



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 65 OF 2015

JAIRUS NGATIAAPPELLANT

-VERSUS—

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. J N NYAGA CHIEF MAGISTRATE** dated 30th November 2012 in Nanyuki Chief Magistrate's **Court Criminal Case No. 121 of 2012**)

JUDGMENT

1. **JAIRUS NGATIA** being aggrieved with his conviction and sentence by the Nanyuki Chief Magistrate's court has preferred this appeal.
2. Appellant was charged before that court with the offence of **Rape Contrary to Section 3(1) (a) (c) (3) of The Sexual Offences Act of 2006**. In the alternative count appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11 (6) (and not section 11 (A) as stated in the charge sheet) of **The Sexual Offences Act of 2006**.
3. The Appellant was convicted on the main charge of rape and was sentenced to serve 10 years imprisonment.
4. Appellant by his petition of appeal before this court indicated that his appeal is only against conviction but as it will be noted in his grounds of appeal below he has request that this court does find that the sentencing of the lower court was illegal. He relied on the following grounds in his appeal:

“(a) **THAT** the Learned Magistrate erred in law and in fact in finding that the Prosecution has proved the offence to the required standard.

(b) **THAT** the learned trial Magistrate erred in law and in fact in convicting and sentencing the Appellant basing his judgment on contradictory and inconsistency evidence by the prosecution witness.

(c) **THAT** the Learned Magistrate erred in law and in fact by disregarding the Appellant's defence of alibi and his defence generally thus arriving at a wrong decision.

(d) **THAT** the Learned Magistrate erred both in fact and in law shifting the onus on

the Appellant and rejected the defence without giving his points on determination in contravention of the law.

(e) THAT the Learned Magistrate erred in law and in fact by relying on and inconclusive medical evidence thus prejudicing the Appellant's case.

(f) THAT the Learned trial Magistrate erred in Law and in fact by basing his judgment on evidence of a single witness and failing to find that crucial witness were never called.

(g) THAT the conviction and sentence are unlawful.”

5. The appeal was opposed by Learned Counsel Mr. Tanui Principal Prosecution Counsel. In his view the appeal has no merit. After narrating the prosecution's evidence Learned Counsel Mr. Tanui stated that the prosecution had proved its case on required standard of proof.
6. This is the first appellant court and as such this court is required to re-consider the evidence tendered at the trial, analyze and reevaluate it and come up this court's own independent conclusion bearing the caution that this court has neither heard or seen the witnesses who testified during the trial and accordingly would not be able to observe their demenour, see the case before Mombasa court of appeal **case No. CRIM. APPEAL NO. 84 of 2014 ERIC ODHIAMBO OKUMU – V- REPUBLIC.**
7. The complainant, P W 1 who I shall henceforth refer to as **VWW** was a teacher at [particulars withheld] School. She was on night duty on 26th January 2012. She left the school at 8.30 p.m. and went to the stage at Nanyuki /Naromoru road. She waited for a public service vehicle for 30 minutes and because no vehicle arrived she walked to the next stage, which she said was a short distance away. At that other stage she found people there. The women at that stage decided to walk home together. VWW joined them but after some distance they parted ways with them going to Gatunyaga and she proceeding on her own towards Kandra. It was by then 9 p.m. Before the other women went away VWW had noted that there was a man who was following them behind. When the women went away VWW decided crossed over to the other side of the road, before she could cross over the man behind held her by the neck/throat. She screamed once and he threatened if she screamed again he would kill her. After he put a cloth in her mouth and after taking her to the bush he ordered her to remove her clothes, which she did. He laid her on the ground and placed a knife at the neck. He then raped her up to midnight. Since they were in the bushes he told her that they should go to the nearby plots to sleep. She pleaded with him to release her but he dragged her towards the plots. He opened one of the houses in the plot and threw VWW inside. He instructed her that they would sleep and she would go away the following morning. While he slept VWW was able to get out of the house and got help from the neighbours who returned with her to the house where the appellant had taken her. She and those neighbours found appellant awake and he had lit a big fire. When the villagers began to beat appellant he said that he had hijacked VWW to rape her. The appellant was taken to Naromoru police station and VWW was referred to the Nanyuki District hospital. VWW while in court identified appellant as the person who raped her. VWW in examination in chief stated how she was able to identify appellant. She stated:

“we were along the highway when the accused held me. There were vehicles passing by me (sic). The vehicles were lighting up his (appellant's) face. I saw he had a beard. It was dark inside the house where he took me. I did not see him that time. In the house people spot lighted at him. I saw that he is (sic) the same person who has been spot lighted by the vehicles.”

8. **P W 3 Ronald Mutahi** the clinical officer at Nanyuki District hospital stated that he signed the P3 form issued to VWW. That P3 form noted that VWW had bruises in the neck and tenderness on the abdomen. VWW's injuries were classified as “harm.” The examination of VWW's genetalia

revealed bruises.

9. The appellant in his defence gave an unsworn statement where he stated that he did not leave his home on the material date. That people, who had not testified before court, went to his home and beat him up.
10. His defence witness (Charles Matheri) on the 26th November 2012 to the contrary of what appellant had stated said that, although he could not recall the date, but in December, of the previous year, that in the year 2011, he and appellant went to work. They eat dinner together and he gave a lift to appellant to his home on his motor bike at 8p.m.
11. Learned Counsel Mr. Chweya for the appellant argued grounds 1 to 5 of appellant's petition together.
12. I have considered the written submissions of the learned counsel for the appellant. I will respond to the submission as presented.
13. In the first place appellant submitted that there was no medical evidence submitted by the prosecution.
14. That submission in my view was in error. It was in error because the medical documents were submitted as exhibits during the trial by the clinical officer (P W 3). In evidence the clinical officer stated:

*“These are the lab test – **exhibit 2**. These are the post rape case notes which I produce as **exhibit 2 and 4 respectively.**”*

It is clear that those documents were produced and I looked at the lower court file and did find those documents there.

15. Secondly appellant's Learned Counsel submitted that the appellant was not properly identified in the dark. The court of appeal sitting in Mombasa in the case No. Crim. **APPEAL NO. 84 OF 2014 ERIC ODHIAMBO OKUMU – V- REPUBLIC** had this to say on identification of an accused person:

*“This court has emphasized time and again that it is of utmost importance for a trial court to closely test and scrutinize evidence of identification particularly where there is only a single identifying witness or in circumstances where identification difficult. In **KARANJA & ANOTHER V. REPUBLIC [2004] 2 KLR 140**, the court, relying on **R. V. TURNBULL & OTHERS (supra)**, stated as follows:*

*“**Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.**”*

Earlier in **WAMUNGA V. REPUBLIC [1989] KLR 424,426** the court had stated:

“...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

The importance of delving into all issues pertinent to identification was emphasized as follows

in **MAITANYI V. REPUBLIC [1986] KLR 198, AT 201:**

“... The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light. Its size and its position relative to the suspect are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.”

The identification of the appellant by VWW was via the passing vehicle lights. It was therefore identification under difficult circumstances. In the case JOSEPH MUCHANGI NYAGA & ANO. –V REPUBLIC [2013] e KLR the court had this to say:

“Evidence of visual identification should always be approached with great care and caution (see Waitthaka Chege v R [1979] KLR 271). Greater care should be exercised where the conditions for a favourable identification are poor. (Gikonyo Karume & Another v R [1980] KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Abdalla Bin Wendo & antother v R (1953) 20 EACA 166: Wamunga v R (1989) KLR 42: and Maitanyi v R [1986] KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him...”

16. VWW stated that it was while she and the appellant were at the highway that she saw his face by aid of the lights from the moving vehicles. VWW saw appellant had a beard. Also when the neighbours confronted appellant they shone their torches on him. VWW was able to identify appellant is the person who accosted her at the highway and raped her
17. Appellant when cross examining VWW he did not question her on her statement that vehicles were passing and were shining their light onto him. it would therefore follow that the appellant did not contest that evidence.
18. Appellant who had confronted VWW not doubt was in very close proximity to VWW when the car lights shone on him. She was even able to note that the appellant had a beard, which was not disputed by the appellant. Further appellant was confronted by the villagers immediately VWW sought help. He was arrested in the house where VWW had just escaped from. I am of that view and with the above in mind I am satisfied that appellant’s identification was free from error and was indeed watertight. In this regard I wholly agree with the finding of the Magistrate’s where he stated:

“The complainant’s evidence was that the accused is the person who raped her. That he had held her next to the high way. That they stood at the place for some time during which time vehicles were passing on the highway. The lights from the passing vehicle were spotlighting his face and she had seen who the person was..... That when she took members of the public to the house the people spotlighted the accused and she identified him as the person who has been spotlighted by vehicle’s lights on the highway and the person who raped her.”

19. The defence witness evidence did not assist the appellant. He gave evidence of having been with the appellant in December, 2011. The incident to which the offence appellant faced occurred on 26th January, 2012. The defence witness therefore gave evidence of having been in the company of the appellant on a date other than when the offence was committed.
20. But even if the evidence related to the day the offence occurred I wholly agree with the evaluation of his evidence by the Learned trial Magistrate when he stated:

“The accused’s employer D W 2 stated that he took the accused to his house at 8p.m. The complainant stated that she was raped at 8.30p.m. In her estimate the accused’s house was about

100m away from the place the accused raped her. The scene of the rape was therefore within the vicinity of the house of the accused. The accused had the opportunity to rape the complainant after he was dropped by his employer at his house at p.m.”

21. In response to appellant's submissions I do find that the appellant was properly identified.

22. I reject appellant's submission that the trial court did not consider the appellant's defence in the judgment. The little I have reproduced above of the evidence of the appellant's witness shows the trial court did consider the defence evidence. It should also be noted that VWW gave evidence about the distance between the rape scene and the appellant's house. She stated:

“From the place I was raped to the house s from here to the D.C.'S gate.”... (DC's gate about 100m from the court).”

23. The distance VWW gave between the rape scene and appellant's house was 100 meters. It follows the trial court was justified in the judgment to state:

“... The vicinity of the rape was therefore within the vicinity of the house of the accused.”

24. I therefore reject appellant's assertion in his submission that the trial court speculated about the distance between the rape scene and appellant's house.

25. I also reject the submissions that the Learned trial Magistrate shifted the burden of proof onto the appellant the trial court's judgment does not bear that out at all.

26. Although appellant in his grounds of appeal stated that the trial court erred in relying on inconclusive medical evidence, that ground was not covered by the submissions before court and it is not clear what appellant meant by that ground. I have perused the medical evidence submitted at trial and there is nothing inconclusive about it. The P3 form shows that the clinical officer found bruises in VWW'S vagina, bruises in the neck, and tenderness on the abdomen. The post rape care form showed that VWW's pants were stained with blood. It also showed inflammation of the vagina. It follows that the medical evidence conclusively revealed that VWW was raped.

27. Appellant submitted that prosecution evidence could not be relied upon because of its contradiction. Appellant pointed out that VWW stated in her evidence that she was raped by the roadside but the investigating officer in her testimony stated she was raped at the house.

28. In response to that submission I will refer to the case **TWEHANGANE ALFRED VS – UGANDA CRIM. APP. NO. 139 OF 2001 [2003] UGCA6**, where the court stated:

“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.”

29. The contradiction highlighted by appellant of the evidence of VWW and investigating officer is in my view minor and it cannot lead to the rejection of the evidence of VWW. The evidence of VWW was, in any case, corroborated by the P3 form where the police officer who received complaint by the complainant noted:

“Alleged to have been sexually assaulted by person unknown to her on 26/1/2012 form 9p.m. to 1a.m. on the road side, he threatened to kill her if she shout (sic)was strangled on the neck and had penetration by force.”

30. That information in the P3 form was information relayed to the police officer by VWW on 28th January, 2012. That was exactly what VWW informed the court when testifying against the appellant. It follows that there is no basis upon which the investigating officer could have testified that VWW was raped at the house. And having so testified it does not detract the weight of the testimony of VWW which evidence was corroborated by the medical evidence.

31. Appellant criticized his conviction on the ground that the prosecution failed to call the witnesses that is the neighbours who were called by VWW.

32. In that regard **Section 143 of the Evidence Act Cap 80** is relevant to be considered. It provides:

“No particular number of witness shall, in the absence of any provision of law to the contrary be required for proof of any fact.”

33. It follows that there no given numbers of witnesses that ought to be called is set in law. In my view the evidence of the villagers who assisted VWW and were instrumental in appellants arrest would have added nothing to the charge appellant faced, that is of rape. All they would have stated is that they confronted appellant in assisting VWW. In my view the evidence of VWW and the corroborating medical evidence sufficed to sustain the conviction of rape no adverse inference can be attributed to the prosecution’s failure to call the villagers.

34. Having considered the appellant’s appeal on conviction I find it has no merit and the conviction is therefore confirmed.

35. With regard to the sentence, **Section 3 (3) of the Sexual Offences Act** provides:

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but may be enhanced to imprisonment for life.”

36. Appellant on being convicted of the offence of rape was sentenced to 10 years imprisonment. That sentence is in compliance with Section 3 (3), quoted above. There is therefore no basis of interfering with appellant’s sentence.

37. In the end appellant appeal is dismissed.

Dated and Delivered at Nanyuki this 4th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state

For Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE