REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.131 OF 2012

JAMES MIRERI ARUNGA ……...……. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(An appeal from original conviction and sentence in CMCRC No. 287 of 2011 by Njeri Thuku,

RM, dated the 7th July, 2011 and sentence by Hon. P.L. Shinyanda on 25th July 2011).

JUDGMENT

Introduction

1. The appellant herein James Mireri Akunga alias Peter was the accused in CMC at Kisii Criminal Case No.287 of 2011. He was charged with rape contrary to **Section 3 (1) (a)** of the **Sexual Offences Act No.3 of 2006** as read with **Section 3 (3)** of the same **Act**. The particulars of the offence were that on the 6th day of December, 2010 at [Particulars Withheld], in Kisii central District within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of A M by use of force.
2. He also faced an alternative charge of committing an indecent act with an adult contrary to **Section 11 (a)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on the 6th day of December, 2010 at [Particulars Withheld] in Kisii Central within Kisii County, he committed on indecent act with A M by rubbing his penis against her vagina.

The Prosecution Case

3. He pleaded not guilty to the charges and trial ensued. PW1 was the complainant A M an elderly lady aged about 80 years old. She told the trial court that on the 6th December 2010 at about 10 p.m. she was asleep alone in her two roomed house which was next to her sister in-law's house. That the appellant entered her room, and that she was able to see him as there was light on in her room. He locked her in the room so she could not leave, as he also covered her mouth and lay on top of her as she lay on her back, and inserted his penis into her vagina. She estimated that the whole incident took about 2 hours as appellant overpowered her and she could not get away. When the appellant entered the complainant's room, she (complainant) was not wearing a panty.
4. The complainant screamed for help after appellant left as before this he had threatened he would kill her and had had her mouth covered. On hearing her screams her daughter in-law came by and took her to Keumbu Sub-District Hospital for treatment and later to Kisii Level 5 Hospital.
5. The complainant also testified that though her eyesight was not so good during the hearing of the

case, she was able to see the appellant in her house on the material day because by then she could see well, and also walk and dig but since the incident she was unable to walk and has to be carried everywhere. On cross examination by the appellant, she reiterated that she saw appellant with her own eyes, and that it was the appellant who was in her house and raped her.

6. PW2 was Denis Omurwa a clinical officer at Kisii Level 5 Hospital. He confirmed that he examined the complainant and filled PW1's P3 form. He stated that during examination, the complainant was in good health though she could not walk and was elderly. From the treatment notes from Keumbu sub district hospital made on 7th December, 2010, the complainant had lacerations on her external genitalia. He explained that laceration occurs when there is contact with a rough surface, that there was blood in her genitalia and lab tests revealed spermatozoa and red blood cells from the laceration. PW2 concluded that there was vaginal penetration which is evidence of rape. He produced a copy of the treatment notes and complainant's P3 form which were marked as **MF1-1** and **Exhibit 1** respectively.
7. PW3 was M C PW1's daughter in-law. She recalled that she went to PW1's house on the morning of 7th December 2010, only to find her alone and in a bad state. That the complainant was lying on her bed on her back with her legs sprawled wide apart and she was wrapped on the top half of her body with a black and blue striped blanket; PW3 stated she saw faeces, as well as discharge of blood and semen on her genitalia, her right leg and some on the area of the bed where she was lying.
8. When PW3 asked the complainant what had happened, she told her that Peter had attacked her and had had sex with her. PW3 confirmed that she was not able to clean the complainant well as she was screaming. Accompanied by her neighbour Mokeira, she took the complainant to Keumbu sub district hospital and later on the same day they went to Keumbu police post. The following day they took the complainant to Kisii Level 5 Hospital. She identified **MF1-2** and **Exhibit 1**. In concluding her evidence in chief she confirmed that appellant was their neighbour and they had no other relationship.
9. PW4 was Elijah Onsono Nyantenga a neighbour of PW1 and PW2 and a member of community police in their area. He recalled that on 27th March 2011 in the evening he received warrants of arrest from the area chief for the arrest of the appellant. On the morning of 28th March, 2011 at 6.30 a.m. he went to arrest the appellant. He was accompanied by Richard Ondieki and Moses Ogega after which they took him to Keumbu sub-district hospital following the chief's instructions.
10. PW4 also testified that after the alleged incident, on 6th December 2010, the appellant disappeared from home and only returned in March 2011 for his sister's funeral and that is how they were able to arrest him.
11. PW5 was Angela Onsono a clinical officer at Keumbu sub district hospital. She recalled that on 7th December, 2010 at about 2 p.m. the complainant was taken to the hospital by some relatives. She confirmed that the complainant was very old and upon observing her private parts she saw bruises on her genitalia, blood stains in her private parts and that the complainant was crying out in pain.
12. That on carrying out lab tests they showed sperms and blood. She noted all her observations on the treatment card which she signed and produced in court as **Exhibit 2**.
13. PW6 was No.71720 PC Edwin Wawire based at Keumbu police post on general duties. He was the investigating officer in this case. He recalled that on the 7th December, 2010 he was at work at 5.30 p.m. when he received the complainant and a relative. He recorded the complainant's statement before escorting her to Kisii Level 5 hospital for her P3 form to be filled. He then endeavoured with the help of the local administration to have appellant arrested. After the appellant was arrested on 28th March 2011, he preferred the charges against him.

The defence Case

14. At the close of the prosecution case, the appellant was put on his defence upon due compliance with **Section 211** of the **Criminal Procedure Code**. The appellant gave an unsworn statement and called no witnesses. In his defence, the appellant contended that on 10th October, 2010 he left home and went to work. In March 2011 he went to visit his wife in Kegati where he was told the

sub chief was looking for him. He also heard that there was a report about him. He was then arrested and taken to Keumbu police post. Later he was brought to court and since then the case has been going on.

Judgment of the Trial Court

15. After carefully analyzing the evidence that was placed before it, the trial court reached the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt that indeed the appellant raped the complainant. The court found the appellant guilty as charged, convicted him and sentenced him to 30 years imprisonment.
16. The appellant felt aggrieved by both conviction and sentence and appealed vide the Petition of Appeal filed in court on 31st May 2012 after being granted leave to file appeal out of time.

Grounds of Appeal

17. The petition of Appeal sets out 8 substantive grounds of appeal:-

1. *That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant without discovering that the prosecution chain of evidence was contradictive. (sic)*
2. *That the learned trial magistrate erred in both law and facts by not discovering that the alleged incident occurred at night hence the complainant denied of recognizing the suspect herein being the appellant.*

3. *That the learned trial magistrate erred in law and facts by not considering that the appellant was not medically examined by any medical officer to link him with the alleged offence herein.*
4. *That the learned trial magistrate erred in law and facts by just relying on the prosecution witnesses hence the investigation officer failed to perform his duty.*
5. *That the learned trial magistrate erred in both law and facts by not discovering that the appellant's rights were violated hence he was arrested after four months from the time of the alleged offence.*
6. *That the learned trial magistrate erred in law and facts by not discovering that the complainant and her relatives had malicious [intentional] against the appellant over a land dispute hence they were neighbours of the same family.*
7. *That the learned trial magistrate erred in law and facts by dismissing the appellant's defence which was not proved unworthy before the trial court.*
8. *That the trial magistrate erred in not discovering that the evidences adduced by some witnesses was just a frame up to fabricate the appellant.*

18. The appellant prays that the appeal be allowed, the conviction quashed and the sentence of 30 years imprisonment set aside.

Duty of this Court

19. This matter is before me on first appeal. In the circumstances, the court is expected to rehear this case, only remembering that it has no opportunity of seeing and hearing the witnesses who testified during the trial. That notwithstanding, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. I am also under a duty to consider and carefully weigh the judgment of the trial court, with a view to establishing whether the conclusions reached by the said court were well founded. In this regard, I am guided by the Principles laid down in **Okeno –vs- Republic [1972] EA 32**; **Mwangi –vs- Republic [2004] 2 KLR 28** and **Pandya –vs- R [1957] EA 336**; among others.
20. I have carefully reconsidered and evaluated the evidence afresh as required of me. I have also carefully considered and weighed the judgment of the trial court. I now proceed to analyze the submissions.

The Submissions

21. At the hearing of the appeal, the appellant submitted that the complainant did not name him as his attacker, and that even after his arrest 4 months down the line, he was never taken for any medical examination. Secondly, the appellant submitted that the complainant, not having stated what source of light was in her room, could not have positively identified him as her attacker on a dark night. The appellant also denied that his alias name was Peter.
22. Finally, the appellant submitted that none of the other witnesses gave his name as one of the complainant's attackers.
23. The appeal was opposed. Mr. Shabola who was duly instructed by the office of the DPP submitted that grounds 1-4, 6, and 8 about contradictions in the prosecution evidence were baseless because all the 6 prosecution witnesses gave very credible evidence. He submitted that the complainant categorically testified that it was the appellant who raped her, and gave his name as Peter. Regarding recognition of the appellant, counsel submitted that the complainant was able to recognize the appellant with the help of light in the room, though the complainant did not disclose the source of that light.
24. Counsel further submitted that PW3, M C also confirmed that the complainant had told her when she (PW3) went to see her that it was the appellant who had harmed her, and that both PW3 and the complainant knew the appellant as their neighbour. It was also counsel's submission that PW2, the clinical officer confirmed after examining the complainant that indeed the complainant had been raped – with the presence of spermatozoa in her private parts. In counsel's view, the entire evidence of the complainant, PW2 and PW3 was consistent and pointed to two things:- that the complainant was raped and that she was raped by the appellant. That there was no contradiction whatsoever.
25. Regarding the appellant's complaint that his constitutional rights were violated during the trial – see ground 5 of appeal. Mr. Shabola submitted that the fact that the appellant was arrested 4 months after the incident did not amount to a violation of his rights and that in any event, there is no provision of law limiting the time within which a suspect of a crime may be arrested. Counsel submitted that the arrest of the appellant after 4 months was explained by PW4 who told the court that the appellant disappeared from home soon after the commission of the offence and only returned end of March 2011 for the funeral of his sister.
26. Counsel for the respondent dismissed the appellant's submissions on ground 7 and submitted that the learned magistrate only dismissed the appellant's defence after carefully weighing that defence against the evidence adduced by the prosecution.
27. In summary, counsel urged the court to find that there was overwhelming evidence adduced by the prosecution against the appellant and to dismiss the entire appeal.

Findings

28. After carefully reconsidering and evaluating the whole of the evidence on record, the submissions and the law, it is clear to me that the whole of the prosecution case revolves around the issue of identification/recognition of the appellant by a single witness, the complainant herein. While it is true that any fact can be proved by the evidence of a single witness, the courts have been cautious in accepting such evidence without question unless such evidence is undoubtedly strong and beyond reproach. See **Wendo –vs- R[1953] 20 EACA 166**. It is also incumbent upon a trial court to examine with care the evidence of identification/recognition where the circumstances prevailing at the time of the alleged commission of the offence are difficult. See **Wamunga –vs- Republic [1989] KLR 324**.
29. In the instant case, the appellant was said to be a neighbour of the complainant and in this regard, the issue is one of recognition and not identification. Although it is easier to recognize somebody who is well known than to identify a stranger, there are still problems that a trial court must address, because even in such cases of recognition of even close friends and relatives, mistakes are bound to be made. See **Turnbull –vs- R[1972] All ER 559** and also see **Mwabuya –vs- Republic [2006] 2 EA 299 (CAK)**.

30. Can it then be said that in the instant case, the appellant was positively identified by the complainant herein? Does the evidence on record also prove that there was penetration?
31. During her evidence in chief, PW1 stated the following:-

"I remember a young man came to disturb me his name is Peter Mireri. There was light on in my room and I saw him with my own eyes. I saw him standing and he is my son. He lives in his house but he is my neighbour.

----- I cannot see now but I can hear. I saw Peter in my house. At that time I could see.

On cross examination she stated:-

----- I saw you with my eyes. I locked you in the house. I know it is you. It is you who was in my house. You cannot deny this."

32. In **Paul Etole & another –vs- Republic CA No.24 of 2000** (unreported) the Court of Appeal expressed itself thus with regard to identification through recognition that:-

"Evidence of visual identification can bring about a miscarriage of justice but such miscarriage of justice occurring can be much reduced if wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the need to caution before convicting the accused."

33. Secondly, the court is under a duty to examine closely the circumstances in which the identification by each of the witnesses came to be made.
34. Finally, the court should remind itself of the specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence.
35. Similarly in **Abdallah Bin Wendo –vs- Republic (1953) 20 EACA 166** it was held that a fact may be proved by the testimony of a single identifying witness, subject to the testing with the greatest care by the trial court of such evidence.
36. In the instant case, though it cannot be denied that PW1 did not state in her evidence in chief the source of light she used to identify the appellant (She only stated there was light on in her room) nor did the trial court warn itself against convicting the appellant on the evidence of a single eye witnesses I am convinced beyond reasonable doubt that the appellant was recognized by Pw1 as her assailant and that he committed the offence. I say so for the following reasons:-
37. First, the appellant was not a stranger to the complainant as she recognized him as his neighbour and so did PW3 and PW4. In **Peter Musau Mwanzia –vs- Republic [2008] e KLR Court of Appeal at Nairobi** (Tunoi, Bosire and Onyango Otieno JJA) expressed themselves thus on the question of recognition:-

"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

38. In the instant case, PW1 testified that the appellant was the son of her neighbour. PW1 knew the appellant as Peter, and she said she saw him with her own eyes when he entered her room. He stood where she lay down in bed. He then lay on her and raped her for about two hours. During the ordeal, the appellant covered PW1's mouth.

39. After the appellant left, PW1 screamed for help. When PW3, M C went to see PW1, and found her in very bad shape, PW1 told her that it was Peter who had raped her.
40. PW4, Elijah Onsono Nyantunga testified that after the appellant committed the offence on 6th December 2010, he vanished from the village and only returned end of March 2011 when his sister died. The question that begs an answer is why the appellant disappeared from the village for

4 months soon after PW1 was attacked? To my mind that was a sign of guilt.

41. From all the above, I am satisfied that PW1 clearly recognized the appellant as her assailant. There is no contrary evidence to dispute the fact that the appellant's other name is Peter.
42. Secondly, there is ample evidence to show that PW1 was raped. Her own testimony and that of PW2, the Clinical Officer who filled the P3 form, PW3 who is PW1's daughter in-law and PW5. Thirdly, it was revealed during the trial in the lower court that the appellant was arrested 4 months after the incident. PW4's testimony was corroborated by PW6 the investigating officer in this case who confirmed that he had to liaise with community policing officers in order to be able to arrest the appellant.
43. All these factors put together point to the appellant as the person who committed this heinous act of raping a woman the age of his grandmother. His assertions that the trial court did not consider his defence cannot stand because his defence did not even touch on anything regarding this case although it was not his duty to prove his innocence. It is the duty of the prosecution to prove its case beyond any reasonable doubt against an accused person. The prosecution discharged that duty in the instant case.
44. Lastly, on the issue that the appellant was not known as Peter but James, it is a fact that when it emerged that PW1 identified her attacker as Peter, the prosecution applied to amend the charge sheet, an application which was not opposed by the appellant. Upon amendment of the charge sheet, the appellant took the plea afresh. In the amended charge sheet the appellant's name was given as James Mireri alias Peter. The issue of the appellant's name was thus settled in my view.
45. In the circumstances I find that this appeal lacks merit on both conviction and sentence. The appeal is therefore dismissed in its entirety. The appellant has a right of appeal to the Court of Appeal within 14 days from today.

Dated and delivered at Kisii this 5th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:

Present in person for the Appellant

Mr. Majale for the Respondent

Mr. Bibu - Court Assistant