape*. The key ingredient of rape is proof of *penetration*. I cannot put it more succinctly than the Court of Appeal in Mwangi v Republic [1984] KLR 595 at 603-

“The doctor's evidence did no more than support Consolata's evidence that she had sexual intercourse. His conclusion was based on the finding of spermatozoa on a specimen of Consolata's vagina which was examined in a laboratory. The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact to the offence of rape, which the doctor's evidence did not establish or corroborate.”

22. In *Republic v Oyier* [1985] KLR 353, the Court of Appeal held that *mens rea* for rape is “*primarily an intention and not a state of mind*”. It held further that the prosecution must prove “*either that the complainant physically resisted, or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist*”.

23. In the end, there is no credible evidence in this case of *forced entry*. I am fortified by the evidence of Francis Yatich, the clinical officer. He examined the complainant on 10th February 2014. The complainant’s clothes were *not* torn or stained. There were *no* visible injuries on the vagina. He said there were *no* tears or bruises on the vagina. She had *no* injury on any *other* part of her *body*. That evidence does not corroborate a *forced entry*. I cannot then say that all the elements of the offence of *rape* were proved beyond reasonable doubt. It follows as a corollary that the conviction for *rape* was *unsafe*.

24. I accordingly *set aside* the conviction and sentence. The appellant shall be set at *liberty* forthwith *unless* otherwise lawfully held.

DATED, SIGNED and DELIVERED at ELDORET this 10th day of May 2017

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. Brenda Oduor for the State.

Mr. J. Kemboi, Court Clerk.