



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 85 OF 2012

ALEX JAMES MUCHANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of LUCY MBUGUA Senior Principal Magistrate Embu in Criminal Case No. 1978 of 2010 on 17th May, 2012)

J U D G M E N T

ALEX JAMES MUCHANGI the appellant was charged with the offence of **rape contrary to Section 3(1) (a) as Read with Section 3(3) of the Sexual Offence Act Number 3 of 2006**. The particulars are that:-

On the 20th day of June, 2009 in Embu Municipality within Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of VWI without her consent.

ALTERNATIVE COUNT

The appellant was charged with **committing an indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act of 2006**. The particulars are that:-

On the 20th day of June, in Embu Municipality within Embu County, intentionally touched the vagina of VWI

COUNT 2

The appellant was charged with **assault causing actual bodily harm contrary to Section 251 of the Penal Code**. The particulars are that:-

On 20th day of June, in Embu Municipality within Embu County, unlawfully assaulted VWI thereby occasioning her actual bodily harm.

After a full hearing, the appellant was convicted on both count 1 and count 2 and sentenced to 20 years and 3 years imprisonment respectively. The appellant has appealed citing the following grounds:-

1. *The appellant pleaded not guilty before the trial magistrate.*
2. *The learned trial magistrate erred in Law and facts when she convicted the appellant relying on evidence which was inconsistent and uncorroborated.*

3. ***The learned trial magistrate erred in Law and facts when she convicted the appellant without considering the fact that there was no eye witness to the alleged crime.***
4. ***The learned trial magistrate erred in Law and facts when she convicted the appellant failing to consider the fact that DNA test was conducted on PW 1 and the accused.***
5. ***The trial magistrate also failed to notice and consider the contradictions in the evidence of PW1 and the doctor who allegedly treated her where PW1 testified that it was on 21.06.2009 contrary to the doctor who stated that it was on 24.06.2009.***

The facts of the case are that on 20.06.2009 at 6.30 p.m, PW1 was sent to the shops by PW4. On the way, she met the appellant who hooked her leg and she fell down. He took a cloth and placed it in her mouth as he dragged her to a coffee farm. He tore her pants and raped her. She could not scream. When he released her, she screamed and PW4 responded. PW1 said she saw the rapist well and he also told her he was James. She was later treated and a P3 form was filled (Exhibit 1). As he was finishing raping her, he bit her on her right cheek. A black torn pant was produced in Court as (exhibit 2). The appellant was arrested on 25.10.2010 while in custody for another offence.

In his unsworn defence the appellant only explained his arrest on 26.10.2010. The appellant presented the court with written submissions on the date of hearing of this appeal. He mainly expounds on his grounds and raises the issue of identification. Ms. Ing'ahizu for the state opposed the appeal saying the evidence placed the appellant at the scene of incident. And that the medical evidence supported PW1's complaint.

As a first appeal Court, this court has a duty to re-evaluate the evidence and come to its own conclusion. In the case of ***MWANGI VS REPUBLIC [2004] 2 KLR 28*** the Court of appeal stated this on the duty of a 1st appeal court:

1. ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
2. ***The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***
3. ***It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.***

I have considered the submissions by the appellant and the State, the grounds of appeal and the evidence on record. Despite the conflicting evidence on the age of PW1, the documents produced by her mother (PW6) confirms that she was aged 19 years at the time of the alleged incident.

Secondly, her evidence on the issue of rape and assault is supported by the medical evidence of PW3 and PW5. It is therefore confirmed that PW1 was assaulted and raped.

The grounds of appeal number 2 – 5 all deal with issue of evidence. I wish to combine them and address the issue of identification which should be able to dispose off this appeal. Was it the appellant who committed these offences? Though PW1 does not state what time she was going to the shops PW4 who sent her stated it was 6.30 p.m. On the way, she met the appellant and he did what he did and left her and that is why she screamed and PW4 responded. According to PW 1 **she saw the appellant well and he also told her he was James.** So did she know the appellant prior to this incident? The answer is NO.

PW 4 was worried when it became dark and PW 1 was not coming back. She was later called by a certain lady (name not disclosed) who told her PW1 was somewhere in a farm. She rushed there and found her, injured and her inner wear was missing. She told her that **James had defiled her.** She knew the said James before as a neighbour. PW2 who took PW1, to the hospital did not know who the James

was.

In Cross-examination at page 35 line 20 – page 36 lines 1 – 4, PW1 states:

“I did not know you prior. You told me your name after the ordeal. I included in my statement that – James had raped me. I did not know you prior. You were shown to me when I was on my way to school. My cousin told me who had raped me”.

From this evidence, it is clear that PW1 did not know the person who had raped her prior to the incident. She was actually visiting a relative in the areas. She however stated that she had seen the person well. There was therefore need for an identification parade.

PW1 alleges that after the ordeal, the rapist told her he was **James**. Can a criminal voluntarily disclose his/her identity to the victim? What if he lied to her? When the name James was mentioned, PW1's mind immediately went to their neighbour called James and a report was made.

On an **unknown** date, a cousin to PW1 showed her the appellant as the James who had raped her. This is what she states at page 36 lines 12 – 15 in re-examination:

“I did not know accused person prior. My cousin who lives near accused home showed accused to me after the ordeal. By then, I had known the accused name. My cousin only told me that “that is James who raped you”. When I saw him I was able to recognize who had raped me.”

This cousin of PW1 was not a witness before the court. He/she was not also an eye witness. The only evidence on the identification of the appellant is that of PW 1 and the fact that the name James was given by the rapist. The name James is not a unique name. It is a common name.

Secondly, people are generally identified by two names though one could as well be identified by one name by those who know them. In this case, PW1 did not know the said James. I have looked at the P3 form (exhibit 1) where the report to the police shows that PW1 knew the person who raped her. This is contrary to her general evidence.

PW1 did not know the details of the earlier report made to the Police. It is therefore not clear if PW1 gave a description of the known person or she gave the name James. In the case of **SIMIYU & ANOTHER (2005), KLR 192**, the Court of Appeal held thus:

“In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given”.

There is no evidence showing that PW1 gave any such name or description of the rapist to the Police. It is trite law that a fact may be proved by the testimony of a single witness. However, there always remains the need to test with the greatest care the identification evidence of such a witness especially where the conditions are unfavourable. And in evaluating such evidence of an identifying witness, the court must ensure beyond all reasonable doubt that the witness was honest and unmistakable about her identification of the appellant. Ref: **MURUBE & ANOTHER VS REPUBLIC [1986] KLR 356**. Even though under **Section 124 of the Evidence Act** the Court may in sexual offences rely on the evidence of a single witness, the evidence of PW1 presents elements of incredibility in the identification.

Finally, this offence was allegedly committed on 21.06.09. The appellant was arrested on 26th October, 2010 while in remand custody over another offence. The learned trial magistrate did not make any inquiry to satisfy herself that the appellant was not in prison custody when this particular offence was committed. It would have costed her nothing to confirm from the prosecution/prisons when the appellant

was taken into prison custody.

After analyzing the evidence, I have come to the conclusion that the conviction herein is unsafe. I allow the appeal and quash the conviction. The sentence is set aside.

The appellant to be released unless otherwise lawfully held under a separate warrant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF NOVEMBER, 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Ingahizu for State

Appellant

Njue CC