



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 186 OF 2012

(Appeal originating from the conviction and sentence by Hon.

W.K.MICHENI PM in Mukurweini CR. CASE NO.604 of 2011)

CHRISTOPHER NYAGA MWANGI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant was charged with the offence of rape contrary to Section 3(1) (a) (c) (3) of the Sexual Offences Act no.3 of 2006. The particulars were that on 18th day of December 2011 at Ngamwa sub location Nyeri County the appellant intentionally by use of force. The alternative charge was the offence of committing an indecent act with an adult contrary to section 11(A) of the sexual offences Act no.3 of 2006. particulars are that on 18TH day of December 2011 at Ngamwa location in Nyeri County the appellant intentionally touched the vagina of E.W. G with his penis against her will.

The trial court convicted the appellant after full trial and sentenced him to 15 years imprisonment. The appellant raised two grounds of appeal as set out hereunder;

1. That the trial magistrate erred in law and fact by failing to hold that there was no medical report to corroborate evidence of injuries on pw2.
2. That the trial magistrate erred in law and fact by failing to evaluate his statement under oath alongside prosecution case.

The appellant submitted that there is no linkage between p3 form and resulting injuries; that the complainant talked of injuries to the throat while pw1 talked of injuries to neck, throat and thigh. He further submitted that pw1 said he did not confirm whether there was rape but he only got to know rape from history. He added that pw1's evidence is not consistent as he says he did not confirm rape and that there was presence of spermatozoa in laboratory results. The appellant submitted that he was not examine as required by section 36(1) of the Evidence Act and that the medical evidence was not conclusive.

On the second ground the appellant submitted that the magistrate did not record section 211 of Criminal procedure code before placing him on his defence but instead recorded 3 ways of defence explained in kikuyu language; that the substance of the charge was not explained to him again as required by section

211 of criminal procedure code. The appellant indicated that in his defence he stated that the complainant had been his friend for a long time and on the material day they had met at 10.0am when the complainant invited him to her home. He added that he went to complainant's home at 6pm.while in the complainant's house, the complainant went out .he said that she delayed outside and he slept on the seat as he had taken 2 beers only to be woken up at 8pm by many people who included the complainant and pw3's husband who started beating him. He submitted that pw2 framed him up because he had wedding arrangements with another person and he was not ready to buy her the Christmas dress she had requested.

The respondent supported both the conviction and sentence. Ms. Mwaniki for the respondent submitted that the complainant told court how she went out to open for the dogs then went back to the house to collect food for the dogs and while in the house she heard somebody calling her mama C. She recognized the voice as belonging to the M the appellant herein. She submitted that the appellant entered her house grabbed her, ordered her to remove her clothes and forcefully raped her; that she tricked the appellant that she wanted to take water then she escaped and called for help. The appellant was arrested inside the house. She submitted that the sexual act was confirmed by medical report produced and that the fact that it was not consensual was confirmed by injuries sustained by the complainant and the torn underpant. She further submitted that in defence the appellant admitted that they had sex but said it was consensual. She added that in defence the appellant contradicted his mother Dw1 when he said that he had been working for a hotel for one and had been married for three years allegations which his mother denied. She submitted that the appellants defence is marred with contradictions. She submitted that the sentence imposed is legal as section 3(3) provide a minimum of 10 years which can be enhanced to life imprisonment. She submitted that the offence is prevalent in Nyeri and urged court not to disturb the sentence.

This being the first appellate court it has a duty to reevaluate evidence on record and arrive at its own decision. I however take note of the fact that I did not have opportunity as the trial court to take evidence first hand and observe witnesses' demeanor. I refer to the case of **OKENO VS REPUBLIC [1972] EA 32** which set out principle to guide in first appeal as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

Record show that on 20th December 2011 when the charges were first read to the appellant in kikuyu language he said “it is true” after reading of the facts by the prosecutor the appellant said some facts are not correct. Plea of not guilty was entered on account of denial of facts.

Pw2 the complainant herein testified that when she went out to check on her dogs she heard the appellant calling her “mama C. She said that she recognized the appellants voice as he had worked for her neighbor for one year.pw2 said appellant asked her what she had told his mother about a job; and when she denied having told her mother anything, the appellant became furious and asked for money proceeds from milk.pw2 called her son C when her son failed to respond, she used her mobile phone to call a neighbor. She testified that when the neighbor called back, the appellant grabbed the phone and threw it then grabbed her by the throat and ordered her to remove her underpant. She said the appellant tore her underpant and had sex with her. She said that she excused herself to drink water and managed to escape. She went to the road and screamed; Jane and purity went and found the appellant in the house. She said the appellant had hit the cupboard and spilt milk. He was arrested by the chief from the house. She said they looked around and did not see the panga the appellant had. She said she slept at the police station and the next day she went with police to the house appellant's panga outside the house and saw that the iron sheet had been cut. She identified the panga in court and said that the appellant had placed it on the table. She also showed court a torn underpant. In cross examination she denied having been appellant's friend nor having had love relationship with the appellant from school days. She denied having had consensual

sex with the appellant and said that the appellant threatened her with a panga.pw2 said she got injured on the knees, thighs and throat as the floor of her house is rough; she said if she consented to sex they would have gone to bed. She denied having gone with the appellant to his home nor lied to his mother that she is not married in 2011.she denied having sent insulting messages to appellant's mother nor threatened her, she also denied burning album and photographs. In reexamination she denied having ever been the appellant's lover.

Pw3 testified that she responded to complainant screams and found the complainant and pw4. She said complainant informed her that she had been raped and that she had locked the person who raped her inside the house where her children were. They called another neighbor and the chief. The chief went for Administration police officers. She said the alleged rapist was still locked in the house. She said the person who was removed by police in the house is the appellant herein .she said he worked for their neighbor. In cross examination she said the complainant's children were asleep. She said complainant's legs had injuries and that she complained of pain on the neck but she did not see her clothes.

Pw4 confirmed going to the scene after hearing the complainants scream. She said complainant informed her that Maina had raped her and that she had locked him inside the house.In cross examination she said there was no way the appellant could escape as he was locked in the house. She further said the lamp was off and he was using light from her mobile phone. She said that she had known the appellant for 2 months and that she did not know his name.pw5 a police officer testified that the complainant reported that the appellant had gone into her house with a panga and forcefully had carnal knowledge of her. He said on visiting the scene the next day, he saw a sharp cut on the roof. He said he looked around and saw the panga the appellant had gone with to complainant's house.

The appellant adduced sworn statement. He said the complainant had been his friend for a long time. He said on the material day he had met the complainant who complained that he had not called her for the whole week. He said the appellant invited her at her house at 5pm for a talk. He said they went to bed as usual. He asked her for a christmas dress and shortly after the complainant excused herself to get water from the kitchen but she took long to come back. Appellant said in the meantime he slept on the seat as he had taken 2 bottles of beer. He said he was surprised to see many people knocking at the door and some pointing torches through the window .He said the complainant opened the door. When they got in pw3's husband started beating him. He said he never got along with pw3's husband. In cross examination the appellant said his wife left him in 2007 and that he went to complainant's home at 6pm.He said he used to go to complainant's house frequently and he would even go several times a day. He said his employer allowed him to go and assist complainant. He said complainant was her lover and having sex with complainant was normal for them. He said they would have sex then they talk. He said that he discovered the door was locked from outside when people arrived. The appellant availed two witnesses his mother and his friend Dw2 and dw3 respectively.Dw2 said her son had gone to the complainant to collect money for work he had done for her .she said the appellant has never married and that the appellant and complainant have been friends for a long time. She said the appellant and complainant had visited her home severally.pw3 said that she used to see them together at the hotel the appellant worked.

I have considered evidence on record. There is no dispute that the appellant went to complainant's house on the material evening. There is also no dispute that sexual intercourse occurred between complainant and the appellant. The appellant says complainant had been her lover and she consented while the complainant said the appellant forcefully had carnal knowledge of her. What I consider to be in issue is credibility of prosecution witnesses more so the complainant.pw1 said that the appellant went to her house with a panga which he used to threaten her. She said he placed the panga on the table and that if they were lovers the appellant would not have gone to her house with a panga.pw3 and pw4 said the complainant locked the appellant from outside and he could not go out until after the door was opened when the chiefs, neighbors and administration police officers arrived. Pw1 said after opening the house they looked around and didn't see the panga. Pw5 said the investigating officer visited the scene the next day and on looking around he saw a panga. The question that arises is why the panga was not recovered from the house immediately the house was opened. A doubt arises as to whether the appellant indeed threatened the complainant with a panga.complainant,pw3 and pw4 all said the complainant's children were locked inside the house together with the appellant; and when they arrived they were asleep. The

question is, if there was a struggle between the complainant and the appellant followed by screams, was it possible for the children to continue sleeping? I doubt if that could be the case. Complainant never mentioned her children's age but if the appellant was an aggressor I believe it would not have been difficult for the complainant to avail at least one of her children to adduce evidence. Evidence adduced casts doubt on credibility of pw1's evidence. From the foregoing I find it unsafe to conclude that the appellant forcefully had carnal knowledge of the complainant. I find the conviction unsafe. I proceed to quash the conviction and set aside the sentence imposed. The appellant is hereby set at liberty unless lawfully held.

Dated and signed at Nairobi this.....day of.....2017.

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RACHEL NGETICH

HIGH COURT JUDGE

Delivered at Nyeri this 19TH day of JULY 2017.

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JUDGE