



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 37 OF 2015

(From the original conviction and sentence in Criminal Case No. 464 of 2012 of the PM Magistrate's Court at Mwingi – GW Kirugumi - RM)

S I M APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with Rape Contrary to Section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 6th August 2012 at *[particulars withheld]* Sub Location in Migwani District of Kutui County intentionally and unlawfully caused his penis to penetrate the vagina of EKM without her consent. In the alternative, he was charged with committing an indecent act with an adult Contrary to Section 11 (a) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally did an act which caused the contact of his male organ namely penis with the female genital organ namely vagina of an adult namely EKM without her consent. He denied both charges. After a full trial, he was convicted on the main count of rape. He was sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial petition of appeal on 8th May 2015. He however filed a supplementary petition of appeal on 27th July 2015 through his counsel C.P Onono and Company, on the following grounds:-

1. In view of the fact that there was nobody else present during the alleged incident, the learned trial magistrate erred by not considering the possibility that the complainant may have been lying in order to fix the appellant for refusing to have sex with her.
2. There is no independent evidence on record that the appellant had sex or had sexual contact with the complainant.
3. The learned trial magistrate erred by failing to give any or adequate consideration to the statement of the appellant in his defence in light of information which came on record through prosecution witnesses.
4. The prosecution case was based on assumptions unsupported by evidence.
5. The learned magistrate erred by failing to appreciate in the defence of the appellant, the significance of the following facts -

(a) That the husband of the complainant was not interrogated or called to testify about his whereabouts or conjugal access to his wife. Also baffling is the husband's general absence from all matters surrounding the alleged incident and the investigations arising therefrom.

(b) The pantie of the complainant which was not removed during the alleged sexual assault but was not surrendered by the complainant to the police and no credible reason is recorded as to why it was not surrendered to or requested by the investigating officer.

(c) That there was no attempt to obtain and match forensic material which should have been obtained from the complainant's pantie, from the appellant, from high vaginal swab and from the complainant's husband either to confirm the person who had sexual contact with the complainant or to exclude certain person.

(d) That ownership of the spermatozoa harvested following the high vaginal swab was not established.

(e) That whereas the biker was allegedly torn during the struggle to secure access to the complainant but the pantie was left in place and merely pulled aside during the alleged sexual assault.

(f) The improbable allegation that the pantie had no evidence.

6. The learned magistrate erred by shifting the burden of proof to the defence contrary to the law.
7. The facts on record are such that the appellant should in any event been given the benefit of the doubt.
8. That generally the conviction was against the weight of the evidence.

During the hearing of the appeal, learned counsel for the appellant Mr. Onono emphasized that during his defence testimony the appellant mentioned two important things. Firstly, the existing domestic grudges in the family and that the complainant was a participant in those grudges. Secondly, the fact that the appellant completely denied that he had sexual intercourse with the complainant.

Counsel submitted that the appellant stated very clearly that the complainant wanted to have sexual intercourse with him but he refused saying that she was his brother's wife. As such counsel argued, the onus was on the prosecution to prove that a sexual act actually occurred using clear, cogent and credible evidence which must be corroborated. Counsel emphasized that the complainant was the only eye witness to the incident and as such her evidence should have been put under minute scrutiny before finding a conviction on the same. Counsel submitted further that the complainant in this particular case was just a liar.

Counsel submitted also that usually penetration by a man results in the deposit of spermatozoa in the woman's vagina and that when the woman closes her legs especially after forced sex, there would definitely be a leak from her private parts which would be deposited at the bottom of her pantie. According to counsel, the evidence on record was that the complainant wore a black biker and a white pantie and that she only changed the outer clothing. It was curious therefore that though she took the biker to the police she did not take the pantie there which item might have contained genetic material related to the complainant and the appellant. If indeed they had sexual intercourse or even a third party who had sexual intercourse with the complainant that evidence would have been on the pantie. Since the appellant said that he did not have sexual intercourse with the complainant, then in case there was genetic material in the pantie it was important to find out if perhaps the sexual intercourse, if any, was with the husband of the complainant who never made a statement nor was called to testify. In counsel's view the prosecution did not tender evidence connecting the appellant with any sexual intercourse with the complainant.

Counsel submitted further that in the P3 form it was noted that the complainant was well groomed, and properly dressed and questioned that if that were so, why did she not have the mind to remove the pantie and hand it over to the police. Counsel doubted the story of the complainant that since the pantie was not torn, it was not necessary for her to take to the police. Counsel also submitted that it was curious that PW2 stated that he did not require to be handed over the pantie because it did not have evidence. According to counsel, there was something very suspicious about the absence of the pantie.

Counsel felt that the complainant was lying mainly because of an existing family grudge and because she was denied sex by the appellant.

Counsel emphasized that, other than suspicion and the suspicious statement of the complainant, there was no independence evidence to support the allegation that the appellant had sex with the complainant. According to counsel, the conviction was based on mere assumptions.

Counsel also faulted the trial court for shifting the burden of proof on the appellant. Counsel submitted that the court had indicated that the appellant was required to adduce evidence to show his innocence which amounted to wrongly shifting the burden of proof to him. Counsel said that the remark by the trial court that the prosecution evidence which had not been disputed was that the husband was absent, amounted to shifting the burden of proof to the appellant.

Counsel submitted also that the appellant should have been given the benefit of the doubt based on the evidence on record. Counsel submitted that the conviction was against the weight of the evidence.

Lastly, counsel submitted that the general behavior of a rapist was of a person who was in a hurry and that there would be definitely be signs of struggle and a lot of careless genetic material left in the area, thus forensic analysis was necessary to sustain a conviction herein. Counsel asked that the appeal be allowed.

Learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that counsel for the appellant had merely addressed the main count and not the alternative count. Counsel contended that the facts were clear and that counsel for the appellant had not said how the complainant had lied.

With regard to the issue of spermatozoa found, counsel submitted that in sexual offences the prosecution did not have a burden of proving the source of the sperm. What the prosecution was required to prove was the fact that consent was not given by the complainant. Counsel submitted that the incident occurred during the day and took considerable time and the complainant had time to identify the appellant. Counsel submitted that PW3 was an expert witness and that it was established that spermatozoa was found on the complainant, which was evidence for sexual intercourse. Counsel submitted that the defence of the appellant was considered by the trial court which dismissed it as a mere denial.

With regard to the issue of a grudge, counsel submitted that the magistrate considered the same and found that it was not a reason to frame up the appellant. In counsel's view since the husband of the complainant was not present that day, it would not have added any value to call him as a witness to testify as what he would say would amount to hearsay evidence.

Counsel urged this court to exercise its powers under 354 of the Criminal Procedure Code (cap.75) and to substitute the conviction for rape with a conviction for the alternative count of indecent act. Counsel emphasized that the burden of proof was not shifted by the trial court. Counsel also stated that the prosecution had proved the alternative count.

In response to the prosecuting counsel's submissions, learned counsel for the appellant Mr. Onono emphasized that it would be important for the husband of the complainant to come and say when it was his last time to have access to his wife. Counsel emphasized that the appellant did not say that he was not in the same home but denied sexual intercourse.

Counsel also submitted that the issue of the court convicting on the alternative count should not arise, as aggression was from the complainant not from the appellant. According to counsel, the appellant was the victim because the complainant was the aggressor.

During the trial the prosecution called 3 witnesses. PW1 was the complainant. It was her evidence that she was wife of O M a cousin of the appellant. That on the 6th August 2012 at 10.00 a.m, as she was cleaning her house at **[particulars withheld]** Sub Location while her husband was in Garissa, the appellant arrived and asked her why she had switched off her mobile phone. He then took the phone from

the table and checked messages he had sent to her and deleted them. He placed the mobile phone on the cupboard, closed the door, held her shoulders from behind, pushed her onto the 3 seater sofa set and she fell on her abdomen. He then held her mouth with a cloth and lay on her back, tore the biker, pulled her panties on the side and raped her. She tried to scream but it was not possible because of the cloth he had put in her mouth. It was her evidence that he had sexual intercourse with her without protection.

She stated that the appellant had the habit of coming to wake her up at midnight and also sent offensive messages to her. Though he had been warned about it, he did not stop his habit. He even assaulted her in April. She stated that she had informed her husband about the appellant's conduct and that the husband had informed his uncles about it.

She stated also that she was to be a witness in an assault case. According to her, the appellant was not married and used to drink beer and take miraa.

She stated that after the incident, the appellant left and went to his house which was about 100 metres away. The complainant then went to Migwani District Hospital and also to Migwani Police Station and recorded her statement. It was her evidence that she was issued with a P3 form and that a treatment card was used to record the treatment she received.

In cross examination, she stated that there were about 4 houses in the homestead including the house of the mother of her husband. She stated that initially, her relationship with the appellant was good but from the end of 2010 the appellant started disturbing her. She admitted the existence of a dispute in the homestead involving herself and her brother in law called Mboi, who was a cousin of the appellant. She stated that some cases had been reported to the OCS Migwani involving their family. She stated that Josephine and Mboi were sister and brother. She stated that Mboi and the appellant lived together and denied that she had ever sent a telephone message to the appellant, but admitted that she used to call the appellant before the incident. She stated that Mboi wanted to evict her out of the homestead. She maintained that the appellant held her shoulders and pushed her till she fell on the seat. She stated that the appellant tore her biker and pulled her pantie aside before raping her at around 10.00 am. She stated that he ejaculated inside her. She stated also that the last time she had sexual contact with her husband was about 3 weeks before the incident.

It was her evidence that the first person she reported the incident to was Corporal Mutiso whom she knew before. Though she met people on the road she did not find it necessary to tell them about the incident. She said that the doctor told her that he noticed spermatozoa on her. She did not know whether the appellant was medically examined. She stated that the doctor took a swab and examined it. She maintained that she was treated on the same day of the incident but took drugs the following day. She took the medical card and P3 form back to the police on 7th August 2012.

In re-examination she stated that the doctor who treated her and the one who filled the P3 form, were different people.

The same witness was recalled afterwards and she identified the biker which was in the possession on the police. She stated that the pantie was not torn but the biker was torn.

In further cross examination, she stated that since the pantie did not get torn it was not taken by the police officers. She stated that the officer to whom she gave the biker was not the person who produced it in court as an exhibit.

Pw2 was Corporal Mutiso Nyamai of Migwani Police Station the Investigating Officer in the matter. It was his evidence that on 6th August 2012 while in the office in the morning, the complainant reported to him that the appellant found her cleaning her house and asked her why she had switched off her phone before holding and pushing her down. She fell on the sofa set and he removed her clothes, tore the biker and pushed off the pantie and threatened her with a beating if she screamed. He then raped her.

Based on this report, he referred her to hospital and later gave her a P3 form. After investigations the

appellant was charged with the offence. He produced the biker as an exhibit. He stated that he visited the homestead and found three houses. He stated that he found that the husband of the complainant lived at Garissa. He then sent a report to the Administration Police Camp and the appellant was arrested.

He stated that the appellant was a witness in a case of creating a disturbance involving members of the same family, which case was still pending under inquiry. He stated that the house of the complainant and that of the appellant were 70 metres apart with a boundary between them. According to him, the complainant did not bring the pantie she wore that day and he never asked her for it.

In cross examination, he stated that he recorded statements from two prosecution witnesses. He was aware of the P3 form and the treatment card from the complainant. He did not however know why the P3 form was written in ink of two different colours. He said that the P3 form was filled by Corporal Wekesa because he requested him to do so. He stated that they completed all the laboratory examination and charged the appellant in court whom he knew before. He stated that in the case of creating a disturbance, a relative of the appellant was the culprit. He stated that there was a dispute between PW1 and her brother in law D K, who is a cousin of the appellant. He said that the complainant did not say whether she informed anybody else about the incident apart from her husband. He also did not ascertain if she had informed anybody else.

He maintained that the officer at the police OB desk, retained the biker and brought it to him. He stated that he did not need the pantie as it did not have evidence. He stated that he did not know the specific last time the complainant had sex with her husband.

He stated that after reading the treatment card and P3 form, he concluded that rape had occurred though there was no eye witness to the incident. In his view the statements of the complainant and medical evidence were sufficient to conclude that the rape had been committed. He stated that he did not ask the complainant if the accused had made passes at her.

PW3 was Dr. Christopher Waihenya a Medical Officer who produced a P3 form filled by Dr. Mutua. He also produced the treatment card of the complainant. According to his evidence the complainant had no blood stains. She was well groomed and no injuries on the upper and lower limbs. She was aged about 29 years. There were no tears on the genetaria. The high vaginal swab had spermatozoa. According to him the P3 form was completed on 7th August 2012.

In cross examination, he stated that he was not sure whether the appellant was medically examined. He maintained that spermatozoa was found in the vagina of the complainant.

When put on his defence, the appellant gave unsworn testimony. He stated that there were existing domestic grudges at home and that the complainant was her cousin's wife and had sued her husband's elder brother, who was his cousin and that he was a witness in that case.

He stated that the complainant thus decided to frame him. He stated that with regard to the present incident, he was arrested after 10 days while he had not gone into hiding. He stated that he told the complainant that since she was his brother's wife, he could not have sex with her the way she wanted. According to him, she said that he would regret because he continued saying no to the sexual advances.

This is a first appeal. As a first appellate court, I am duty bound to examine all the evidence on record afresh and come to my own conclusions and inferences. I am required to take in mind that I did not see witnesses testify to determine their demeanor and to give due allowance for that fact – ***see the case of Okeno -vs- Republic (1972)EA 32.***

I have examined the evidence on record afresh. I have considered the petition of appeal and the submissions on both sides.

The appellant was convicted of the offence of rape. In order to sustain a conviction for rape, the prosecution is required to prove beyond reasonable doubt firstly that there was sexual intercourse i.e

penetration even if it was partial. Secondly, that such penetration was without consent of the complainant. Thirdly, that the accused person is the culprit.

The evidence of the prosecution and the defence is that the appellant and the complainant knew each other well before. They were a sister and brother in law, the appellant being a cousin of the husband of the complainant. They lived in the same homestead with their houses being about 100 meters apart. The appellant was not yet married so he was a bachelor. The complainant was a married woman with three children, but her husband lived in Garissa where he worked as a watchman.

The allegation against the appellant is that he used to make sexual advances on the complainant a number of times. He used to send her even offensive messages on the phone. That the situation was reported to family members and the husband of the complainant and discussions held but the appellant continued to bother the complainant. The prosecution position was that on the day in question at around 10.00 a.m, the appellant went to the house of the complainant found her cleaning the house, demanded to know why she was not picking his calls, deleted messages from the phone, pushed her down on the sofa, tore her biker, and pushed the pantie aside and raped her.

The appellant on the other hand denied committing the offence. He stated that it was infact the complainant who demanded sexual intercourse with him and that he refused. He also stated that there was a grudge in the family because of a dispute over land or boundaries, in which he sided with a cousin against the complainant. According to him, the existing dispute, which was admitted by the complainant, and the failed sexual advances of the complainant created the reason for him being implicated by the complainant.

The burden is always on the prosecution to prove a case against an accused person beyond reasonable doubt. An accused person does not have an obligation or a burden to prove his innocence. ***See the English case of WOOLMINGTON -vs-DPP (1932)AC 462.***

In order for the prosecution to prove the commission of the offence of rape, their burden was to prove the act of intercourse or penetration, they had to prove lack of consent. They also had to prove that the appellant was the culprit.

The version of the prosecution was that the rape was a buildup or a culmination of advances made by the appellant to have sexual intercourse with the complainant. It was also the prosecution case that those advances were reported even to the husband of the complainant. In my view therefore, the evidence of the husband of the complainant or a relative of either the complainant or the appellant was necessary to prove the truth of the sexual advances. No witness was called by the prosecution to do so and no reason was given by the prosecution for the failure to call such crucial witnesses. In my view therefore that gap creates a doubt that in law has to be given to the appellant, which I hereby do – ***See Bukonya -vs-Uganda(1972)EA 549.***

It was the prosecution case that spermatozoa was found in the vaginal of the complainant to prove that sexual intercourse had indeed taken place. That evidence in my view was hearsay evidence. The person who examined the specimen and confirmed the presence of spermatozoa did not come to testify in court. No reason was given for the failure of the prosecution to call that person to do so. The P3 form was filled by one doctor and produced by yet another doctor. Though technically such evidence was admissible, it would become stronger when the person who entered the information came to court to testify, because that person could be cross examined on the entries. In my view, in a case such as the present one where the only evidence of sexual intercourse was the alleged finding of traces of spermatozoa, the prosecution was duty bound to bring the person who found those traces of spermatozoa to testify to the findings. Secondly, that person would have to establish medically or scientifically whether that spermatozoa originated from the appellant. The prosecution also failed to prove the existence of spermatozoa and whether the said spermatozoa originated from the appellant through direct evidence. Again they failed to discharge this evidential burden.

The third curious omission of the prosecution, was that they went on to produce a biker which in my view

did not have much evidential value in this particular case. They did not produce the pantie which the complainant was said to have been wearing during the incident and which they said they did not even ask for. The pantie was thus not taken for analysis to determine whether there was any evidence establishing sexual intercourse and a connection of that sexual intercourse with the appellant. Again this is another failure on the part of the prosecution to establish sexual intercourse and connect the same to the appellant.

Maybe, having noticed the weaknesses of the proof of the offence of rape, the learned prosecuting counsel Mr. Orwa submitted on appeal that the offence of rape was not proved but that an offence of indecent act was proved. Even with the offence of indecent act, the issue of credibility of the complainant could still arise. This was because it was admitted by her at the trial that there was an existing dispute which involved the appellant in which a cousin of the appellant was trying to evict her from her homestead. Also her failure to produce the pantie she was wearing talked of volumes. Her failure to report the incident to anybody including neighbours, also created suspicion on her credibility. The failure of her husband to come to court and testify affected the basis believing the complainant. The fact that no reason was given, even by her, as to why the husband who certainly would have an interest in this matter and whom she reported the incident would not come to court to testify, in my view greatly affected the credibility of her testimony.

In my view, the prosecution failed to prove that the appellant committed either the main or alternative charge. In my view the learned magistrate erred in finding that the prosecution had proved their case against the appellant beyond reasonable doubt. They did not prove sexual intercourse occurred. They did not prove that the appellant was the culprit. They did not prove commission for any indecent act by the appellant. I will thus quash the conviction and set aside the sentence.

Consequently and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered Garissa this 3rd day of November 2015.

GEORGE DULU

JUDGE