



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 45 OF 2015**

**JOSEPH NDAI CHEGE.....APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

***(Appeal from the Judgment of the Chief Magistrate's Court***

***at Molo Hon. H. M. Nyaga –Chief Magistrate***

***delivered on the 11<sup>th</sup> February, 2015***

***in CMCR Case No. 1852 of 2013)***

**JUDGEMENT**

The appellant **JOSEPH NDAI CHEGE** had filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Molo Law Courts.

The appellant had on 16/9/2013 been arraigned before the trial court facing a charge of **RAPE CONTRARY TO SECTION 3(1) OF THE SEXUAL OFFENCES ACT, 2006**. The appellant pleaded 'Not Guilty' to the charge and his trial commenced on 24/2/2014.

The prosecution led by **INSPECTOR TANUI** called four (4) witnesses in support of their case.

**PW1 M W** told the court that on the night of 13/9/2013 she was asleep in her house together with her two children aged 3 years and 5 years. **PW1** heard someone call out her name and hit her door very hard. The man ordered her to open. **PW1** demanded that he identify himself. The man kicked in her door and entered her house. He pushed her down and lay on top of her. All the while the complainant's children were crying. The man whom **PW1** identifies as the appellant held her by the neck and strangled her. They struggled and appellant pulled off her panty. He then inserted a bottle into her vagina. Thereafter he raped her. After ejaculating the appellant rose and went away. They complainant feared to go outside so she waited until the following day when she reported the matter to the police. **PW1** later went to hospital where she was examined and treated.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied having raped the complainant at all. On 11/2/2015 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Rape and thereafter sentenced him to serve eleven (11) years imprisonment. Being aggrieved by both the conviction and sentence the appellant filed this appeal.

This being a first appeal the court is required to analyse the prosecution case afresh and draw its own conclusions. In **MWANGI Vs REPUBLIC [2014]eKLR** it was held that

***“The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”.***

In a case of rape the prosecution needs to adduce evidence to prove beyond reasonable doubt the following

1. The fact of penetration

2. The identity of the perpetration

3. Lack of consent

In this case **PW1** told the court that a man burst into her house at night and proceeded to rape her. **PW1** told the court that her two children who were with her in the house witnessed the incident. She gave the ages of the children as 3 years and 5 years. The two children being of very tender age were not called to testify as witnesses.

**PW1**, later went to seek medical attention after the incident. She told the court that she had already bathed and for that reason much of the evidence was destroyed and unavailable for testing.

**PW3 DR. DENVER MARIGA KAMAU** was the doctor who examined the complainant. Her findings were not conclusive. Given that **PW1** was an adult woman who already had two children the specific signs of penetration would be difficult to detect.

**PW1** told the court that the man who raped her pulled off her underwear. This underwear was not produced in court as an exhibit. **PW1** also told the court that she screamed during the incident and some neighbours responded to her call. However they could not approach her house as the accused kept them at bay with his knife. None of these neighbours was called to testify to confirm that they did indeed witness a commotion at the house of **PW1** on the material day.

**PW1** also told the court that her assailant first penetrated her using a bottle. This bottle was apparently never recovered and was not produced in court. In my view this type of forced penetration with a solid object would have left bruises or tears in the genital area. No such bruises or tears were noted the next day when the doctor examined the complainant. From the evidence available it is difficult for the court to conclude that the complainant was indeed defiled as she has alleged as there exist no physical evidence to corroborate this fact.

The complainant identified the appellant as the man who defiled her. The incident occurred at night at about 2.00am. **PW1** was woken up from her sleep. There were no electric lights in her house. **PW1** claims that she shone the light of her mobile phone which enabled her to see the appellant. A mobile phone gives of a very faint dim light which would not be sufficient to aid in proper identification. There was no other source of light available at the scene, no electricity, no lanterns and no torch.

**PW1** told the court that the appellant was a neighbour, a man she knew well. However she did not state anywhere in her evidence in court that she was able to recognize the appellant's voice, despite her statement that her assailant spoke to her. It is trite law that identification may be proved by the testimony of a single witness. However such evidence must be carefully scrutinized in order to eliminate any possibility of an error. In **MAITANYI Vs REPUBLIC [1986] KLR 198**, it was held as follows:-

***"1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult".***

In this case as already stated the lighting was poor. The complainant was awoken suddenly from sleep and may have been disoriented. Her two children were crying beside her probably requiring attention. Given the circumstances pertaining identification would be difficult and this court cannot rule out the possibility of a mistaken identity.

Finally in a charge of rape it must be shown that there was a lack of consent to sexual intercourse on the part of the victim. In his judgment the learned trial magistrate cited the alleged insertion of a bottle into the genital of **PW1** as evidence of use of force. However as I found earlier the said bottle was not produced as an exhibit and no bruises were noted in the genital tract of the victim.

In her evidence **PW1** stated that her assailant strangled her. She went on to state that she fought and struggled with him. I have no doubt that a woman facing rape would put up a vigorous fight. No marks were noted on the neck of **PW1** when she was examined the next day. No bruises were seen on her person. In short there were no signs of any struggle on the person of **PW1**. Unfortunately this is a case where the prosecution only adduced the bare minimum as evidence to prove their case. What remains is essentially the complainant's word as against the word of the appellant. I find that the charge of rape was not proved to the standard required in law. The appellant's conviction was not sound and I hereby quash that conviction. The sentence of eleven (11) years is also set aside. This appeal succeeds. The accused is to be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered in Nakuru this 12<sup>th</sup> day of June, 2017.**

Appellant in person

Mr. Chigiti for State.

**Maureen A. Odero**

**Judge**