



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 298 OF 2009**

**JAMES NG'ANG'A NJAU..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 256 of 2009 in the Chief Magistrate's Court at Kiambu – A. Ongeru (SPM) on 3<sup>rd</sup> July 2009*

**JUDGMENT**

**Introduction**

1. The Appellant, **James Ng'ang'a Njau** was charged with the offence of Rape contrary to **Section 3(1)** of the **Sexual Offences Act No.3 of 2006**. At the close of the trial, the appellant was convicted and sentenced to serve life imprisonment.

**Particulars of the charge**

2. The particulars of the charge were that on the 17<sup>th</sup> day of February 2009, at Anima sub-location, Kamiti Location, in Kiambu District within Central Province, he intentionally and unlawfully committed an act that caused penetration with P W M without her consent. In the alternative the appellant was charged with indecent act contrary to **section 6(1)** of the **Sexual Offences Act No 3**.

**Grounds of Appeal**

3. The appellant averred in his grounds of appeal that the prosecution's case was not proved against him beyond reasonable doubt, and that the conviction was based on fabricated evidence and further that his defence was not duly considered.

**Respondent's Reply**

4. Learned state counsel Miss Ndombi on her part, opposed the appeal on behalf of the respondent, for reasons that the prosecution proved their case to the required standard, the conviction was based on sound evidence and was safe and that the appellant was satisfactorily identified.

**Case summary**

5. **PW1**, P W M who is the complainant in this case told the court that on the material night at 1 am she was asleep in her house at Kamiti corner when she was awakened by the noise her hens were making under her bed out of disturbance. Suddenly the appellant appeared and held her by the neck in a stranglehold. He picked a machete which was in the room and threatened to kill **PW1** if she said or attempted to say anything. The appellant opened the door and placed a jerry can outside the house and then returned and got in to bed with her. He instructed the complainant to lie properly whereupon he mounted and raped her.
6. **PW2**, G M M testified that **PW1** woke him up at about 3.00 a.m. on the night in question at his house. She sought his assistance in apprehending the appellant who was at her house sleeping. **PW2** went into **PW1**'s house and found the appellant asleep in her bed. When he woke him up the appellant attempted to flee but was arrested and taken to Mugumo AP post.
7. **PW3**, A.P.C. Mohammed Molu who is attached to Mugumo AP Post arrested the appellant on 17<sup>th</sup> February 2009, after a group of people in the company of **PW1** took him to the AP Post on allegations of raping **PW1**. **PW3** later visited **PW1**'s house and saw a hole in the mud wall, directly where the complainant's bed was. The appellant had used it to gain entry into **PW1**'s house.
8. **PW4** the doctor examined **PW1** on 1<sup>st</sup> April 2009 for purposes of filling the P3 form. He noted that she had mouth ulcers and bruises under her nose. She also had a scar on her abdomen from a previous operation as well as tenderness on the side of her body. He found that the tear in her hymen was not recent. She had no bruises in her genitalia but had a foul smelling discharge.
9. **PW5**, CPL Beatrice Wayeko the investigating officer booked **PW1**'s report and sent her to Kiambu District Hospital for examination. She later accompanied her to her house where she was shown the hole in the wall of the mud hut, which the appellant used to gain access into the house.
10. In his unsworn testimony the appellant told the court that he was returning home from work, having passed through a place called West and drunk beer with one of his colleagues, when he found himself at the police post, being accused of having raped an old woman. He was taken to hospital for examination and charged in court the following day.

### **Analysis**

11. This court has analysed and re-evaluated the evidence to make its own findings and draw its own conclusions, bearing in mind that the trial court had the advantage of hearing and seeing the witnesses as they testified which this court did not have. The issue for determination is whether the evidence on record was sufficient to prove the charge of rape and to link the appellant to the offence.
12. On identification the appellant pointed out that the trial magistrate erred when she stated in her judgment that "***She PW1 was able to recognize the accused person.....***" yet **PW1** in her evidence in chief stated that she had never seen the appellant prior to that day.
13. **PW1** testified that she was able to recognize the appellant because he used the road near her house routinely. In the Court of Appeal case of **Anjononi & Others V. Republic (1976 - 80) 1 KLR**, the Court had this to observe on the question of identification by recognition:

***"..... recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

The appellant was not a stranger to **PW1** and her identification of him was therefore more reliable than that of a stranger.

14. Besides, the evidence of **PW1** that the appellant was found still sleeping in her bed and arrested at the scene as he attempted to flee, was corroborated by **PW2** the neighbour who helped to arrest him. The trial magistrate took note of this when she made the following finding:-

***"In the current case, I find that the complainant was not mistaken. This is because after the accused person raped her, he slept on her bed and she managed to lock him up and get help. PW2 found the accused person asleep on the complainant's bed. He***

***did not manage to flee and therefore there was no possibility of error in the arrest, Identification of the accused person. There is evidence that the accused person gained access to the complainant's house through a hole in the mud wall.”***

The circumstances of the appellant's arrest therefore rule out the possibility of the wrong person having been arrested.

15. The appellant also submitted that no nexus was established between him and the offence with which he was charged, since the prosecution failed to avail the evidence of the first doctor who examined **PW1** and the villagers who allegedly arrested him.

16. The record indicates that **PW4**, the doctor filled the P3 form with regard to **PW1** on 1<sup>st</sup> April 2009, relying on the notes made during her initial examination on 17<sup>th</sup> February 2009 at 9 a.m. **PW4** said that he did not notice any laceration or tear on **PW1**'s genitalia and that although her hymen was torn, this was not recent. That **PW1** had no bruises to her genitalia but had a foul smelling discharge.

17. From the evidence there is no doubt that the complainant was assaulted on the night in question, as was evinced by the bruises under her nose and the tenderness on the side of her flank. Under **Section 3(1) of the Sexual Offences Act:**

“A person commits the offence termed rape if-

- a. **He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;**
- b. **The other person does not consent to the penetration; or**
- c. **The consent is obtained by force or by means of threats or intimidation of any kind.”**

The ingredients of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.

18. The appellant argued that **PW1** being an elderly woman, had mostly likely not had sexual intercourse in a long time and that therefore she should have sustained tears in her genitalia. Indeed at 68 years of age **PW1** was elderly. I find however that first, it is mere conjecture that **PW1** had not had sexual intimacy in a long time and second, there is no legal requirement that there should be injury to the genitalia of the victim for the offence of rape to be proved. **PW4** confirmed that it was possible for sexual assault to occur without there being evidence of tears and spermatozoa in the victim's genitalia.

19. In the case of **Republic V. Oyier (1985) KLR pg 353**, the Court of Appeal held as follows:-

1. **“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.**
2. **To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**
3. **Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”**

20. In the case before me it is in evidence that the appellant gained entry into **PW1**'s house by digging through her mud wall. That the appellant threatened to kill her if she did not let him have

his way with her. To drive the point home he armed himself with a machete which was in the room. According to **PW1**, the appellant was not drunk. He ordered **PW1** to remove her pants, and then tore off the pants from **PW1** himself.

21. It is therefore clear that she yielded through fear of death and did not consent to the sex. In her own words **PW1** testified as follows-

***“He had dug a hole from outside and entered my house. He was not sleeping in the house. He held my hand and I pushed him away. He came and held my neck and started strangling me. He took the torch and took a panga which was at the other side of the bed.....***

***He said if I talk he would kill me. When I realized he would kill me. I went back to bed as he told me and I slept. The accused went and opened the door; he removed a jerry can and took it outside. He returned in the bed and told me to sleep well. He climbed on the bed and he slept with me. He came and slept on me. He tore my underpant. He stepped on it with his shoes and removed it. He would have sex with me and sleep and then do it again. He raped me twice. The first time he went to sleep and the second time he did it again and he slept again. I pretended I had died. He had placed his hand on me. I realized he had slept. I locked him inside the house and I ran to call neighbors across the river.***

22. The trial court considered and found the appellant's defence that he was on his way home from a drinking spree when he found himself at the AP Post to be a mere sham. I have also re-evaluated it in the context of the evidence and submissions on record in which he states that **PW1** fabricated the case against him. I find that there is no material in the evidence to support the averments of fabrication.

23. In the end I find that the appellant was properly identified as the person who had sexual intercourse with **PW1** without her consent. That therefore he raped her. I find also that the trial court acted properly in dismissing the appellant's defence since it was not tenable in light of the evidence on record.

24. For the foregoing reasons I find that the offence of rape was proved against the appellant to the required standard and the appeal is accordingly dismissed.

**SIGNED DATED and DELIVERED in open court this 12<sup>th</sup> day of March 2014.**

**L. A. ACHODE**

**JUDGE**