



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 59 OF 2014

(FROM ORIGINAL SENTENCE AND CONVICTION OF THE PRINCIPAL MAGISTRATE'S COURT AT KILIFI CRIMINAL CASE NO. 193 OF 2012 BEFORE HON. E. M. KAGONI – RM)

MICHAEL RANDU MWATSEKAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant was convicted of the offence of Rape contrary to Section 3(1) (a) (b) and 3 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 12th day of May, 2011 at Malindi Township in Kilifi County within Coast Province, intentionally caused his penis to penetrate the vagina of C K K without her consent.

The appellant was also charged with two other counts of obtaining money by false pretense but he was acquitted of those two counts. The appellant was convicted of the count of rape and sentenced to serve ten years imprisonment. The grounds of appeal are that he was not examined medically as required by Section 36 of the Sexual Offences Act, the prosecution case was not proved and that his alibi defence which remained unshaken was not considered.

The appellant filed written submissions and further grounds of appeal. The further grounds of appeal are that there was only dock identification as the complainant did not know the appellant. The medical examination did not prove that the complainant was raped and that the complainant's evidence was not corroborated. The written submissions expound on the above grounds. The appellant contends that the complainant did not know him and she told the court that they had not met before. There was only dock identification. There was no corroboration of the complainant's evidence as required. No specimen was taken from the appellant. The complainant did not tell anyone that she had been raped and she never went for medical examination on the date she was raped.

The appellant further contends that he was arrested ten months after the incident. The complainant was already working yet she alleged that the appellant was to secure her employment. The P3 form indicates that the complainant would identify her rapist if she was to see him again.

The State opposed the appeal. Ms. Kitilit, State Counsel, submitted that there was no need for corroboration of the complainant's evidence as Section 124 of the Evidence Act takes care of that requirement. The complainant knew the appellant and identified him. All the ingredients of rape were brought out. There was sexual intercourse without consent. There was a fight from 11.00pm up to

1.00am between the complainant and the appellant. Ultimately the appellant raped the complainant.

The record of the trial court shows that five witnesses testified for the prosecution. PW1 was the complainant. She gave a long testimony on how she was introduced to the appellant by one J C who was a church mate. She informed the court that the appellant was introduced to her as a military officer and he could help her to secure employment in the forces. She did not have her result slip as she had not completed paying her school fees. There was recruitment for armed forces on 27th April, 2011. The appellant called her as she was working in Watamu as a room attendant. The appellant informed her that he was involved in the recruitment but he had been sent to Bamba for recruitment. She told the appellant that she did not have the required result slip. On 9th May, 2011 the appellant called her again and told her that he had secured a place for her at Kiganjo and wanted to see her in Malindi. She went to Malindi on 12th May, 2011 and they met at Malindi Complex. They had not met before and they talked on phone until they managed to meet each other. They went to a hotel where there was a police vehicle parked outside. They went in and met two men whom the appellant alleged to be his friends in the police. They took sodas and the gentlemen left.

It was late in the evening and she wanted to leave when the appellant told her that she could sleep in one of his houses. She resisted but the appellant insisted. They boarded a motor bike which ended into a guest house. She refused to get in but once again the appellant insisted and he was given room number 10. Immediately they went in, the appellant locked the door and put the keys in his bag. The appellant tried to force her to have sex with him but she refused. The appellant assaulted her and they fought up to 1.00am. She lied to him that she was HIV positive but that could not stop the appellant from insisting. He overpowered her and raped her. After he was through, he told her that she was a big girl yet she was virgin and they slept. In the morning he promised to withdraw kshs. 22,621/- from his ATM to clear the balance of the school fees. She was kept waiting up to 11.00am when she decided to leave. They kept on communicating over the phone and the appellant kept on asking for money for purposes of facilitating her movement to Kiganjo. She sent money on several occasions and the number he gave her was showing that the recipient of the money was J N. The appellant informed her that J N was his mother.

It is her further evidence that she notified her sister and they decided to trace the appellant. They reported the matter to the police and the appellant was arrested on 12th February, 2012. When she reported to the police she was referred to Kilifi Hospital and she was issued with a P3 form. She was desperately looking for employment so that she could lift herself from abject poverty. She was 28 years old and had trusted the appellant to get her a job in the forces.

PW2, J S K, is a sister to PW1. She was informed by PW1 all what had transpired in relation to the job in the forces and they decided to trace the appellant. The appellant told them where he was staying and when they went there they could not find him. At one time he said he was at [particulars withheld] area and at another time he was at [particulars withheld]. He would promise them that he was going to meet them only not to turn up. They reported the matter at Kilifi Police station and the appellant was later arrested. PW3, N G C, is the father of PW1. He was informed about the job in the army. PW1 wanted some money and he gave out Kshs. 2000/-. He sent the money through Mpesa and the recipient was J N. He immediately called the number and the appellant told him that J N was his mother. It is his evidence that the appellant was referring to himself as Col. Nzai.

PW4, DR. HASHIM SULEIMAN was based at Kilifi District Hospital. He examined PW1 on 26th May, 2011. Her hymen was not intact and the rape had occurred fifteen days before. He filled the P3 form. PW5, PC SAMWEL KAMOTI, was based at the Kilifi Police Station. The report was made on the 20th May, 2011 by the complainant. He investigated the case and his evidence is a summary of what he was told by PW1. It is his evidence that PW1 sent money by way of Mpesa to the appellant on several occasions. The money was to facilitate the recruitment. The report was made on 20th May, 2011 and he issued a P3 form to PW1. There were two other complainants by the names Michael Mumba and his brother Martin Mwanyamba who alleged that the appellant had also taken money from them promising jobs in the forces. The two complainants knew the appellant and promised to help in arresting him.

On the 11th February, 2012 the appellant had gone to release his wife at the Kilifi District Hospital where she had delivered and the two other complainants informed PW5 that they had seen the appellant. He went to the hospital the following day and managed to arrest the appellant. The appellant told him that he was an ex-army officer. He preferred the charges against the appellant. PW1 went to the police station and identified the appellant. PW1 had informed him that she had seen the appellant and would identify him

The appellant was put on his defence and he gave unsworn testimony. His evidence was that Martin Mukombe is his neighbor and he had a debt due to him. On the 12th February, 2012 he went to Kilifi Hospital to release his wife who had delivered and he met a man who introduced himself as a police officer. The man was accompanied by Martin and Michael Mukombe. He was taken to the Kilifi police station and put in the cells. He was taken to his house where search was conducted but nothing was recovered. A lady was taken to the police and she was asked whether she knew him. He had not met the lady before. He was arraigned in court on the 13th February, 2013 and charged with the offences. The main issue for determination is whether the prosecution proved its case against the Appellant as required. The appellant contends that the Complainant did not know him and there was only dock identification. It is the Complainant's evidence that the Appellant had been introduced to her by a friend. The Complainant met the Appellant on 12th May, 2011 at Malindi. The two stayed together and slept in a room until morning. Given the evidence of PW1, it is clear that there was no need for an identification parade as PW1 had seen the Appellant before and could easily identify him.

The next issue is whether the Appellant raped PW1. According to PW1 she went to meet the Appellant at Malindi on 12th May, 2011. she had not met him before. They ultimately met at about 6.45pm. They stayed together until the Appellant convinced her to stay in one of his rooms but she was taken to a guest house. She struggled with the Appellant who wanted to have sex with her up to 1.00am. On his part, the Appellant explained who he was arrested when he had gone to discharge his wife from Kilifi hospital. It was his evidence that the Complainant went to the Kilifi Police Station and he told a police officer that he did not know her.

Given the evidence on record, I do find that indeed the Complainant was raped. The fact that she did not tell anyone immediately after the rape does not disprove the rape incident. The rape occurred on 12th May, 2011 and it was reported at the Kilifi Police Station on 20th May, 2011. There was no eye witness but the evidence of PW1 is convincing and direct. Under Section 124 of the Evidence Act, there is no requirement for corroboration in rape cases. Once the trial court is of the view that the Complainant is truthful, then the accused can be convicted.

I am satisfied that the trial magistrate reached at the correct decision. There was no need to take the Appellant for medical examination. The Appellant was arrested in February, 2012 while the rape incident occurred on 12th May, 2011. The long period taken to arrest the Appellant is explained in the proceedings. The Appellant was dodging the Complainant and her sister. It took the intervention of two other people who had a Complaint against the Appellant to enable the police arrest the Appellant.

The Appellant maintains that the medical evidence did not prove that PW1 was raped. PW1 was 28 years old. She was examined by the doctor fifteen (15) days after the rape incident. This was not a case of defilement of a minor child. PW1 was an adult. Once her evidence established that she was raped, the medical evidence is only part of the prosecution case to show that PW1 was taken to hospital. PW1 informed the court that she was a virgin at her age. According to the P3 form, PW1's hymen was not intact. That proves that PW1 was raped.

The defence evidence did not raise any doubt on the prosecution case. The trial was properly conducted. There was no alibi proved as the Complainant did prove that she was with the Appellant the whole night. The sexual act was not voluntary. The appellant took advantage of the Complainant's desperate situation. The fact that the Complainant was already working does not mean that she was not looking for another job.

In the end, I find that the appeal lacks merit and is hereby disallowed.

Delivered and dated at Malindi this 8th day of April, 2015.

Said J. Chitembwe

JUDGE