



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 208 OF 2011

PATRICK NDUNGU KARIUKIAPPELLANT

VERSUS

REPUBLICRESPONDENT

From original conviction and sentence in criminal case Number 1797 of 2010 in the Chief Magistrate's court at Kiambu – C. Oluoch (SRM) on 11th August, 2011

JUDGMENT

The appellant Patrick Ndungu Kariuki was charged with two offences. In count I he was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars were that on 22nd December, 2009 at [*particulars withheld*] village, Kasarani Nairobi while armed with a dangerous weapon namely a knife, he robbed M N G of cash Kshs. 3,150/= a pair of socks and a handbag all valued at Kshs. 3,510/= and at or immediately before or after the time of the robbery used actual violence to the said M N G.

In count II he was charged with the offence of rape contrary to Section 3 (1) and (3) of the Sexual Offences Act. The particulars were that on the same date and place as in count I, he intentionally and unlawfully had carnal knowledge of the complainant without her consent. In the alternative to count II he was charge with the offence of indecent act with an adult contrary to Section 11 (6) of the Sexual Offences Act aforesaid. The particulars were that on the same date and place as in the main count he intentionally and unlawfully committed an indecent act upon the same complainant by touching her private parts.

He denied the offences but after a full trial he was convicted of counts I and II and sentenced to death in respect of count I, and ten years imprisonment in respect of count II. The sentence in respect of count II was ordered to be held in abeyance. Aggrieved by the said conviction he lodged this appeal.

The evidence adduced before the trial court was that, the complainant who is a business woman left for home from Muthurwa market where they were doing business with her husband. The time was 8 p.m. and when she alighted at Maziwa stage she saw someone pretending to be drunk, staggering and falling. This person ordered her to go where he was. She got scared and started running away joining a path that

goes to her home. She realized that this man was behind her. She then started screaming but the man caught up with her and held her neck.

He then produced a knife and threatened to kill her if she continued screaming. With the aid of lights of motor vehicles passing by she was able to see him and realized she knew him prior to the incident. At that point she recognized him but did not want to let him know. This person had once asked her husband for a cigarette as they were going to work.

When she saw the knife she stopped screaming. This person pulled her to a nearby farm into a maize plantation and demanded money and a phone. She told him she had no money because she was from hospital and had only Kshs.150/= which she gave him. He then demanded to have sex with her and she told him she was HIV positive. The assailant disputed this and said he knew her and her husband very well and that she was not sick. He tried to pull down her pant but she resisted. He tore the pant He then raped her and upon her request the man got off after she said she was tired.

The man then sat beside her and chatted. He said he was not satisfied and raped her once again, all this while telling her that he had always wanted to sleep with her and had had the urge wherever he saw her. He then snatched her purse and ran away. She pursued him but gave up after he crossed the river. The purse had Kshs. 3,000/= a pair of socks, CD a blouse and her identity card.

The complainant then went to her auntie's house and informed her of the incident whereupon she was given a phone and called her husband who came. She took him to the scene where they picked the pant she had left behind and went to Nairobi Women Hospital where she was treated. At about 5 a.m. the following day, they made a report to the police and told them she knew her assailant. Later, she led the police to his arrest at a construction site.

P.W. 2 heard a scream near his home and on the following day went down to the farm where he saw some footsteps and a disturbed scene. A woman came and said she had been raped at that point and he told her that he had heard some screams. The husband of the complainant gave evidence as P.W. 3 and told the court that he received a call from his wife at 10 p.m. who told him that she had been robbed and raped. He went and confirmed that she had been raped and also injured on her legs and neck.

The complainant told him Ndungu is the one who had raped her and that she had identified him with the help of lights from vehicles passing by. She had also recognized him from his voice. Ndungu was his friend. He had earlier on shared a drink with him and used to meet him almost daily when going to work with his wife. He lived near the road and had known him for about 10 years. He then took his wife to Nairobi Women Hospital where she was treated and discharged, and then proceeded to Kiamumbi Police Station where they made a report. P.C. (W) Mercy Tikoi received a report from the complainant and later was informed the suspect had been seen at a construction site. Together with her colleagues, they arrested and charged him with these offences.

The complainant was examined by the late Dr. Muhombe of Nairobi Women hospital who prepared her report. Having passed on at the time of the trial, the report was produced by Dr. David Thuo. Dr. Thuo had worked with the late Dr. Muhombe for two years and was familiar with her handwriting and signature. The report revealed that the complainant had a mild discharge when a vaginal swab was taken, and urinalysis revealed she had fair spermatozoa. The diagnosis was sexual assault.

In his defence given by way of unsworn statement, the appellant denied the offence and said he was a mason. While on duty some people came and asked for a plan for the house they were constructing. He told them that the plan was with the owner and these people told him to call the owner and say he had been arrested. They did not say why. He was then taken to Kiamumbi police station placed in the cells and subsequently charged. He was remanded for one year and discharged under Section 87(a) of the Criminal Procedure Code, but re-arrested and taken to the police station. He was again arraigned in court. He denied the offence.

In this appeal, the appellant has submitted that he learned trial magistrate erred in law and fact in

convicting him on the evidence of identification and recognition by P.W. 1, a single identifying witness whereas the circumstances were not favourable for a positive identification. He also faulted the admission of the evidence of P.W. 3 and P.W. 4 on the evidence of recognition and also the evidence of P.W. 5 Dr. Thuo, as no names were given in the medical report. It is also his case that essential witnesses were not called to testify and that the case was not proved beyond reasonable doubt. Finally, that he was denied the right to mitigate and his defence was not considered.

As the first appellate court we have considered the evidence adduced before the learned trial magistrate and, evaluated the same with a view to arriving at independent conclusions. In arriving at the appellant's conviction the learned trial magistrate had the following to say,

“On identity of the suspect there was no eye witness. The only evidence relied on was that of complainant. Given that the offence was committed at night, I warn myself that accused shall not be convicted unless the evidence is water tight. The complainant said she knew the accused before the incident. She used to see him on her way to work. He was friend of her husband a fact which was confirmed by P.W. 3. When she made a report to the police she gave his name. She identified him to the police when he was arrested. She also told the court that she was able to see him with the help of lights from motor vehicles passing near the scene. This was basically evidence of recognition rather than identification. I am satisfied that the evidence was free from the possibility of error.

Turning to the offence of rape the complainant is on record saying that the accused person tore her pant and raped her twice. A specimen taken from her vagina that same night at Nairobi Women hospital revealed presence of spermatozoa. This corroborates the complainant's testimony that there was penetration of her genital organ by the male genital organ of the accused. From the evidence the complainant put up a resistance that resulted in the tearing of her pant. It is also noted that in the P3 form that she suffered a scratch on the external genitalia and bruises on her left knee. This supports a conclusion that she did not consent to the act.”

It is true that the learned trial magistrate relied on the evidence of P.W. 1 alone as the basis for the conviction. The learned trial magistrate warned herself of the danger of relying on such evidence. She was persuaded that the evidence was sufficient upon which to base the conviction. She had known the appellant before. The appellant was her husband's friend and she had seen them smoking together. She was subjected to searching cross-examination by the appellant. She remained firm in that regard. Soon after the incident she gave his name as Ndungu to the police in the first report. She also gave his name in her statement.

After the appellant raped the complainant first, they sat and chatted. This must have been at close proximity. She said she recognized him by appearance and voice. This was not a case of mistaken identity. The evidence of the husband and that of the doctor, fortified that identification. Upon being examined by the doctor evidence of sexual assault was detected. It is instructive that the appellant did not cross-examine Doctor Thuo when he gave evidence.

There is evidence that the appellant was armed with a knife with which he threatened to kill the complainant if she continued screaming. He did not challenge the evidence that the complainant was robbed of the property set out in the charge sheet. It is not the number of witnesses that proves a charge but the weight of the evidence adduced. We have not identified any miscarriage of justice in the proceedings before the learned trial magistrate. His defence was addressed by the learned trial magistrate.

The fact that it was not specifically overruled does not mean that it was not considered. Even if it had been considered beyond what the learned trial magistrate said, it would not have made any difference considering the weight of the prosecution case. The ingredients of the offence of robbery with violence were satisfied and we have arrived at the same conclusion as the learned trial magistrate that the offence was proved beyond any reasonable doubt.

On the offence of rape, there is evidence of force manifested in the tearing of the complainant's pants which showed lack of consent and the medical evidence that proved penetration. That also was proved. We are satisfied that the conviction was well founded and the sentences were lawful. This appeal is dismissed.

SIGNED DATED and DELIVERED in court this 8th Day of July 2014.

A.MBOGHOLI MSAGHA

L.A. ACHODE

JUDGE

JUDGE