REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Criminal Appeal No. 140 Of 2012

(An Appeal Against Both Conviction And Sentence Of The Senior Resident

Magistrate's Court At Butali In Criminal Case No. 214 Of 2010

[S. N. Abuya, Srm] Dated 624h August, 2011)

Mukangai Musumba Wilson ..... Appellant

Versus

Republic …….……..……. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with rape contrary **Section 3 (1) (a)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on 14th March, 2010 at [particulars withheld], Kakamega North District within Western Province intentionally and unlawfully inserted his genital organ namely penis into the genital organ namely vagina of M M. In the alternative, he was charged with indecent act with a woman contrary to **Section 11 (1)** of the same Act. The particulars were that on the same day and place unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of M M. He denied both charges. After a full trial he was convicted on the main count of rape and sentenced to serve 10 years imprisonment from the time that he would be arrested. At the time of sentence, he was not in court.

Being dissatisfied with the decision of the trial court, he appealed to this court on several grounds. He also filed supplementary grounds of appeal and submissions. He relied on the said submissions and stated in this court that he was the sole bread winner of his family. I have perused the said submissions, both written and oral.

The learned Prosecuting Counsel Mr. Oroni opposed the appeal. Counsel submitted that the evidence of PW1, PW2 and PW3 was consistent. In counsel's view, the prosecution case was proved beyond reasonable doubt. The appellant was arrested in the room in which he had taken advantage of a school girl.

In response, to the Prosecution Counsel's submissions, the appellant submitted that the police did not carry out proper investigations. The complainant did not bring independent witnesses to support her story. The Clinical Officer also did not medically examine the appellant.

The facts of the prosecution case are that PW1 M M aged 19 years was a student. On the 14/3/2010, she went to play games and got late. She met her cousin L M who was to take her home after the school marches on a motor bike.

When L came and she boarded the motor bike, another boy jumped onto the same motor bike. L drove the motor bike but did not use the usual route. He did not take the route to Chelugo. He instead dropped her at the [particulars withheld] claiming to have run out of fuel. He then left her to go and refuel.

The complainant then stood at a place called [particulars withheld] with the other boy. A cousin of the boy (the appellant) came and told her that she would take her home. The complainant however, went to stand near the road in attempt to get a matatu home. The other girl (cousin of the appellant) came and told her it was not safe for a girl to stand outside near a bar in school uniform. She also offered to stay with her in her house until someone came to collect her. She then gave her a lodging room at the bar.

As she was inside, the young man (appellant) who had taken a ride with her on the motor bike, forced the door open, entered the room and locked the door from inside. He forcefully undressed her. Though she screamed, there was music at the bar and nobody came to her assistance. He raped her once.

Thereafter, she cunningly asked him to allow her go to answer a call of nature. When she opened the door, she screamed and attracted the attention of others. In the process, APC Abdul Hussein PW3, who was around, came to her assistance. They went to the room and knocked. When the door was ultimately opened, the appellant was in there. The dress of the complainant was also in the room. The complainant took her dress. The appellant was thus arrested.

The complainant was then taken to Malava District hospital on 15/3/10. She was examined by PW2 Kizito Sifuna. She had blood stains on her underpants. There were traces of sperms in her private parts. The appellant was thus charged with the offences.

When put on his defence, the appellant tendered unsworn testimony and called two witnesses. It was his defence that he was an electrician. That he went to the subject bar at 4 p.m. A t 8 p.m. he booked a room for four hundred shillings. He took drinks and then went to the room. It was raining that night. As he was sleeping, the door was knocked. When he opened, it was alleged that he had raped a woman. He denied committing the offence. He called DW2, Zakayo Wandinge. His evidence was that he was at the village inn bar drinking. He heard a fracas at about 10 p.m. When he tried to find out, he realized that some policemen had arrested the appellant. DW3 was Zeblan Matero. He was a security officer. He testified that he was at the village inn bar on 14/3/10. That at about 10 p.m., the appellant came to him with a receipt from the counter and he showed him room number four. Later, at around 10.30 p.m. he got a report that the appellant had been arrested in his room.

Faced with the above evidence, the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt on the first count. He was consequently convicted and sentenced. Therefrom arose the present appeal.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on 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 appellant was in the same premises or bar with the complainant that night. He does not deny this. The complainant said that the appellant followed her in the room and raped her. The appellant says that he was booked into a room and went and slept. Later some people came and knocked claiming that he had raped a girl.

Indeed crucial witnesses were not called by the prosecution herein. This was the cousin of the complainant who had taken and dropped them near that alleged scene of crime. The father of the complainant was also not called to testify. In the case of **Bukenya –vs- Uganda [1972] EA 549**, the court held that where crucial witnesses are not called to testify, the court is entitled under the general principles of the law of evidence to make an inference that such evidence would have been prejudicial to the prosecution case.

In the present case, the complainant clearly narrated how the incident occurred. She was a young woman of about 19 years. Her age is not in contest. She gave a graphic account of what happened. That the

appellant rode on same motor bike with her. That she got stranded when her cousin dropped her and did not come back. That the appellant was with her throughout. That she got a good Samaritan who offered her a sleeping place. That the appellant was related to that Good Samaritan. He took advantage of the situation to push his way into the room. That he raped her once. That she screamed but there was music in the bar and her screams did not attract any attention. That she used a trick by telling the appellant that she wanted to go for a call of nature. When she opened the door, she screamed and attracted the attention of people including PW3.

PW3 Abdul Hussein, an independent witness who was an Administration Police Officer, described how he saw the complainant emerge from a room crying. She only had her underwear and sought help. When he knocked the door where the appellant was, the appellant was found inside. When the door was opened, the complainant went in and dressed up. Her clothes were in that room.

The Clinical Officer found traces of blood in the underpants of the complainant. He also found evidence of sexual intercourse as well as spermatozoa in the vagina of the complainant. The medical examination was done just the next day that is 15/3/10.

In my view, the evidence of the prosecution in this present case was such that a case of rape was proved beyond any reasonable doubt. There was no likelihood that the complainant would have deliberately implicated the appellant. Though the appellant seems to suggest that he was sleeping in his own room alone, the evidence of PW3, an independent witness, clearly showed that the appellant and the complainant had been sharing the same room since the complainant had to find her clothes and dress up in the same room. If there was consent for sexual intercourse, there would be no reason for the complainant to jump out of the room almost naked and scream for help. From the evidence, I find that there was sexual intercourse between the two without the consent of the complainant.

In my view, the failure of the prosecution to call some crucial witnesses in the circumstances of this case, cannot lead to the inference that those witnesses would have given evidence that would be adverse to the prosecution case. In my view, the prosecution proved their case against the appellant beyond any reasonable doubt.

In conclusion, I find that the appeal has no merits. I dismiss the appeal and uphold both the conviction and the sentence of the trial court. May appeal within 14 days.

Dated and delivered this 13th day of March, 2014

George Dulu

J U D G E