



REPUBLIC OF KENYA

Cases in Magistrate Courts

Criminal Appeal 9 of 2012

GEORGE ONYANGO ODONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT.

[Appeal from the Conviction and sentence in Criminal case of the Senior Resident Magistrate's Court dated 21.8.2008 at OYUGIS: HON. C.L. NYALWALA ESQ., - R.M.

IN

SRM'S C. OYUGIS NO. 488 OF 2007]

JUDGEMENT.

The appellant was charged with Rape C/Section 3(1) © of the Sexual Offences Act 2006 on Count 1 and with Indecent act with a female C/Section 6(1)© of the Sexual Offences Act on Count 2.

In his judgment the Learned Trial Magistrate found the Appellant guilty on both counts but sentenced him only on the charge of Rape noting that Count 2 should have been an alternative count. The Appellant was ordered to serve 10 years imprisonment. Being aggrieved he now appeals against the conviction and sentence.

The facts upon which the Appellant was convicted were that on 6.6.2007 at about 11Am the complainant then aged 28 years was at the river when the Appellant accosted her. He pushed her and when she fell removed her underpant and had sexual intercourse with her twice. That he then threatened to kill her if she told anyone.

Thereafter he pierced her buttock with a needle. She screamed and her brother G.O aged 12 years who had been sent to look for her after she overstayed at the river saw her lying down with the Appellant lying on top of her. When the Appellant saw him he put on his trouser and fled. They went home and reported the matter to their mother who in turn reported to the Area Chief and to Othoro Police Post. She was advised to take the complainant to hospital but she could not do so as it was late.

The next day the complainant was taken to Rachuonyo District Hospital by her younger sister. A P3 form was issued and the accused was arrested and charged.

According to Samwel Koech a Clinical Officer at Othoro Clinic who produced the P3 form filled by his colleague who was on leave, the examination of the complainant's genitalia did not reveal any abnormality. He stated that the P3 form was filled after 3 days.

The complainant's mother told the trial court that the complainant had a slight mental problem and that her clothes were dusty/soiled when she returned home with her brother.

In his defence the accused stated that there was a long standing land dispute between him and the complainant's family. That after an exchange with the complainant's father he had vowed that he the accused would suffer.

The Appellant lists 5 grounds of appeal to wit:

- 1. That the Learned Trial Magistrate erred in law in failing to establish that the medical report was not consistent with any act of penetration.**
- 2. That there were glaring inconsistencies and contradictions**
- 3. That Article 50(2)(j) was not complied with**
- 4. That there was no independent witness**
- 5. That my defence citing bad blood was not given due consideration**

At the hearing of the Appeal the Appellant relied on written submissions. He submitted that 4 of the prosecution witnesses were family members which is unconstitutional since more than 2 witnesses from the same kinship should not testify. That it was wrong for the magistrate to entirely ignore the evidence of the professional Clinical Officer and instead fully rely on that of PW1 and PW2 which was contradictory.

He cited inconsistency regarding the date and time the incident is alleged to have occurred. On this he submitted that according to the complainant it was on 16.6.2007 at 11Am whereas her brother and mother testified it was on 6.6.2007.

He submitted that the other inconsistency was in regard to whether the complainant's brother had witnessed the incident. That it was the complainant's evidence that she reported the matter to her brother. That it was also her evidence that nobody identified the incident.

That there was also a contradiction regarding the place the incident occurred with the Investigating Officer saying it was at a borehole while the others testified it was at a river.

He contended that there was also no medical evidence of rape and that his defence was ignored.

Miss Valery Counsel for the Republic opposed the Appeal. She submitted that the offence was committed on 6.6.2007. That all the ingredients were proved as the complainant did testify that the Appellant had carnal knowledge of her and injected her with a needle. That an eye witness found the appellant on top of the complainant and she was screaming for help. That he also saw the accused inject the complainant with a needle and all this demonstrates that there was no consent.

She further submitted that during cross examination the Appellant attempted to put up a defence that the complainant had consent but when that did not work he denied the allegation.

Regarding the defence she submitted that PW3 and PW4 disputed there was a land dispute between the parties. She concluded by stating that the accused was caught in the act and hence the conviction was proper and the sentence lawful.

This is a first appeal and so this court is mandated to reconsider and re-evaluate the evidence which was adduced before the Trial Court and arrive at its own determination on whether or not to uphold the conviction bearing in mind that the court did not see or hear the witness testify – see **NJOROGE VRS. REPUBLIC [1987] 1 KLR 19 .. OKENO V. R.**

I have reconsidered and re-evaluated the evidence carefully and my finding is that the conviction of the Appellant is not safe. That the evidence adduced by the prosecution fell far short of the standard required to prove the charge.

Before I give my reasons however let me deal with some of the issues that were raised by the accused person in his petition. The first one was in regard to the date when the offence is alleged to have been committed. It is indeed correct that there was a variance between the charge and the evidence adduced regarding the date. That would however not affect the outcome of the appeal in view of section 214(2) of the Criminal Procedure Code which provides as follows:-

“Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is not proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof”

The defect in the charge sheet would also have been saved by S. 382 of the Criminal Procedure Code as already the same did not occasion a failure of justice.

A similar issue arose in **MATHEKA KITHOME V. REPUBLIC – CR. APP. NO. 48 OF 2005 (unreported)**

Where my brothers Lessit J. and Makhandia J., as he then was held:-

“.....in our view the conclusion reached by the superior court as to the effect of the confusion in dates was correct. In reaching this conclusion we have taken into account. Section 214(2) set out above which provides that variance with respect to time at which the alleged offence was committed is not material. We consider that errors to dates fall within “ variance with respect to time” We would also if it were necessary have relied on section 382 of the Criminal Procedure Code as we do not consider that in this case any failure of justice has been occasioned by the procedure adopted.....”

I do agree with my brothers because as was observed by the Court of Appeal in JMA V. REPUBLIC [2009] KLR Page 671 at Page 676:-

“.....it is not in all cases in which a defect detected in the charge on appeal will under a conviction invalid. Section 382 of the Criminal Procedure Code is meant to cure such irregularities where prejudice to the appellant is not discernible.”

It will be noted that the variance referred to was not raised earlier. The accused did not himself allude to any prejudice and this court has not discerned any prejudice to him due to that defect.

The second issue I wish to deal with is in regard to the constitutionality of the 4 prosecution witnesses being family members with due respect no where does the Constitution provide that members of one family cannot testify in a trial. The competency of witnesses is provided for under chapter V of the Evidence Act – Sections 125 to 127. Nowhere does the law state that the 4 witnesses who testified in this case were not competent to do so.

He did also raise an issue regarding Article 50(2) (j) of the Constitution. The same sets out the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. It will be noted however that this trial was conducted in 2007 and concluded in 2008.

Whereas the Constitution was promulgated in 2010. Much as there is case law regarding the accused’s right even under the old Constitution it will be noted that the accused never applied to be afforded such right which was denied. That ground was in my view raised as an afterthought.

As I have stated however it is my finding that the prosecution did not prove its case beyond reasonable doubt in the lower court. In my view the evidence left a lot of gaps which could only have been resolved in the accused's favour.

To begin with although the complainant's brother testified that he saw the accused person lying on the complainant and that when the accused saw him he put on his trouser and fled. The complainant is on record as saying that it was she who reported the incident to her brother. The question then would be why would she report it to him if he himself was a witness? Could it be that the brother did not in fact see the accused person? Then there is this person by name O.S who the complainant initially said witnessed the rape before changing to say she only saw him afterwards. Why he was not called as a witness? Indeed there is no number of witnesses that the prosecution should call to prove a fact. However the presumption is that where such a witness exists and is not called the presumption is that his evidence would have been prejudicial to the prosecution's case.

The evidence is also silent on whether the complainant and her brother knew the accused prior to this incident. Their sister told the court that she did not know him although she did state that he was known as Onyango in their home. The evidence is also silent on how, when or where the accused was arrested. Who identified him to the arresting officer? According to him the complainant and her mother reported that she was raped by George Onyango. They themselves did not tell the court what they told the police. They simply stated that they reported the matter. The question arises as to how the arresting officer connected the person he arrested to the person who committed the offence? No identification parade was held and all we have is dock identification. Although the offence was committed during the day, we do not know as I have already stated whether the eye witness knew the accused person before or for how many minutes he observed him so that we can say for sure that he positively identified him. All these questions should have been put to the witnesses by the prosecutor as the burden of proof lies on the prosecution. Remember that according to PW2 the offence was being committed in a bush and he was 6 meters away.

I also find the medical evidence adduced here curious. I do not fault the Learned Trial Magistrate's finding that absence of spermatozoa is no proof that sexual intercourse did not take place. To the contrary I agree with him. What I find curious is the fact that although the complainant alluded to having been taken to hospital at Ramunda and Othoro there was no mention of this by her mother PW4.

The complainant testified that she was treated in those 2 places first and then referred to the District Hospital. I suspect that this was for purposes of filling the P3 form. In this case it would have been proper to adduce evidence regarding the treatment she received at those 2 places where she first went? Why was that evidence not tendered yet it is clear that she was not examined by the Doctor who filled the P3 form until 3 days later? That too is curious because according to PW3 she took the complainant to Rachuonyo District Hospital the following day. Indeed the medical evidence is confusing because on a closer look at the P3 form it was completed at Othoro Health Centre which is where the court was told by the complainant that she first went. The complainant was emphatic that she was treated there so why does the Clinical Officer (PW6) state that the examination was done after 3 days? was the allegation that the complainant was injected with a needle reported to the police and to the Doctor. Who examined the complainant and what was the result of the medical examination on this. Again the evidence is silent yet this could have gone along way in proving lack of consent.

Again where did this incident occur? Was it at a river proper or a borehole? Of course if the offence was committed the place where it was committed would be immaterial but in this case the place occurred is relevant as it goes to the credibility of the witnesses. If the witnesses told the police officer it was at a borehole, why did they tell the court it was at a river? The complainant was emphatic that it was at River Lwanda when did they tell the truth is it when they reported the matter or when they testified in court?

On the whole my finding is that had the Learned Trial Magistrate properly directed his mind on all these discrepancies, inconsistencies and contradictions in the prosecution's evidence he would have arrived at a different conclusion as they raise a shadow of doubt in the prosecution's case.

Accordingly the appeal is allowed, the conviction quashed and the sentenced set aside.

The appellant is to be released forthwith unless otherwise lawfully held.

E.N. MAINA
JUDGE.

Signed, dated and delivered at Homa bay this.....8th..... day ofMay..... 2013

In presence of:-
Miss Valery for the Republic
Eudice Okombo Dholuo Interpreter
The Appellant in person.