



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**  
**CRIMINAL APPEAL NO. 88 OF 2013**

**BETWEEN**

**SIMON MUTUKU MUSYOKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu (Majanja, J.)*

*dated 30<sup>th</sup> October, 2013*

**in**

**H.C.CR.A No. 215 of 2011)**

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**JUDGMENT OF THE COURT**

1. **Simon Mutuku Musyoka**, the appellant, was charged with the offence of rape contrary to **Section 3(1)(a)(c)** of the **Sexual Offences Act No. 3 of 2006** and an alternative count of indecent act with an adult contrary to **Section 11(6)** of the **Sexual offences Act** in the Principal Magistrate’s Court at Siakago.
2. The particulars of the charge of rape were that on 24<sup>th</sup> October, 2010 at [Particulars Withheld] Village within Mbeere South District of Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of E M N without the consent of the said E M N. The particulars of the alternative count were that on the aforementioned date and place, the appellant committed an act of indecency with an adult namely E M N by touching her private parts with his hands.
3. The appellant pleaded not guilty and the prosecution called a total of six witnesses in support of its case. It was the prosecution’s case that on 24<sup>th</sup> October, 2010 PW1, E M N (E), attended a party at PW5’s, Damaris Mweni Muthusi (Damaris), house. At around midday E decided to leave the party and visit her friend. As she was leaving the compound, a man followed her. E did not know the said man. After walking for some distance, the man asked E to have sex with him. E refused to give in to his request and the man pushed her to the ground causing her right hand to dislocate.

- In the process of the scuffle, E got an epileptic attack; the said man removed her panties and his trousers and proceeded to rape her.
4. Meanwhile, while PW4, Grace Wayua (Grace), was coming from church she saw a man on top of E; she identified the man as the appellant. She gave evidence that the appellant had removed his trousers and was having intercourse with E. Grace asked the appellant what he was doing and the appellant told him that he was with his girlfriend. Grace screamed for help; the appellant put on his trousers and ran away. Members of public who had by then gathered at the scene ran after the appellant. Grace called Damaris and informed her what had happened. Damaris arrived at the scene and together with Grace they helped E to dress up and took her to Mbondoni Police Patrol Base.
  5. PW6, Joel Maina Karuga (Joel), who was then in his compound saw a man ran into his compound; he asked him where he was headed to; the man told him that he was headed to Kitoloni. Thereafter, a crowd of people emerged and Joel noticed they were pursuing the said man. Joel also took the chase and with the assistance of members of public the said man was apprehended. Joel learnt that the said man was being pursued because he had raped a young woman nearby. The appellant was escorted to Mbondoni Police Patrol Base wherein Grace identified him as the man she found raping E.
  6. PW2, John Mwangi (John), a clinical officer based at Mbeere District Hospital examined both the appellant and E on 25<sup>th</sup> October, 2010. He testified that he found the appellant to be in good health and mentally stable. John testified that he noticed both the appellant's and E's clothes were muddy. He gave evidence that he saw blood on E's vaginal area; the medical examination established that E was HIV positive and she had gonorrhoea. His conclusion was that there was penile penetration on E and hence she was raped.
  7. After the prosecution closed its case, the trial court found that the appellant had a case to answer and he was placed on his defence. The appellant gave an unsworn statement. He testified that on 23<sup>rd</sup> October, 2010 he left his home at Kitoloni and went to Manyani to cultivate a certain parcel of land belonging to one Mutua. Thereafter, he and Mutua went to a bar and drunk beer the whole night. The following morning he was unable to trace his way back home since he was drunk. He saw two people behind him who apprehended him and took him to Mbondoni Police Patrol Base. He denied committing any of the offences he was charged with.
  8. Being satisfied that the prosecution had proved its case, the trial court convicted the appellant for the offence of rape and sentenced him to 30 years imprisonment. The appellant was aggrieved with that decision and appealed to the High Court; the appeal was dismissed vide a judgment dated 30<sup>th</sup> October, 2013. Unrelenting, the appellant has filed this second appeal based on the following grounds:-

- ***The learned Judge erred in both in points of law and facts when he relied on contradicted and uncorroborated evidence adduced by PW1, PW4 and PW5 on passing conviction and sentence upon the appellant.***
- ***The learned Judge erred in both points of law and facts when he failed to consider that PW2, the doctor did not connect the appellant with the alleged offence yet both the appellant and the complainant were examined by PW2.***
- ***The learned Judge erred in both points of law and facts when he failed to consider the injuries sustained by the complainant were not as a result of the alleged offence but were as a result of the epileptic disease.***
- ***The learned Judge rejected the appellant's defence in violation of Section 169(1) of the Criminal Procedure Code.***
- ***The learned Judge failed to note that the prosecution had failed to avail the investigating officer who was a crucial witness.***

9. The appellant appeared in person while the State was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor. The appellant relied on his written submissions which were filed before this Court. The appellant submitted that the prosecution's evidence was full of contradictions; PW1 (E) gave two contradicting accounts of the incident; in one breath she said that the appellant pushed her to the ground and broke her hand and in another breath she testified that the appellant pulled her and her injured hand got dislocated. PW1 testified

that it was Damaris who requested the appellant to escort her and later on she testified that when she left the party a man who wasn't known to her followed her. The appellant further submitted that the evidence of PW5 (Damaris) was full of contradictions because in her examination in chief she testified that she arrived at the scene and saw the appellant on top of E; she also saw the appellant running from the scene. On cross-examination she testified that she did not witness the incident.

10. According to the appellant, the charges against him were a fabrication because if indeed the complainant had an epileptic attack the same would have deterred any rapist. The appellant also challenged PW2's (John's) evidence on the ground that despite John testifying that he had seen blood on the complainant's vaginal area the same was not indicated in the P3 form. He argued that there was no medical evidence connecting him to the offence he was charged with. He submitted that the investigating officer never tendered evidence yet he was a crucial witness. He urged us to allow the appeal.
11. Mr. Kaigai supported the appellant's conviction. He submitted that the evidence of the complainant was consistent; the clinical officer, PW2, produced the P3 form which confirmed that the complainant had been raped; the appellant was found raping the complainant by Grace. He urged us to dismiss the appeal.
12. We have considered the appeal, the submissions by parties and the law. This being a 2<sup>nd</sup> appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611.***
13. On the issue of contradictions in the prosecution's evidence, we note that when the complainant first gave evidence she was stood down in order for the prosecution to amend the charge sheet. In her testimony before she was stood down, she stated that Damaris had requested the appellant to escort her home. In her testimony after she was later recalled, she testified that when she left the party, a man who was unknown to her followed her. Clearly there were discrepancies as to how the appellant followed the complainant. On the other hand, we also note that there were inconsistencies in PW5's (Damaris) evidence as to whether she caught the appellant in the act or if she saw the appellant flee from the scene. So what is the consequence of the said discrepancies? **Section 382** of the ***Criminal Procedure Code*** provides;

***“Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”***

14. The test for making a decision on cases with discrepancies is established in ***Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993*** wherein this Court held:-

***“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”***

15. We find that the said inconsistencies did not prejudice the appellant and they were inconsequential to the appellant's conviction. Why do we say so? This is because the evidence of PW4, Grace, was clear and detailed as to what occurred and what was material to the case, Grace

testified that while on her way home, she found the appellant on top of E; the appellant had removed his trousers and E did not have her undergarments; she found the appellant having intercourse with E ; the appellant later on ran away. Grace’s evidence was never shaken and clearly established that it was the appellant who had sexual intercourse with the complainant. She caught the appellant red handed; the incident occurred during the day and there was no case of mistaken identity.

16. It was the appellant’s contention that the medical evidence did not connect him to the rape incident; there was no spermatozoa found on the complainant. He argued that there was evidence that the complainant was HIV positive and had gonorrhoea yet he was healthy and did not have any of the said infections; this proved that he did not commit the offence. We are of the considered view that the evidence of the clinical officer as well as the P3 form established penetration and that complainant had been raped. We concur with the following findings by the High Court (Majanja, J.):-

***“The lack of spermatozoa is not itself conclusive of lack of penetration nor is the fact that the appellant did not contract an infection from the victim.”***

As to whether the appellant was the perpetrator, the evidence of Grace, an eye witness, was clear that it was the appellant who had raped the complainant.

17. The appellant also contended that the investigating officer was not called and he was a crucial witness. We find that the failure of the investigating officer to tender evidence did not prejudice the appellant. In ***Julius Kalewa Mutunga -vs- Republic, Criminal Appeal No. 31 of 2005***, this Court held that:

***“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”***

18. Lastly, we find that the two lower courts did consider the appellant’s defence and rightly rejected the same. Consequently, we find that the appeal has no merit and is hereby dismissed.

***Dated and delivered at Nyeri this 16<sup>th</sup> day of December, 2014.***

***ALNASHIR VISRAM***

***JUDGE OF APPEAL***

***MARTHA KOOME***

***JUDGE OF APPEAL***

***J. OTIENO- ODEK***

***JUDGE OF APPEAL***

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**