



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 345 OF 2008

BETWEEN

FRANCIS MUGENDIAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Embu

(Ong'undi J.) delivered on 14th June, 2012

in

H.C.CR. Appeal No. 106 of 2008)

JUDGMENT OF THE COURT

1. Francis Mugendi was charged with rape contrary to **Section (3) (1) (a)** of the **Sexual Offences Act, 2006**. The particulars were that on the 2nd day of June, 2007 at around 4.00 pm in Embu District within the then Eastern Province unlawfully had carnal knowledge of a girl namely CWI aged 19th years without her consent.
2. The prosecution case rested on the testimony of the complainant PW1 CW who testified as follows:

“I am a student in class 7 at [Particulars withheld] Primary School. I know that I am in court. I know that in court I am supposed to tell the truth. I know I can be jailed for speaking lies. I go to church called [Particulars Withheld]. The church is based at [Particulars Withheld]. Even in church we are told to tell the truth. I have sworn to tell the truth. I am 19 years old. I do recall on 2nd June 2007 at 4.00 pm I escorted my friend CN to her home after she had visited me. On the way from escorting Caroline, I met the accused who is a person I knew as I always see him in our village. The accused appeared drunk. When we met he blocked my way. In the process he got hold of my right hand and I realized he was smelling alcohol. As I was struggling to free myself he started pulling me to a nearby maize farm. I was screaming but nobody came to my rescue. At the maize farm he pushed me to the ground. He then slept on me. I was dressed in a dress, petticoat and

camisole pant. He pushed my dress towards my face. He tore my pant and removed the same. He also pushed my petticoat towards my upper abdomen. He unzipped his trouser and he pushed his trouser to expose his penis. He then raped me. After he raped me he left me at the scene. I took my pants and went home. At home I found nobody, my father and mother had gone to attend a wedding. Because I am normally epileptic I went and took my drugs for epileptic. I did not tell my father. My mother came back home at 8pm on 3rd June 2007. I did not tell her anything. The next day we went to church and I later informed my mother. When my mother learnt of the incident, she examined me and the next morning she escorted me to hospital in Kianjokoma. We were referred to Embu Provincial General Hospital”.

3. The trial magistrate upon considering PW1’s testimony and the defence evidence convicted the appellant for the offence as charged. The appellant was sentenced to a term of 15 years imprisonment. The trial court observed that the “accused is a person well known to PW1 as they come from the same village. There is therefore no possibility that PW1 may have been mistaken about the identity of the person who raped her. I find that from the evidence of PW1 and PW5 there is no doubt that the accused caused the penetration of PW1’s organ with his own penis. The penetration from the evidence was intentional and unlawful as PW1 never gave her consent”.
4. Aggrieved by conviction and sentence meted by the trial court, the appellant lodged a first appeal to the High Court. The High Court (Ong’undi J.) dismissed the appeal and confirmed the conviction and sentence. The learned Judge having re-evaluated the evidence on record was satisfied that the appellant committed the offence. On the question as to who actually raped PW1, the Judge expressed herself as follows:

“The alleged incident took place on 2nd June 2007 at 4.00 pm. It was broad daylight. PW1 stated that the person who did this to her was a neighbour and well known to her and his name was Mugendi. This was the name she gave her mother and to the police”.

5. Aggrieved by the High Court’s dismissal of his appeal, the appellant has lodged a second appeal to this Court. The gist of the appeal is that the sentence is harsh and excessive and this Court should review the same.
6. At the hearing of the appeal, the appellant acted in person while the State was represented by Senior Prosecution Counsel Mr. J. Isaboke.
7. In his submissions, the appellant urged this Court to review the sentence meted upon him. He stated that since 2007, when he was jailed, he had learnt carpentry work and this will enable him support his family. He was remorseful for the offence.
8. The State through the Senior Prosecution Counsel supported the appeal. It was submitted that the evidence on record did not support conviction of the appellant; that the appellant was convicted on the testimony of PW1 as a single testifying witness and there was no proper corroboration of the testimony given by PW1. The State submitted that the High Court erred in law in finding that the testimony of PW 5 Dr. Godfrey Njuki Njiru corroborated the testimony of PW1 CW. It was submitted that the evidence of PW5 was worthless. The record shows that PW 5 Dr. Godfrey Njuki Njiru testified that when she examined the complainant’s private parts, he noticed she had a painful vulva and a tender or perforated hymen which made it difficult to take vaginal swab. He stated that his fingers became blood stained when he inserted the same into the vagina. The State submitted that there was no evidence on record to connect the appellant with the injuries sustained by the complainant. It was further submitted that PW1 admitted in evidence that she had had a previous sexual encounter with another man and there was no medical evidence on record to prove that the appellant did cause his genital to penetrate the complainant; there was no chemical analysis to connect the appellant with the offence; there was no proof of penetration by the appellant; the Judge erred in finding that the doctor’s evidence confirmed that the complainant had been physically and sexually penetrated in the absence of any chemical analysis. It was the State’s case that the allegation that the appellant disappeared from the scene of crime did not prove that he committed the offence. The State urged this Court to allow the appeal.
9. We have noted the submission by the appellant and the State. It is our duty to consider the submissions and apply the law to the facts as established by the two courts below. This being a

second appeal and by dint of **Section 361(1)** of the **Criminal Procedure Code, Chapter 75, Laws of Kenya**, this Court's jurisdiction is limited to matters of law only. In ***Chemagong vs. Republic, (1984) KLR 213*** at page 219 this Court held:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)”

10. The State in supporting the appeal submitted on factual matters. The two courts below had already established the facts of this case. The identity of the person who raped the complainant was proved and established to be the appellant; the fact of rape and penetration was established by the two courts below. During trial, the State prosecuted the appellant and before the High Court, the State supported conviction and sentence. It is surprising that during this 2nd appeal, the State now prevaricates and does not support conviction and sentence which they had earlier done. Be that as it may, we reiterate that this is a second appeal and we are confined to deal with points of law. It is our considered view that the two courts below did establish the facts in this case and we have no reason in law to interfere with the facts as established.
11. The State submitted that the Judge erred in stating that the doctor's testimony corroborated the testimony of the complainant PW1. It was further submitted that the absence of corroborative evidence in the rape case facing the appellant rendered the conviction by the trial court to be improper. We have considered the submission by the State and note that under **Section 124** of the **Evidence Act**, corroboration is not always mandatory in rape cases. The proviso to **Section 124** of the **Evidence Act** states that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. The evidence on record shows that before the complainant PW1 CW testified, a *voire dire* examination was conducted by the trial court. The complainant was 19 years old when the offence was committed. The learned magistrate who saw and heard her testify was satisfied she was telling the truth. The doctor who examined her confirmed the complainant's vulva was painful, she had a perforated hymen which impeded a vaginal swab test. She was given anti-HIV and Sexually Transmitted Diseases medication. In our view, this corroborated the complainant's evidence.
12. Turning to the appellants ground of appeal based on severity of sentence, we note that sentencing is a question of fact and this being a second appeal, we consider points of law. We are cognizant of the decision of this Court in ***Griffin -vs- R. - Criminal Appeal No. 185 of 1998 (UR)*** wherein it was stated that:-

“The Court of Appeal cannot interfere with the sentence solely on the ground that it was heavy, unless it was also manifestly excessive. See also the case of Keneth Kimani Kamunyu -vs- R. (2006) EKLR where this Court stated it can only interfere with the sentence if it is illegal or unlawful”

13. The minimum sentence under **Section 3 (3)** of the **Sexual Offences Act 2006** for the offence with which the appellant is charged is 10 years subject to an enhanced sentence of life imprisonment. In the instant case, the 15 year term

of imprisonment meted on the appellant is neither illegal nor unlawful. For the foregoing reasons, we find that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 17th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR