REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 105 OF 2014

(From original conviction and sentence in Criminal Case No. 126 of 2014 of the P.M Magistrate's Court at Hola)

DOMINIC KITEMA MALUKI ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged with rape contrary to section 3(1)(a)(b) as read with (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 27th April 2014 in the area of Tana North District within Tana River County intentionally and unlawfully caused his penis to penetrate the vagina of K. K 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 touched the vagina of K. K with his penis. He denied both charges. After a full trial, he was convicted on the main count of rape and 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 grounds of appeal on 2nd December 2014. However on 11th August 2015, he filed an amended petition of appeal which he relied upon on the following grounds:-

1. The trial magistrate erred in law and facts to convict him without considering that the prosecution failed to discharge the burden as required by Section 109 and 110 of the Evidence Act.

2. The trial magistrate erred in law and fact to convict him without considering that the evidence of the complainant was contradictory and full of inconsistencies contrary to section 63 of the Evidence Act and Section 154 of the Criminal Procedure Code.

3. The learned magistrate when delivering verdict failed to consider that the circumstances surrounding the scene of crime could not support the complainant’s allegations.

4. The trial magistrate erred in law and fact to convict him without putting into consideration the evidence of the doctor which excluded him from the allegations of the prosecution tailored to fix

his life in breach of section 36 and 26 of the Sexual Offences Act.

5. The trial magistrate erred in law and facts to convict him without considering that he was arrested in his house sleeping .

6. The trial magistrate erred in law and fact to convict him without considering that very crucial witnesses were not availed to unveil the truth of the alleged offences contrary to section 150 of the Criminal Procedure Code.

7. The sentence pronounced by the trial magistrate was exceedingly harsh and excessive.

The appellant also filed written submissions to the appeal. I have perused the written submissions of the appellant. He relied on a number of reported court cases. At the hearing of the appeal the appellant choose to rely on his written submissions. He elected not to make oral submissions.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the complainant tendered evidence that there was a struggle with the appellant who managed to escape after suffering injuries. Counsel stated that the medical examination of the appellant confirmed this. Counsel added that the proof of HIV status was not relevant in the present case. Counsel submitted also that the T-shirt of the appellant was black with red marks. Counsel was of the view that the appellant was positively identified as the culprit.

Counsel submitted further that there was no person named as mama Mutamu in the evidence as alleged by the appellant. Counsel submitted that the sister in law to the appellant directed witnesses to the house of the appellant and was not an eye witness and as such her evidence was not of value to the case. Counsel stated that Wambua PW4 was an independent witnesses.

On the variance of time of the offence, counsel argued that the variation of time was minor and natural as different people had different perceptions of time especially when not referring to their watches.

On the distance between where the appellant lived from the complainant, counsel submitted that the reference at one point to 30 Km was a wrong perception by the magistrate otherwise all the evidence was that the appellant lived about 20 metres from the complainant.

Counsel submitted also that the defence of the appellant was considered in the Judgment. Counsel urged that the appeal be dismissed.

In response to the Prosecuting Counsel's submissions, the appellant submitted that the prosecuting counsel was paid for opposing the appeal. He asked that justice be done.

During the trial the prosecution called 5 witnesses. PWI was the complainant. It was her evidence that she came from Bura and that her business was to burn charcoal. On the 27th of April 2014 at around 5.00 am, she was in her one bedroom house sleeping with her husband and children. She woke up to feel somebody having sex with her. She felt that this person was not her husband. She therefore screamed and held his hand. Her husband woke up and caught him and asked her to find a match stick or torch but did not find any. She rushed to her neighbour's house to get a torch and the neighbour gave her a mobile phone which had spot light. They came back with the neighbour and saw the appellant naked with a black long sleeved shirt tied around his waist. The appellant struggled and slipped away from the hands of the husband of the complainant but left behind his torch and shirt.

They then proceeded to where the appellant lived and called his sister in law who showed them his door. When they knocked, the appellant insisted a number of times on them waiting for two minutes but he never opened the door, and they proceeded to Bura Police station. That same night the police picked the appellant from his house. On the following day she was examined at Bura Health Centre with her husband and the appellant. She identified the T-shirt, and the torch both said to belong to the appellant

and her P3 form.

In cross examination, she denied working with the complainant. She maintained that she screamed and thought that the appellant was attempting to infect her with a disease. She maintained that the appellant left behind a black T-shirt which had some red marks. She stated that the appellant's home was 30 Km away. She stated that she had seen the appellant before drinking. She stated that the appellant bit her husband's hand and managed to run away. She maintained that the appellant was sick.

In re-examination, she clarified that the appellants house was a stone throw away from the house. She stated that though the appellant raped her, he did not ejaculate.

PW2 was Daniel Mapombe a Clinical Officer Bura District Hospital. It was his evidence that the complainant aged 35 was referred to the hospital on 27th April 2013 from Bura Police station, with an allegation of rape. She was examined. No obvious lacerations were found. No disease was detected. Pregnancy test was negative. He filled a p3 form on 28th April 2014, and produced the same as an exhibit.

He also carried medical examination on the appellant Dominic Mitemba Maluki. He had general fair conditions with bruises on the right elbow joint and shoulder. No venereal disease was detected.

In cross examination he stated that he was not present when the offence was committed.

PW3 was F W the husband of the complainant. He was a charcoal dealer in Bura. It was his evidence that on 27th April 2014 at around 1.00 Am while at home with his wife the appellant entered the house and raped his wife the complainant who screamed. He caught that person and they struggled for around 10 minutes but he bit him on the left hand and managed to run away. His wife the complainant borrowed a mobile phone torch from a neighbour called J which was flashed on the appellant whom he knew before for about 4 years. None the less the appellant ran away.

According to him the appellant tied a black T-shirt around his waist but he left that piece of cloth as well as his torch behind when he ran away. They then were shown the house of the appellant by an in law. However on knocking at the door the appellant kept telling them to wait for 2 minutes. They then reported the incidence to the police station and handed over the items they had recovered to the police.

In cross examination he stated that he had seen the appellant wearing the T-shirt before. He maintained that the torch belonged to the appellant. He denied working together with the appellant at any time. He maintained that the appellant lived 20 metres away.

Pw4 was J N W from Bura, a business woman dealing with charcoal.

It was her evidence that on 27th April 2014 at 1.00 am the complainant a neighbour knocked at her house. Before that she had heard screams coming for the complainants house saying ***"this is the person".*** The complainant came asking for a torch but I gave her the mobile phone. Together with neighbours they followed and found a naked man held by the husband of the complainant. Though it was not very clear when neighbours shined their torches they recognized it was Kitema the son of K. According to her people thought that the appellant was HIV positive and because he was trying to bit those who wanted to catch him they let him go. He left behind his T-shirt and a torch. They then woke up M a sister in law of the appellant who confirmed that the T-shirt belonged to the appellant. She stated that they were then shown the house of Kitema but he refused to open and insisted for them waiting for 2 minutes. They thus reported the incidence to the police, and he was arrested the same night.

In cross examination she stated that she saw the appellant struggling with the complainant's husband. She denied doing any business with the appellant. She stated that the time was about 2.00 Am. She denied having been paid by anybody to come and give evidence.

PW5 was PC Tom Onyango the Investigating Officer. It was his evidence that on 27th April 2014

while at the police station Bura he received a report from the complainant who narrated to him that she had been raped. They proceeded to the house of the suspect with Corporal Mwaniki. It was a one roomed house and they pushed the main door open and they arrested the appellant who had visible injuries on the head, neck and the abdomen. The complainant had them over the T-shirt and the torch. Both the complainant and the appellant were taken to Bura Health Centre for examination and filling in of P3 forms. He produced the T-shirt and the torch as an exhibit. After investigations he charged the appellant in court with the offences.

In cross examination he stated that he did not mention the items recovered in his report but included them in the investigations diary. He stated that time of commission of the offence would not be established exactly. He stated also that they did not find it necessary to bring children witnesses in this case to testify. He stated that he was very drunk when he was arrested, though he did not record that position in his statement.

When put on his defence the appellant erected to give unsworn testimony. He stated that he was a farmer at Bura and did Jua Kali work. He stated that on Saturday 26th April 2014 after work he went home early at around 6.30 Pm took a bath and went to sleep. At around 4.00 am, he was woken up by people at his door step who said that they were police men. He went to open the door they pushed him in and injured him and took him to police. At around 9.00 am two people he knew as husband and wife came and alleged that he had raped the wife. He stated that PC Tom Onyango talked to him and asked him to give the money to settle the matter. He was later taken with the complainant and her husband to be tested for HIV. He stated that he had a family with children. He stated that the complainant and her husband wanted to fix him but the HIV test had proved that wrong. He stated that the allegations against him were lies.

This being a first appeal, I am required to re evaluate all the evidence on record and come to my own conclusions and inferences. I have to be mindful of the fact that I was not able to see witnesses testify to determine their demeanor - ***see the case of Okeno -vs- Republic (1972) EA 32.***

I have re evaluated the evidence on record. The appellant was convicted of the offence of rape. By definition rape is having sexual intercourse with somebody without the consent of that person. It is thus to be proved by the prosecution first that penetration or sexual intercourse did occur. Secondly, that such sexual intercourse was without the consent of the victim or complainant. Thirdly, it has to be proved that the accused is the culprit. The burden is always on the prosecution to prove these 3 elements of the offence beyond any reasonable doubt. The accused does not have a burden to prove his innocence. He is merely entitled to create or raise some reasonable doubt to the prosecution case.

This incident occurred at night. It was dark. When the complainant felt that somebody was raping her she raised the alarm and the husband got hold of the person. However there was no light in the single roomed house. The complainant ran to a neighbours house and brought a mobile phone which was flashed upon the assailant before he ran away. Though the appellant and the complainant and the husband of the complainant knew each other before, the evidence of identification through eye sights does not come out very clearly. However both the complainant, husband and the witness from whom a mobile phone with a torch was brought to assist in identifying the appellant were positive that he was the person who had gone to the house of the complainant and he was held by the husband before he escaped. There was a struggle and the appellant was injured. The husband of the complainant was also injured. When the police went and arrested the appellant from his house the same night, they found that he was injured. The medical evidence shows that he was injured. In my view it cannot be doubted that the appellant was the one who visited the house of the complainant that night. He was thus the culprit.

The offence charged being rape, penetration had to be proved. The medical evidence does not indicate any injuries on the victim. No spermatozoa or semen was found. The allegation of HIV infection was not proved or established. However in my view the appellant had raped the complainant. For an adult woman the fact of penetration does not necessary lead to any noticeable lacerations or injuries in the genital organ of the woman. From the evidence on record also it's quite clear that the appellant did not manage to complete the Sexual Act through ejaculation. He was stopped midway. Since rape is

committed even when there is partial penetration, in my view the offence was committed. It is my finding that penetration did occur.

The evidence of the complainant was very clear that she did not give consent to the appellant penetrating her. In my view therefore from the evidence on record the three ingredients of the offence of rape were established or proved by the prosecution beyond any reasonable doubt. I will thus uphold the conviction.

With regard to the sentence, the sentence pronounced by the trial court was the sentence allowed by law. I will thus also uphold the sentence.

Consequently I find no merits in the appeal. I dismiss the appeal and uphold both the convictions and sentence of the trial court.

Dated and delivered in Garissa on 3rd December 2015.

GEORGE DULU

JUDGE