



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 114 OF 2013

M AAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

This appeal arises from the decision and judgment of the Senior Resident Magistrate at Lodwar in Criminal case No. 29 of 2012 in which the appellant, M A A, was convicted and sentenced to serve ten (10) years imprisonment for rape contrary to section 3 (1) (a) (b) read with section 3 of the Sexual Offences Act.

Initially, the appellant had been charged with defilement contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act but this was substituted for rape after an age assessment carried out on the complainant, H revealed that she was an adult.

It was alleged that on diverse dates in the month of October, 2011, at Turkana West District, the appellant engaged in sexual intercourse with the complainant without her consent.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in the petition of appeal dated 27th November, 2013 filed herein on his behalf by the firm of **Samba & Co. Advocates**. At the hearing of the appeal, learned counsel **Mr. Samba** appeared for the appellant while the learned Prosecution Counsel, **Mr Kimathi** appeared for the State Respondent.

In his submissions, the appellant's learned counsel stated that the case was that of rape and therefore the main issue was whether there was necessary consent. That, the learned trial magistrate had a duty to establish the lack of consent. That the complainant (PW4) alleged that she was at the house of her cousin B when the appellant went there and gave her an open soda which she drank and passed out after which he raped her. Yet, in cross – examination, she did not mention an open soda neither did she know the type of soda and its colour.

Learned Counsel noted that the incident was never witnessed by anybody including B whom the complainant had visited. That, the complainant alluded to four incidents of sexual intercourse with the appellant. Yet she hid the fact from everybody until her pregnancy let the matter out in the open.

Learned Counsel submitted that the complainant's mother (PW2) was furious to the extent of forcing the complainant to reveal the name of the person responsible for her pregnancy and that is when she (complainant) alleged that she had been raped by the appellant in order to conceal the shame that engulfed her.

Learned Counsel went on to submit that the complainant's evidence with regard to photographs allegedly used by the appellant to blackmail her was not credible as the said photographs were never produced. Learned counsel contended that it was made clear by the complainant that she would not have disclosed to anybody about her sexual encounters with the appellant had she not become pregnant.

That, it was apparent that the complainant's mother instigated the charge against the appellant. That although the complainant, alleged that she had been dragged, B who was a crucial witness was not called to testify and explain the complainant's condition after the incident. That, in denying that she had an affair with the appellant, the complainant was not truthful.

Learned counsel called upon this court to allow the appeal.

On his part, the learned prosecution counsel supported the appeal and submitted that the charge was serious and required serious evidence. That, the evidence relied upon was that of the complainant which showed that she indeed had sex with the appellant such that the only question was whether she consented to it.

That, since the issue before the court was rape and not paternity, the learned trial magistrate ought not have given serious emphasis to the results of the DNA test. That, although the complainant alleged that she bled after the incident, the lady called B was not called to testify and confirm the fact. That, it was not excusable for the complainant to say that she did not inform B what had happened to her for fear that the appellant would have exposed photographs taken by him during the act. That notwithstanding the existence of the photographs, the complainant, ought to have reported the matter.

Learned Prosecution counsel submitted that there was clear suggestion from the evidence that the complainant's mother (PW2) was instrumental in having the appellant charged and that she was incensed by the appellant impregnating her daughter and sought to fix him.

It is for the foregoing reasons that the learned prosecution counsel did not oppose the appeal.

This is a first appeal, notwithstanding the position taken by the state respondent, the duty of this court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In summary, the prosecution case was that the appellant was related to the complainant, J H O (PW1), and one day in the month of October, 2011, he visited her in the house of one B whom she referred to as her sister. He went there with a soda and asked her to drink it. She (complainant) drank the soda and passed out immediately thereafter. She fell unconscious and on regaining consciousness noted that she was naked and that the appellant had engaged in sexual intercourse with her. He was at the scene with photographs taken by him during the act using his mobile phone. He threatened to expose the photographs to all and sundry if she dared raise any alarm. She therefore remained mute and did not disclose to her sister what had happened. At a later stage, she felt sick and when she was examined at a nearby clinic was found to be pregnant. It is then that the matter was reported to the police even though the appellant had on four occasions engaged in sexual intercourse with her.

The complainant's mother **H O D (PW2)**, indicated that it was sometime in December, 2011 that the complainant informed her that, she had been raped. Later, it was discovered that she (complainant) was pregnant. It was then that she disclosed to her mother (PW2) that the appellant

was responsible for her pregnancy and narrated the circumstances under which it happened. Her mother reported the matter to the appellant's parents and when they defended their son, she reported to the police.

A Government Analyst, Ann Wangeci Nderitu (PW3), conducted a DNA examination to determine the paternity of the child alleged to be the product of the unlawful sexual relationship between the complainant and the appellant. The results were positive in favour of the appellant as the biological father of the child.

P.C Paul Sum (PW4), received the necessary report and after obtaining statements from the complainant and her mother, arrested and charged the appellant accordingly. The learned trial magistrate after considering the foregoing evidence by the prosecution ruled that a prima facie case had been established and placed the appellant on his defence. However, the appellant exercised his right of remaining silent. He was eventually convicted by the learned trial magistrate and sentenced accordingly.

In convicting the appellant, the learned trial magistrate rightly found that sexual intercourse had indeed taken place between the complainant and the appellant and that its result was the giving birth of the appellant's baby by the complainant. Indeed, the paternity of the child was not an issue.

The DNA examination by the Government Analyst (PW3) was therefore unnecessary. Be that as it may, the issue that presented itself for determination was whether the complainant (PW7) consented to several acts of sexual intercourse with the appellant.

The indication given by the complainant in her evidence was that she did not consent to any of the sexual acts as she was in the first instance drugged by the appellant who went ahead to engage in the act while she was unconscious and in other instances, the appellant used photographs to blackmail her into having sexual intercourse.

None of the alleged acts was witnessed by an interdependent person, neither was any information given to anybody nor sooner had the acts occurred. Therefore, the complainant's evidence remained uncorroborated with regard to the fact of rape. However, the learned trial magistrate was convinced to rely on that evidence even without independent corroboration and convict the appellant so long as the evidence was credible. Indeed, the learned trial magistrate convicted the appellant on the basis of credibility of the complainant's evidence. He found that the complainant was telling the truth when she stated and contended that she did not give her consent to the several acts of sexual intercourse with the appellant.

It is without doubt that the trial court saw and heard the witnesses and was therefore better suited than this court to make findings based on the credibility of witnesses. However, in this matter, the complainant's evidence was shrouded with material contradictions, gaps and concealment of facts such that it could not be believed by any reasonable individual.

To begin with, there was absolutely no worth while investigations carried out by P. C Sum (PW4) to determine the truthfulness of the complainant's statement made to the police. He (PW4) merely recorded the complainant's statement and that of her mother and quickly proceeded to arrest and charge the appellant without determining the truthfulness of the allegations.

In her evidence, it was apparent that the complainant was not candid with regard to her age and the circumstances which led her to have sexual intercourse with the appellant not once but four times. Would a person who had engaged in sexual intercourse with a known person on more than one occasion be said to have done so without her consent???

The suggestion that the complainant was drugged or blackmailed to have sex without the appellant could not hold water as there was no evidence of drugging nor was there evidence establishing the

existence of the alleged photographs. It seemed that the introduction of photographs into the whole issue was an after thought to lend credence to the complainant's allegations against the appellant.

If indeed she (complainant) was raped by the appellant nothing prevented her from reporting the matter to her host B or to the police. It would appear that B was left out as a witness because there was no rape as alleged and that she may have spilled the beans regarding the intimate relationship existing between the complainant and appellant which relationship was often "cemented" in her house.

The fact that the complainant made allegations of rape against the appellant only after she was found to be pregnant clearly indicted that she was involved in a secret love relationship with the appellant, her relative, and that the pregnancy was as a result of that affair and not as a result of being raped. She could not be said not to have consented to the affair and all that went with it. Her allegation of rape therefore arose out of the shame that she brought to herself her family and that is why her mother (PW2) decided to report the matter to the police after the appellant's parents defended him over the allegation of rape. It is doubtful whether this matter would have landed at a police station had the appellant's parents not defended him.

From all the foregoing, it is clear and obvious that the complainant's evidence was not credible enough for a second conviction of the appellant by the learned trial magistrate. The prosecution did not discharge its burden of proof in as much as it availed evidence which was neither sufficient nor credible.

Consequently, this appeal is merited and is allowed to the extent that the appellant's conviction by the learned trial magistrate is hereby quashed and the sentence imposed upon the appellant set aside.

The appellant shall forthwith be released unless otherwise lawfully held.

J. R. KARANJA

JUDGE

(Delivered and signed this 4th day of February, 2014)