



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 71 OF 2012

KILONZO MWETU APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Senior Resident Magistrate delivered on 6/6/2012 in Mutomo Senior Resident Magistrate Criminal Case No. 61 of 2012)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Kilonzo Mwetu**, was charged in Count I with the offence of rape contrary to **Section 3 (1) (a) (b)** as read with **section 3 (3)** of **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 2nd day of April 2012 at about 12.30 a.m. at *[particulars withheld]* village, **Kibwea Location** in **Mutomo District** within the **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **A N K** without her consent.

2. In the alternative, the Appellant was charged with the offence of indecent act with an adult contrary to **section 11 (A)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the charge were that on the 2nd day of April 2012 at about 12.30 a.m. at *[particulars withheld]* village, **Kibwea Location** in **Mutomo District** within the **Kitui County** willfully and unlawfully committed an indecent act with **A N K** a female adult by touching her private parts namely breasts, buttocks and vagina without her consent.

3. In Count II, the Appellant was charged with the offence of assault causing actual bodily harm contrary to **section 251 of the Penal Code**.

The particulars of the offence were that on the 2nd day of April 2012 at about 12.30 a.m. at *[particulars withheld]* village, **Kibwea Location** in **Mutomo Location** within **Kitui County** unlawfully assaulted **A N K** thereby occasioning her actual bodily harm.

4. When the Appellant was arraigned before the trial court, he pleaded not guilty in all the counts. After a full trial, the Appellant was convicted in both Count I and II and sentenced to serve ten (10) imprisonment

in Count I and three (3) years imprisonment in II. The sentence runs concurrently.

5. The prosecution case was that on the material date at about 12.30 a.m. the complainant, PW1 **A N K**, a farmer in **Kibwea Location** in **Mutomo District** was at her home asleep when she heard a knock at her door. When the complainant asked who was there, the person outside said he was **Kilonzo Mweu** (Appellant). That the Appellant who was known to the complainant as a neighbour asked the complainant to open the door. When the complainant opened the door, the Appellant told her that he wanted to sleep with her. The complainant asked the Appellant to leave but the Appellant held the complainant by the hand and pulled her outside the house. The complainant tried to scream but the Appellant hit her on the mouth, took her to a footpath and beat her then fell her down, removed her clothes and raped her. The Appellant left after threatening to harm the complainant if she disclosed what had happened.

6. The complainant proceeded to the **Kisayani Administration Police Post** and made a report. The complainant was referred to **Mutomo Police Station** where she also made a report. The complainant was issued with a P3 form and treated at **Mutomo Health Centre**. The blood stained shirt, skirt, petticoat and pants that the complainant had worn at the material time were kept at the police station as exhibits. The Appellant was subsequently arrested and charged with the offences herein.

7. In his defence, the Appellant gave sworn evidence and called one witness. The Appellant described himself as a charcoal dealer. He denied the offence and stated that he was arrested then informed of the offence herein. The Appellant further testified that the complainant is his friend. His witness, DW2 **Kimilu Kiritu** gave evidence that the Appellant and the accused are friends but added that he did not know when the two differed. The witness did not however know what transpired between the Appellant and the complainant at the material time.

8. This being a first appeal, this court is duty bound to re-evaluate the evidence on the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.

9. The complainant described the Appellant as someone she knew. It was the complainant's evidence that when the Appellant visited her in the middle of the night and wanted to sleep with her, she told him to leave but that the Appellant used force and raped her. The Appellant's evidence is that the Appellant pulled her out of her house to a path where he beat her up then raped her. The complainant identified as exhibits in court her blood soaked shirt, skirt, petticoat and innerwear. The complainant who described the Appellant as a neighbour denied that she was the complainant's friend. In any event being friends does not give the right to use force and non consensual sex.

10. The complainant had a conversation with the Appellant who she knew as a neighbour. The interaction between the complainant and the Appellant was in close proximity and as close as to two human beings can ever get. The complainant also informed the police officers who she reported to that she had been raped by somebody she knew. Although the offence took place at night, the complainant recognized the Appellant without any possibility of error. The Clinical Officer's evidence clearly shows that violence was visited on the complainant. This affirms the complainant's evidence that the sex was not consensual.

11. Is a Clinical Officer a competent witness to give medical evidence? The answer is found in the Court of Appeal's dictum in the case of **Kavoi Kiilu –vs- Republic (2010) e KLR** the **Court of Appeal** state as follows:-

“Under section 2 of the Clinical Offences Act (Training, Registration and Licensing Act Cap 260 (LOK) a clinical officer means:-

“a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act.....”

Section 7(4) of the Act states:-

“A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette.”

The Act goes further to provide that such officers may engage in private practice “in the practice of medicine, dentistry or health work for a fee.” It follows that the clinical officer did testify in this case on his area of competence.”

12. The evidence of the police officer, PW2 **APC Kennedy Maina Chege**, PW3 **APC Jecinta Kisina** and **PC Grace Gicholi** confirms that the complainant made a report of rape the same night at about 1.00 a.m. The scene was visited and the injured complainant issued with a P3 form and referred to hospital for treatment. The complainant’s dusty and blood stained clothes were also kept as exhibits and later produced in court.

13. The defence by the Appellant is that he was arrested for an offence he had not committed. The Appellant described the complainant as a friend. There are no reasons that emerge from the record why the complainant would frame up the Appellant.

14. The Appellant’s witness (DW2) is of no probative value as he did not know what transpired between the Appellant and the complainant. The witness only described the complainant and the Appellant as friends and stated that he did not know why they differed.

15. The trial magistrate who saw both the complainant and the Appellant testify and observed their demeanour believed the complainant’s evidence. I have no reason to doubt the same. However, having convicted the Appellant in the main count of rape, no conviction could be entered for the alternative count of indecent act.

16. After evaluating afresh both the prosecution and the defence case, I am satisfied that the prosecution case was proved in the main count of rape and assault causing actual bodily harm in Count II. The defence raised by the Appellant did not cast any reasonable doubts on the same. The sentence is within the law. I find no merits in the appeal and dismiss the same. The conviction and sentence by the trial court is upheld.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 12th day of June 2014.

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JUDGE