



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 204 OF 2012

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN THE CRIMINAL CASE NO. 70/2011 OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT VOI: L. M. NYAKUNDI – RM)

FREDRICK WADIA MASANJU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **FREDERICK WADIA MASANJU** has filed this appeal challenging his conviction and sentence by the Senior Resident Magistrate based at Voi Law Courts. The appellant was arraigned in court on 21st January, 2011 facing a charge of **RAPE CONTRARY TO SECTION 3(1) (a) as read with SECTION 3(3) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:

“On the 21st day of January, 2011 at [Particulars withheld] Estate within Taita Taveta County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of R E M aged 28 years without her consent.”

Additionally the appellant faced an alternative charge of **COMMITTING AN INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(a) OF THE SEXUAL OFFENCES ACT, 2006**. The appellant entered a plea of ‘Not Guilty’ to both counts and his trial commenced on 23rd March, 2011. The prosecution led by **CHIEF INSPECTOR KITUKU** called a total of four (4) witnesses in support of their case. **PW1 R E M** who was the complainant told the court that she was employed as a receptionist at Silent Guest Resort in Voi. On 20th January, 2011 she called the appellant who was a taxi-driver and whom she knew by the name ‘Fred’ to pick her up from her home in Sikuja Estate and take her to her place of work. The appellant arrived at her resident at 8.30 p.m. in a motor vehicle KBJ 912T. **PW1** got into the vehicle and they set off. The appellant told her that he needed to pick another client on the way and he diverted to a bushy place off the road. While parked there he began to make sexual approaches to **PW2**. She resisted his advances but the appellant overpowered her. He pulled up her dress and removed her underpants. He then proceeded to rape her. When he completed the sexual act the appellant gave **PW1** a bottle of water to wash herself but she declined. Then he drove her to work. Upon arrival at work **PW1** immediately requested for permission to go to hospital. She also called her cousin **E M PW2** and informed her that she had been raped. **PW2** left her home that very night and met **PW1** in the hospital. After treatment **PW1** reported the matter to Voi police station. The appellant was arrested the following day and was placed into cells. He was later charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to give an unsworn defence in which he denied having raped the complainant at all. On 7th March, 2012 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of rape and thereafter sentenced him to serve ten (10) years imprisonment. Being aggrieved the appellant filed this appeal.

The appellant who was in person during this appeal chose to rely upon his written submissions which had been duly filed in court. **Ms. MWAURA** learned state counsel made oral submissions opposing the appeal.

I have carefully perused the grounds of appeal filed by the appellant. He relies basically upon the following grounds:

- Insufficiency of evidence
- Inconsistencies in the prosecution case

From the evidence there can be no doubt that the appellant and **PW1** did meet on the night of 20th January, 2011. In his defence the appellant confirms the complainant's evidence that he was a taxi driver and that she was one of his regular clients. The appellant further confirms that on the material day he did pick the complainant at her request and drove her to her place of work at Silent Guest House. The two were well known to each other. **PW1** knew the appellant as Fred. They were alone together in the vehicle. There can be no possibility of a mistaken identity.

The complainant claims that on the way to drop her, the appellant diverted to a bushy deserted area where he proceeded to rape her. In his defence the appellant denies this. He insists that he merely picked the complainant dropped her at her place of work then he went back home and slept. In other words the appellant claims that no sexual intercourse took place between himself and the complainant on the material night. However, the complainant on her part insists that the appellant raped her in his car. Sexual offences are normally committed in private thus there is unlikely to have been any witness to the assault. It is persuasive to note that immediately upon arriving at work, **PW1** sought permission to go to hospital and she did seek treatment that same night. Similarly **PW1** did report the rape immediately to her cousin **PW2** and to the police. **PW1** told her cousin and police that she knew her attacker and named him as 'Fred'. **PW1** was an adult woman of sound mind. Why would she claim to have been raped and go so far as to make a report with the police if no such incident occurred? **PW3 DR. CHARO WILSON** was a medical officer attached to Moi Voi Hospital. He testified that he examined **PW1** on the same night at about mid-night. His evidence was that:

“a high vaginal swab yielded spermatozoa cells.”

This was evidence that sexual activity had taken place. The evidence of the doctor corroborates the testimony of **PW1**.

In his defence the appellant claims that the charge is the result of his enmity with some unknown person. He claims that this unknown person forced the complainant to name him as her rapist. The appellant claims that he was given this information by the complainant's mother. Firstly the mother of **PW1** did not testify to confirm or deny this. Secondly, how could the appellant claim to have been the victim of a vendetta with a person whom he does not even know? This does not make sense. Thirdly, why would the complainant who herself had no grudge against the appellant agree to be used by some mysterious unknown person to fix the appellant? This defence is clearly a pure fabrication. The fact that the appellant did not put these issues to the complainant under cross examination is further proof that this defence was a mere after thought. The appellant in his defence goes on to state that:

“My investigations revealed that the complainant has a habit to put men in similar problems. I am the third person she has done that to”

However, the appellant provides no evidence of this claim. He does not name any of the other men the

complainant has allegedly falsely accused of rape and neither has he called any of these men as witnesses. The appellant makes no claim that the complainant personally held a grudge against him and had any reason to fabricate a case against him. All in all I find this defence to be totally incredible and the trial magistrate was right to dismiss the same. From the evidence it is clear that sexual activity did take place between the appellant and the complainant on the night in question.

In cases of rape the crucial question is whether the sex was consensual. The fact that **PW1** immediately sought treatment and made a report to the police indicates that she did not consent to sex with the appellant. If the two were lovers, they would have probably made arrangements to meet for a rendezvous, not have sex in the car on the way to work. I am satisfied that the sex was not consented to by **PW1** and that the appellant forced himself upon her.

Finally, I note that no samples of blood or blood typing was done to prove that the semen found inside the complainant's vagina came from the appellant. This was remiss of the prosecution. Such testing is necessary to prove a charge of rape conclusively. For this reason I find that the trial magistrate erred in convicting the appellant on the main charge of Rape. As such I do quash that conviction. However, I am satisfied that the evidence on record sufficiently proves the alternative charge of Indecent Assault. I therefore substitute the conviction on rape with a conviction of Indecent Assault on an Adult Female contrary to section 11(A) of the Sexual Offences Act. In the circumstances the ten (10) year sentence becomes unlawful. I therefore substitute the sentence with a fine of Kshs. 30,000/= in default to serve three (3) years imprisonment.

Dated and delivered in Mombasa this 4th day of February, 2014.

M. ODERO

JUDGE