



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 202 of 2009
BETWEEN

ANDREW APIYO DUNGA1ST APPELLANT
HENRY OTIENO ADIE2ND APPELLANT
AND
REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J.) dated 18th February, 2008

in

H.C.CR.A. NO. 77 OF 2007)

JUDGMENT OF THE COURT

The first appellant **Andrew Apiyo Dunga** and the second appellant **Henry Otieno Adie** were each charged before the Senior Resident Magistrate at Maseno with rape contrary to **section 140** of the Penal Code. In the alternative, each was charged with the offence of indecent assault on a female contrary to **section 144 (1)** of the Penal Code. The particulars of the offence of rape were the same in respect of each appellant and were that on the 16th day of June 2005 in Kisumu District within Nyanza Province they each had carnal knowledge of F.A.O without her consent. The particulars of the alternative charge of indecent assault on a female were also the same and were that on the 16th day of June 2005, in Kisumu District of Nyanza Province, they each unlawfully and indecently assaulted F.A.O by touching her private parts. Each pleaded not guilty to the main charge and to the alternative charge but after full hearing in which the prosecution called three witnesses and each of them gave unsworn statement in defence, the learned Senior Resident Magistrate (A. Ong'injo) found each of the appellants guilty of the main charge of rape contrary to **section 140** of the Penal Code, convicted each of the offence and sentenced each to serve ten (10) years imprisonment. They were dissatisfied with the conviction and sentence meted out to them by the learned Senior Resident Magistrate. They appealed against both to the superior court through their lawyer Mr. Olago Aluoch. The superior court, after full consideration of the appeals, dismissed their appeals which were consolidated and heard together. They are still not satisfied and hence the appeal before us. They filed a joint memorandum of appeal on 26th August, 2009 and a second handwritten memorandum of appeal which was handed over to us together with submissions at the time the appeal was heard. We treated the second memorandum of appeal as supplementary memorandum of appeal and accepted it though no leave to file it was obtained prior to the hearing, only because the appellants, though represented in the superior court, appeared in person before us. The main complaints in the original memorandum of appeal are briefly that the trial court erred in convicting the appellants notwithstanding that some witnesses were not called by the prosecution to testify in the case; that the conviction was entered against each appellant whereas there was no medical evidence connecting them with the offences as there was no medical evidence that the spermatozoa found in the complainant were those of the appellants; that the learned Senior Resident Magistrate erred in law and in fact in convicting the appellants on the evidence of a single witness without any corroboration of her evidence; that the trial court erred in its failure to observe that the appellant's constitutional rights pursuant to the provisions of

section 72 (3) of the Constitution were violated and that the sentences imposed were harsh and excessive.

The facts giving rise to this appeal are simple and straight forward. The complainant F.A.O (PW1) was a resident of Nyamasaria in Kisumu. On 15th June 2005, she went to attend her uncle's funeral . After burial there was a dance which went into the night of 15th/16th June 2005. They had left their vehicle in a home away from her uncle's home. At 2.00 a.m. F and the driver of that vehicle went to get compact discs from the vehicle. Before they could get to the vehicle, the two appellants both of whom had been with her at the dance confronted her and the driver. The first appellant who was armed with a panga held her by the collar. She inquired why the first appellant was holding her. In response, first appellant slapped her and told her to release the driver to go back. Out of fear, F held on to the driver. The two appellants then told the driver to leave her or else he would be cut. This was in Dholuo although the driver was of Kikuyu ethnic community. On hearing this, F released the driver and told him to go back, but the driver declined to do so. The first appellant then slapped F with a panga on the back and told the driver to leave. The driver then left. Both appellants pulled F to N Primary School compound nearby. Once in the school, in a classroom, the first appellant removed a lessa which F had tied on her head and spread it on the floor in the classroom. The first appellant then undressed F against her will and told her to lie down. When she refused to lie down, the first appellant slapped her and she obliged. The first appellant then removed his trouser and had sexual intercourse with her for ten minutes. Thereafter, the second appellant also did the same. All in all, the first appellant had sexual intercourse with her three times while the second appellant did so twice. At 3.00 a.m. relatives of F, who were searching for her, approached the scene and on hearing their approach, the two appellants ran away. F was taken back to her uncle's home while her relatives, assisted by members of the public who had witnessed her being pulled to the school continued tracing the appellants. They went to the home of the second appellant, arrested him and took him to the funeral venue where F identified him as one of her assailants. The second appellant then led the search team to the first appellant's home. The first appellant refused to open the door for the team but the door was forced open and the first appellant was also arrested. They were both escorted to Holo Police Station from where they were escorted to Maseno Police Station by Pc Maro. F also went to Maseno Police Station, made a formal report there and recorded her statement. Pc Austin Onyango (PW2) was the Police Officer who received F and the two appellants at Maseno Police Station. He, together with Pc Martha, escorted F who had been issued with a P3 form, together with the two appellants to Chulaimbo hospital for examination and filling of the P3 forms. After examination, the appellants were escorted back to the police station. Erick Omolo (PW3), a Clinical Officer at Chulaimbo hospital examined F and found that her thorax and abdomen were tender, her vagina was torn and there was obvious an offensive discharge therefrom with blood stains. A high vaginal swab showed numerous spermatozoa and fevered blood cells. He also examined the appellants and found the first appellant was normal whereas the second appellant had a small cut on the head. After full investigations, the appellants were charged as stated above. In their defence, the first appellant stated as follows:-

“I come from Osiri Sublocation, I ‘m a fisherman, I was fabricated (sic) I did not commit offence.”

And the second appellant's defence was that he was fabricated (whatever that meant). At the time of the incident he was on his way to the lake to fish so as to get fare back to Nairobi. When the team searching for the rapists went to his house, they found he had gone to the lake and they took a panga from his house. On his return, he was arrested and taken to Holo and later to Maseno police station and charged.

The above were the facts that were before the trial court and upon which the learned Magistrate found the appellants guilty and convicted each of them of the main offence of rape contrary to **section 140** of the Penal Code. On first appeal the superior court, (Mwera, J) analysed, and re-evaluated those facts and after doing so, came to the conclusion that the decision of the Senior Resident Magistrate's Court could not be disturbed and he therefore confirmed it. Before us, the appellants conducted their appeal in person although in the superior court, they were represented by an advocate as we have stated above. In their written submission which was thumb printed by both appellants and which we accepted, they complained that their rights were infringed in that they were confined in the police cells for more than the period stipulated by the constitution; that they could not have perpetrated the act of rape in the knowledge of members of the public without the same members of the public taking any action to rescue the victim; and that as there was no evidence that their spermatozoa were the same as the ones found in the victim, the conviction could not stand. Miss Oundo, the learned Senior State Counsel on the other hand opposed the appeal contending that the complaint on violation of the appellant's constitutional rights

was raised too late in the day and so she was unable to respond to it effectively; that as the evidence that was before the court was not inadequate, there was no need to call the other witnesses; that medical report produced by the Clinical Officer confirmed rape and that where the complainant is an adult like in this case there was no need for corroboration of her evidence; and lastly that the sentence was not harsh and excessive in the circumstances of this case.

This is a second appeal. By dint of **section 361** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact unless it is demonstrated that the trial court and or the first appellate court considered matters that should not have been considered or did not consider matters that should have been considered or that looking at the matters considered, the decision was plainly wrong, in which case those omissions and/or commissions become matters of law. In this appeal, though the appellants did not raise the issue of identification as a complaint, their defence that the evidence against them was fabricated as they were not at the scene with the second appellant saying he had gone to the lake to fish, in effect meant that they were claiming that they were mistakenly identified by F as the people who raped her. Secondly, in our understanding of matters raised in their memorandum of appeal, particularly where they claimed that several witnesses were not called to give evidence at their trial, they were saying in effect that evidence of F should not have been relied upon to found a conviction without either corroboration or further supporting evidence.

Section 143 of the Evidence Act states as follows:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

And in the well known case of ***Bukenya and others vs Uganga, (1972) EA 549*** the predecessor to this Court held inter alia as follows:-

“(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.”

(iii)

(iv) Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”

It is thus clear that in law, unless specifically stated in the relevant law, there is no need for more witnesses than enough to prove the offence. In this case, Florence’s evidence was the main evidence on what took place at the time she alleged she was raped. The driver was there when they were attacked but he was forced to leave before the complainant was raped. There could have been some people in the home where the vehicle was, but F said in evidence that they were intercepted and attacked before they reached that home where the vehicle was. Her brother and others reached the school where she was being raped just after the rapists had run away for it was their approach that prompted the rapists to flee from the scene. These, in effect mean F was the only direct witness. Although the law is clear that a conviction can be based on the evidence of one witness, there is however, a rider. That rider is that in situations where conditions for easy identification are difficult, such as at night, a court of law would rely on such evidence of one identifying witness only after testing with greatest care that such evidence though of a single witness under difficult conditions, was nonetheless reliable. In the case of ***Abdallah Bin Wendoh and another vs. Reginam, (1953) 20 EACA page 166***, the predecessor to this Court held:-

“(i) Although subject to certain exceptions, a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification, especially when it is known that the conditions favouring a correct identification, are difficult. In such circumstances, other evidence, circumstantial or direct pointing to the guilt is needed.”

See also the decision of this Court in the case of ***Wamunga vs. Republic, (1989) KLR 424***.

It is with the above principles in mind that we now proceed to consider this appeal particularly on the allegations that the appellants were not at the scene and were thus not properly identified.

The complainant said in evidence in cross examination by the second appellant as follows:-

“I was able to identify you because you were at the dance from 6.00 p.m. to 2.00 p.m. (sic) when you waylaid us and attacked us.”

From 2.00 p.m. (sic) when the appellants attacked her, and took her to the Primary School where she was

raped, the complaint was with both appellants up to 3.00 p.m. (sic) when they left her. There was moonlight. In our view, the period from 6.00 p.m. to 3.00 a.m., i.e a period of nine hours, was a long period and added to that, the appellants came close to her on more than one occasion when raping her. There was moonlight when she was intercepted. All these situations were, in our view, conducive to proper identification of the appellants and we have no doubt that the trial court and the superior court's concurrent findings on this aspect was based on proper evidence. That F was raped was confirmed by the medical report and there was no need to match the spermatozoa found inside her with that of each appellant as the offence of rape is complete once there is penetration of the female's genital organ with the male's penis. It is not necessary that spermatozoa be released. In this case medical evidence confirmed F's evidence that there was penetration of her vagina by a male organ. According to her evidence which both courts below accepted, the persons responsible were both appellants.

The last point raised by the appellants albeit belatedly is that their constitutional rights were violated in that they were not taken to court within twenty four hours from the date they were arrested. This Court has stated in several decisions that where an appellant had an advocate either at his trial or in his first appeal, he was expected to raise such a matter in the courts below and if he did not raise it he would be taken to have waived his right to raise it in this Court. Further, he still has the right to raise it, pursuant to **section 84** of the Constitution but under separate proceedings. In this case, Mr. Olago Aluoch, represented the appellants in their first appeal. They never raised that issue and indeed, even in their main memorandum of appeal before us, they did not raise it. They waited and raised it at the time they were asked to address the Court in their appeal. That was too late. They are taken to have waived their right to raise that point and we say no more on that ground.

In conclusion, having considered all aspects of this appeal, we see no reason to warrant our disturbing the decision reached by the two courts below. Under **section 361** (supra) severity of sentence is a matter of fact and does not fall under our jurisdiction much as we may consider it on the lower side in the circumstances of the case. The appeal lacks merit. It is dismissed.

Dated and delivered at Kisumu this 30th day of April, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR