



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 532 OF 2010

JOSHUA MUTITU MAINA..... APPELLANT

VERSES

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4232 of 2006 in the Chief Magistrate's Court at Makadara – T. Murigi (PM) on 12th July 2010

JUDGMENT

1. The Appellant, **Joshua Mutitu Maina** was charged with the offence of Rape contrary to **Section 3(i)(a)(3) of the Sexual Offences Act No. 3 of 2006**. In the alternative he was charged with indecent assault with an adult contrary to **Section 11(6)** of the same Act.
2. The particulars of the charge were that on the 26th day of July 2006, at Kahawa West in Nairobi he intentionally and unlawfully committed an act that caused penetration with male genital organ (penis) into the female genital organ (vagina) of S B J without her consent. In the alternative the appellant was charged with indecent act with an adult contrary to **section 11(6)** of the **Sexual Offences Act No 3**.
3. A brief summary of the case before the lower court was that **PW1**, the complainant herein, met the appellant at his behest at Mijikenda Bar in Eastleigh. The appellant was in the company of his friend. **PW1** testified that they ended up at Kahawa West after chasing after the appellant's friend who had made off with her phone. At Kahawa West the appellant turned against her and beat and dragged her into a lodging house where he raped her. She was rescued the next day by some good Samaritans. She reported the matter to Pangani Police and had the appellant arrested the next day with the help of Kiambu Police. She was treated at Nairobi Women's Hospital and had a P3 filled by a police Pathologist. The appellant was subsequently charged.
4. In his sworn defence the appellant denied the offence and stated that on the material day he was at Eastleigh buying cosmetics for his shop, when he telephoned **PW1** to meet him at Mijikenda Bar. They did meet at 3.00 p.m. and had some drinks together until 9.00 p.m. and later had dinner at Red Robin Café in town. They then went to Kahawa West in search of his friend Ndung'u who had made off with **PW1**'s phone, but did not find him. At around 1 a.m. they rented a room at **[particulars withheld]** Bar and lodging for the night and had consensual sex.
5. The appellant denied use of force during the intercourse and that he harmed **PW1** or stole anything from her. He also faulted the prosecution for not calling Ndung'u as a witness.
6. At the close of the trial the appellant was sentenced to ten (10) years imprisonment in count I and one (1) year imprisonment in count II. The sentences were ordered to run concurrently. Being

- dissatisfied, the appellant filed an appeal against both conviction and sentence, advancing five grounds. In sum he argued that his right to a fair trial under **Section 200(3) of the Criminal Procedure Code** was contravened; the witnesses were not credible; there was no medical evidence to support the conviction; the appellant's final submissions were not considered and lastly that the sentence of 10 years was manifestly excessive.
7. Learned counsel Mr. Mutitu urged for the appellant that the learned trial magistrate misdirected herself on the law applicable and the facts of the case leading to miscarriage of justice. In particular Mr. Mutitu argued that the learned magistrate had failed to adhere to legal procedures and had disregarded mandatory legal provisions. He also urged that she had convicted the appellant on the uncorroborated evidence of the complainant and that the prosecution's case lacked merit and credibility. He relied on the cases of **Erick Omondi v Republic (2007) EKLr Criminal appeal No.15 of 2007, Raphael v Republic (1969) EA 544, (a Tanzanian case) and Mwangi v Republic (2008)1Klr.**
 8. I have submitted the entire proceedings to the fresh scrutiny that the appellant is entitled to in a first appeal and have arrived at my own conclusion. The evidence of the complainant raised questions as to how she would board a matatu at 10 p.m. to go to a place she was not familiar with and with a person she only knew on a superficial level if her evidence is to be believed.
 9. Both the medical evidence as to whether she was sexually assaulted and the evidence of the Government Analyst's on whether the seminal stains found on her pants came from the appellant was inconclusive. It was not in dispute that **PW1** accompanied the appellant to Kahawa West voluntarily and that before that they had been taking drinks in a bar together all evening and that the appellant was not armed.
 10. **PW1** had no injuries to her body although she testified that the appellant beat and dragged her along the road to get her into a lodging room. That he continued to beat her even as he was having sex with her. It is also notable that the prosecution made no effort to take statements or call any of the night watchmen that might have seen her being dragged towards the lodging house, to lend support to her evidence that she did not go there willingly.
 11. The defence did call the watchman who guarded the lodging house where the appellant and **PW1** ended up and in his evidence the two people were holding each other when they arrived. Upto the next morning when he reported off duty he had heard no commotion from room No. 10 which they hired for the night.
 12. The likely scenario is that the two young people got themselves drunk and ended up in bed together. As to whether the appellant deliberately got **PW1** drunk and took advantage of her, it is difficult to tell from the evidence on record. The next day **PW1** may have realized that she had compromised herself in a manner that she did not intend to, hence the complaint.
 13. More important however, was the failure of the trial court to observe the provisions of **Section 200(3) Criminal Procedure Code**. The record of the court does not demonstrate that when the case passed from Hon. Ademba Resident Magistrate to Hon. Okundi Senior Resident Magistrate and later still to Hon. T. Murigi the principal magistrate, the provisions of **Section 200(3) Criminal Procedure Code** were given due regard. There was no ruling by either of the two subsequent magistrates on the issue.
 14. The proper procedure would be to inform an accused person of their right under **Section 200(3) Criminal Procedure Code** and let them indicate their preference to the court. If the prosecution had any objection to the accused person's election, the court should have heard them out and then ruled on the matter giving its reasons. In the case before me, the court appears to have decided summarily that the case had gone too far to start *de novo* when the matter was before Hon. Okundi Senior Resident Magistrate. Hon. T. Murigi Principal Magistrate on her part was silent on this issue.
 15. Miss Nyauncho learned counsel, was therefore wise to concede the appeal on behalf of the Respondent, for reasons that **Section 200(3) Criminal Procedure Code** was not complied with.
 16. For the foregoing reasons I find that this appeal must succeed on two major grounds. The first is the procedural flaw and the second is the real doubt created in the prosecution case. The appeal is therefore allowed and it is ordered that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **16th** day of October **2014**.

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L. A. ACHODE

JUDGE