



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CRIMINAL APPEAL NO.22 OF 2014

(An Appeal arising out of the conviction and sentence of HON. C. ONDIEKI - RM delivered on 14th February 2014 in Kibera CM. CR. Case No.2413 of 2012)

CHRISANTOS OTIENO OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Chrisantos Otieno Omondi, was charged with the offence of **rape** contrary to **Section 3(1) (a) & (b)** as read with **Section 3(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 6th May 2012 in Nairobi County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of B M N (the complainant) without her consent. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of unsafe circumstantial and hearsay evidence. He faulted the trial magistrate for relying on a medical report that did not support the charge. He took issue with the fact that the trial court failed to discharge the burden placed on it of properly evaluating the evidence and thereby arrived at the erroneous decision to convict him. The Appellant faulted the trial magistrate for relying on contradictory evidence that was full of discrepancies which raised reasonable doubt as to the guilt of the Appellant. The Appellant was aggrieved that the trial magistrate had failed to take into account the totality of the evidence adduced which in the circumstances of the case would have exonerated the Appellant. In particular, the Appellant faulted the trial magistrate for failing to appreciate the law as applied to the Appellant's case and thereby made a decision that failed to accord justice to him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, Ms. Aluda for the State conceded to the appeal. She submitted that the two witnesses who testified in the case gave contradictory evidence. According to their evidence, it was apparent that the complainant had gone on a drinking spree with the Appellant. The complainant was in an intoxicated state. She went with the Appellant to his house. The complainant's friend testified that she saw the complainant with the Appellant in a taxi. The complainant went away with the Appellant. The

complainant testified that she was hit on the cheek by the Appellant. The medical evidence adduced in court did not support this contention. It was not clear from the medical report if she was examined by Dr. Thuo of Nairobi Women Hospital as she alleged in her testimony. The medical report did not reveal that the complainant had indeed been raped. Ms. Aluda submitted that from the evidence, a case can be made that the Appellant was a victim of mistaken identity. The complainant and her friend drunk alcohol with the Appellant for some time before the complainant went with the Appellant to his home. The complainant did not know the name of the Appellant. Mr. Drammeh for the Appellant agreed with the submission made by Ms. Aluda conceding to the appeal.

What are the facts of this case?

The complainant in this case B M N and her friend J M W (PW2) went out for a drink on the night of 5th May 2012. They went to a joint known as Bacchus Lounge. PW2 had invited the complainant (who was a student at the time) to accompany her. According to the two witnesses, they took a couple of alcoholic drinks before they met with the Appellant and his friends. The complainant testified that the Appellant offered to buy her some drinks. She accepted. She stated that the Appellant was charming. The complainant explained that after she had taken a few sips from the bottle that she had been given, she felt dizzy. PW2 noted that the complainant appeared to get drunk as the night progressed. PW2 decided to go to another nearby joint called Black Diamond. Upon her return, she saw the Appellant with the complainant. She requested the complainant to go home with her. The complainant declined. She appeared comfortable in the Appellant's company. According to the complainant, she could not recall what happened from the time she was with PW2 at Bacchus Lounge to the time she woke up at the Appellant's house at ***[Particulars Withheld]*** Estate. On his part, the Appellant testified that he had a nice time with the complainant. The complainant agreed to accompany him to his house. He had consensual sex with the complainant. He even escorted her to the bus stage on the following morning.

According to the complainant, when she woke up in the morning of the 6th May 2012, she realized that she was in a strange place. She was sleeping in a different couch to where the Appellant was sleeping. She requested to leave the house but the Appellant held her back. The Appellant then forcefully took her to his bedroom where he raped her. In the course of forcing her, the Appellant slapped her on her cheeks and mouth. She said she had injuries on her cheeks and mouth. The Appellant denied that he had assaulted the complainant or that he had raped her. He insisted that if indeed he wanted to have sex with the complainant without her consent, he would have done so in the night when the complainant was drunk.

The complainant testified that after leaving the Appellant's house, she went to the PW2's house. She told her that she had been raped. A report was made to Kabete Police Station. She was advised to go to Nairobi Women Hospital for medical examination. She claimed that she was examined by Dr. Thuo. However, on 25th March 2013 when he was supposed to testify before court, this is what the prosecutor told the court:

“The doctor who was here denied the report and he says that he did not prepare the report and he has therefore distanced himself from the report. The investigating officer has also found himself in the fix as he does not know who prepared the report.”

The medical report that was produced in court was actually prepared eight (8) days after the alleged rape incident by Dr. Kamau of Police Surgery. He noted that the complainant did not have injuries that were consistent to being raped.

This court has carefully re-evaluated the evidence adduced before the trial court. It was clear to this court that the prosecution did not establish a case of rape against the Appellant. In rape cases, the crucial evidence is that of the victim. This is because in most rape cases, the only persons present when the rape takes place is the victim and the accused. The testimony of the victim regarding the sexual assault is usually corroborated by medical evidence which establishes the sexual assault. In the present appeal, it was clear that there was material discrepancy in the evidence adduced by the complainant and the medical evidence that was produced in court. The lapse between the time the sexual assault is alleged to have

taken place and the complainant being seen by a doctor raises reasonable doubt as to the complainant's story relating to the alleged rape. The complainant claimed that she was seen by Dr. Thuo at Nairobi Women Hospital. The doctor denied that he saw the complainant. It was apparent to this court that an attempt was made to fabricate medical evidence to support the complainant's assertion that she had been raped.

Further, from the evidence adduced before the trial court, it was clear that the Appellant and the complainant met at a bar, enjoyed the night before the two went to the Appellant's house. PW2 could not in the circumstances of this case have left the complainant with the Appellant if she had not surmised that the Appellant and the complainant had struck a rapport and were comfortable in each other's company. The events preceding the complainant and the Appellant going to the Appellant's house does not point to the fact that the Appellant had the intention to sexually assault the complainant. Taking into consideration the totality of the evidence adduced, this court cannot reach a finding that the sexual intercourse between the Appellant and the complainant was not consensual. The fact that the complainant requested the Appellant to use a condom (and the fact that the Appellant acceded to this request) convinces this court that it was more probable than not that the Appellant had consensual sex with the complainant.

The prosecution, correctly in this court's view conceded to the appeal. In the premises therefore, the appeal is hereby allowed. The conviction is quashed. The Appellant is set at liberty forthwith and ordered released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF MARCH 2016

L. KIMARU

JUDGE