REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 160 OF 2012

(An appeal against both conviction and sentence of the Senior Resident

Magistrate's court at Butali in Criminal Case No. 305 of 2011

[S. N. ABUYA, SRM] dated 23rd November, 2011)

ANTONY KUVOLA..... APPELLANT

VERSUS

REPUBLIC ……..……..……. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with rape contrary to **Section 3** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 26th May 2011 at [particulars withheld], Kakamega North District within Western Province intentionally and unlawfully caused his penis to penetrate the vagina of G N a girl with mental disability by use of force. He denied the charge. After a full trial, he was convicted and sentenced to serve 10 years imprisonment. Being dissatisfied with the decision of the trial court, he has appealed to this court on several grounds. He also tendered in written submissions.

The learned Prosecuting Counsel Ms Opiyo, opposed the appeal. Counsel argued that the evidence of PW1, PW2 and PW3 was clear and implicated the appellant with the commission of the offence. Counsel emphasized that the appellant and the complainant were seen together and the time was during the day. The complainant knew the appellant before. Her evidence was believable.

In response to the Prosecution Counsel's submissions, the appellant submitted that PW3 said that he saw him at 3 p.m. with a girl while the complainant said that the time was 2 p.m. This was a contradiction. In addition, there was an existing grudge which he brought to the attention of the trial court.

The facts of the prosecution case are in brief that PW1, G N, who was a mentally challenged girl, was seen in the company of the appellant by PW2. It was in the afternoon. The appellant lured the complainant to a sugarcane plantation, undressed and raped her three times. A good samaritan called N came to her rescue. The complainant was then taken for medical attention. She was attended to by PW4 Sylvance Osida a Clinical Officer. The Clinical Officer found an injury in her private parts. He filled a P3 form which was produced in court. The appellant was then charged with the offence.

When put on his defence, the appellant gave an unsworn statement. He stated that people came to the gate of his home on a Sunday 6th June 2011 and arrested him. The Assistant Chief told him that he

was arrested because of some suspected stolen property. He also asked him if he could identify two uncles and a brother of the Assistant Chief who were involved in a killing. It was his evidence that he was charged because of a frame-up and also because he failed to give the Assistant Chief Kshs.6,000/= for his release.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. He was thus convicted and sentenced to serve 10 years imprisonment. Therefrom arose this appeal.

This being a first appeal, I am duty bound to re-evaluate all the evidence of record and come to my own conclusions and inferences. See the case of **Okeno -vs- Republic [1972] EA 32**.

I have re-evaluated the evidence on record. The evidence of the complainant, PW1 G N is very scanty. She was said to be mentally handicapped. She did not say how, after raping her twice, the appellant managed to get away. The fact that the evidence of the complainant is very scanty on what happened gives the impression that it was recited evidence. Taking into account the fact that the complainant was mentally handicapped, the prosecutor should have tried to bring out more details about the events that led to the rape and the events subsequent. That did not happen. The evidence of the complainant is so scanty that it cannot be a basis for sustaining a conviction in the circumstances of the present case.

Besides the scantiness of the complainant's evidence, she stated that N came to her rescue and found the appellant at the scene. N was not called to testify. In my view, N was a very crucial prosecution witness in establishing whether the appellant raped the complainant. She would have explained the circumstances of the incident starting from the screams of the complainant, and whom she found at the scene, whether the appellant was at the scene, and how he escaped.

In the absence of the evidence of this crucial witness, who was mentioned by the complainant, this court finds that it is unsafe to uphold the conviction of the appellant. In the case of **Bukenya -vs- Udanga [1972] EA 549** the court emphasized that where crucial witnesses are not called by the prosecution and no explanation is given for the failure to call those witnesses, the court is entitled to draw an adverse inference on the prosecution case and acquit the accused.

In the circumstances of the present case, I find that the failure to call Nancy a crucial eye witness, created such a doubt in the prosecution case, that this court is entitled to draw an adverse inference and acquit the appellant. The prosecution failed to prove its case beyond any reasonable doubt, by its failure to call this crucial witness.

Consequently, I find merits in the appeal. 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 this 13th day of March, 2014

George Dulu

J U D G E