



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 62 OF 2017

BETWEEN

JARED NYAKUNDI ORARO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both conviction and sentence of ten (10) years dated 1.3.2017 by Hon. R. Kefa in Nyeri CMC Cr. (S.O) case number 32 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Charge

1. The appellant herein, Jared Nyakundi Oraro was charged with the offence of Rape Contrary to **Section 3(1)(a)(b)** as read with **Section 3(3) of the Sexual Offences Act no. 3 of 2006**. The particulars are that on the 19th day of July 2016 within Nyeri County, Jared Nyakundi Oraro intentionally and unlawfully caused his penis to penetrate the vagina of FWM aged 25 years without her consent.
2. In the alternative the appellant was charged with the offence of committing an indecent act with an adult contrary to **Section 11(a)** of the **Sexual Offences Act no. 3 of 2006**, particulars being that on the 19th day of July 2016 at [particulars withheld], within Nyeri County intentionally and unlawfully touched the vagina of FWM with his penis against her lawful will.
3. The appellant pleaded not guilty to the charges.
4. The prosecution called five witnesses who testified in favour of the prosecution case. The appellant was placed on his defence and was the only witness for the defence case.

Judgment of the Court

5. The learned trial magistrate found that the prosecution had established a prima facie case and that the prosecution witnesses were consistent in their testimonies. On the other hand he found that the defence of the appellant was unconvincing and in addition to that

he did not call any witnesses to corroborate his evidence. He was therefore found guilty of the offence with regard to the main count and he was convicted and sentenced to ten (10) year imprisonment. I must point out here that the fact that the appellant did not call witnesses should not have drawn an adverse remark from the court because the appellant could have chosen to remain silent in his defence.

The Appeal

6. The appellant being aggrieved by both the conviction and sentence of the lower court filed a petition of appeal based on the following grounds:

i. That the learned trial magistrate erred in both law and facts while convincing the appellant disregarded that the charge was refractory after the complainant was denied access to accused employers property.

ii. That the learned trial magistrate erred in both law and facts while convicting the appellant that the medical evidence adduced did not indicate any recent sexual activity as stated in the charge.

iii. That the learned magistrate erred in both law and facts while convicting the appellant on charges that were not proved and inconsistent to the required standard to meet the needs of justice as spelt out in Section 50(2)(a) of the Constitution.

iv. That the learned magistrate erred in both law and facts while the clothes alleged to be worn by the complainant were not produced in court as exhibit.

The Duty of this Court

7. The law demands that as the first appellate court, this court analyzes and evaluates the evidence afresh with a view to reaching its own conclusions in the matter. It has however to be remembered that this court does not have the privilege of seeing and hearing the witnesses who testified during the trial, and to make an allowance for the same. This court has also to remember that the appellant expects it to rehear his case, and to make no conclusions until and unless the evidence has been given a thorough analysis. Generally see *Oururi versus Republic [2013] eKLR and Okeno versus Republic [1972] EA 32*. Also see *Martin Nyongesa Wanyonyi versus Republic [2015]eKLR*

8. The appellant included supplementary home-made grounds of appeal in his submissions being:

a. That the learned trial magistrate fell into error by affirming conviction and sentence by relying on PW1's evidence which was insufficient, unsatisfactory and unsafe to build on a conviction.

b. That the learned trial magistrate erred in law and facts in affirming conviction and sentence by failing to find out there were key and vital witness mentioned who were not summoned to testify during the trial proceeding.

c. That the trial magistrate fell into error by not finding out that the testimony of PW4 the clinical officer did not put any effort on prosecution regarding to what she narrated to the trial court concerning the matter as per the records.

d. That the learned trial magistrate fell into errors by not considering the evidence adduced by the clinical officer did not indicate or show any result of recent sexual activity moreover, the same evidence of PW4 did not link the appellant to the said allegations.

e. That the learned trial magistrate fell into errors by relying on PW1's evidence and declare it credible while according to what she stated, she was alone at the time of the incident, meanwhile no witnesses stated that he or she witnessed what PW1 said and it clearly resulted to single evidence.

f. That the learned trial magistrate failed to consider the appellant's brief and credible defence which displaced the

reliability of prosecution case.

g. That the learned trial magistrate erred in law and facts in affirming conviction and sentence by not considering whole of prosecution evidence and their witnesses was not enough and insufficient to support a conviction.

9. The appellant prays that the appeal be allowed, the conviction quashed and the sentence of 10 years set aside.

The Prosecution Case

10. During the trial, PW1 FWM testified that she was collecting firewood in the bushes on 19th July 2016 when the appellant Jared Nyakundi Oraro approached her and told her to go to the owner of the property. He then followed her and touched her breasts. He had two pangas. PW1 tried to push him away but he told her not to resist. He spread his coat to the ground, removed her clothes as well as his trousers and raped her by inserting his penis into her vagina. PW1 went home, took a bath, and informed her mother of the incident who in turn advised her to report to the police and she accompanied her to Kiganjo Police Station. She knew the appellant as he used to guard the area. PW2 JWM the mother of the complainant accompanied her to the police station. Thereafter they informed PW1's husband. She also accompanied the complainant to Kiganjo Health Center.

11. SMW, PW3 was informed that his wife the complainant had been raped by a person who lived at Kwa Gatheru. Accompanied by James Wanjohi and Wambugu, PW3 went to the house of the appellant but on seeing them, the appellant tried to run away. PW3 stopped him, and at that point, the appellant said that he used to be in a relationship with the complainant and he also told PW3 that he had raped the complainant.

12. A Clinical Officer at Kieni East sub-county hospital Rebecca Wamathai testified as PW4. She examined the complainant, FWM and stated there were no tears or bruises on her vagina and no injuries were noted on the vagina or labia minora. The post care rape form was filled after 11 days. She noted that the complainant was on menstruation and that she took a bath and washed her clothes before she came to hospital. A P3 form was filled which she produced as Pexhibit 1 while the Post Rape Care Form was produced as Pexhibit 2. PW4 relied on the history of the complainant but could not confirm whether she had been raped.

13. PW5 Cpl. Betty Chepkoech of Kiganjo Police Station was the investigating officer to whom the complainant PW1 and PW2 reported the incident. They told her what had transpired between PW1 and the appellant. She then visited the scene and could see that there was movement and some footprints confirming that there had been a struggle. She interrogated the appellant but he did not make any claims of the charge being a frame up. She did not recover any panga.

The Defence Case

14. On being placed on his defence, the appellant testified as DW1. He stated that he worked as a farmhand in someone's farm. The husband of the complainant came and attacked him and he even broke some of his teeth. He had never seen them before. He was taken to the police station but the complainant refused to come and identify him. He was not taken to hospital. The complainant asked him to pay her kshs 20,000/= if he wanted her to withdraw the case, but he refused to do so as he was innocent.

The submissions

15. The appellant canvassed his appeal by way of written submissions in line with the four grounds of appeal set out in the Petition of Appeal. His first ground is that of identification. He submits that the complainant's evidence on identification is contradictory and that the same does not pass the test of being water tight. He contends that such contradictory, insufficient and incredible evidence cannot form the basis of a conviction for such a serious offence as rape.

16. Secondly, the appellant submits that the evidence of PW1 and PW2 when placed side by side was inconsistent. The complainant, PW1 testified that she did not tell anyone of the incident until after she got home and took a bath then called her mother and her husband before proceeding to report to the police. PW2 testified that she was called by PW1 and informed about what had transpired. PW2 testified that upon reaching PW1's home she rushed her to hospital. The two witnesses, according to the appellant gave differing accounts as to whether they went to hospital or the police station first. The appellant also submits that PW2 confessed that she narrated everything as she was told by her daughter. He submits that PW2 is an untruthful witness hence her

testimony should not be relied on as it is not watertight. In addition to the above, the appellant submits that PW2 did not witness the incident and could not therefore identify the appellant.

17. The appellant also submits that the prosecution did not call vital witnesses to corroborate the evidence of PW3. PW3 testified that he chased after the appellant alongside two other people called W and his uncle JW, however the prosecution did not explain why those two gentlemen were not called as witnesses. The appellant submits that failure by prosecution to call JW and W resulted in miscarriage of justice.

18. On ground 4, the appellant relied on the evidence of PW4, the clinical officer who testified that no injuries were noted on the vagina and labia majora. He also submits penetration was not proved, which means the offence of rape was not committed. He also submits that the clinical officer did not mention that there was penetration by a male sexual organ. The appellant called upon the court to re-assess and re-evaluate the entire evidence of the Clinical Officer as she confirmed that she relied on the history presented by the complainant to fill the P3 form and the PRC form.

19. The appellants last ground was that the events he narrated in his alibi defence were not considered by the trial court, and further that the prosecution shifted the burden of proof to the appellant contrary to the law when it comes to the issue of an alibi. He concluded that the prosecution failed to prove its case to the required degree of beyond reasonable doubt hence his request to the court to re-assess and re-evaluate the entire evidence and come to a different conclusion.

20. Counsel for the prosecution opposed the appeal via oral submissions. Counsel submits that **Section 124 of the Evidence Act** allows courts to rely on the evidence of a single identifying witness in sexual offences as long as the trial court believes that the single witness is trustworthy. Counsel also submits that the testimony of PW1 remained unshaken throughout the trial and that the said evidence is sufficient to sustain a conviction.

21. Regarding the issue of witnesses who were not called, counsel submits that under **Section 143 of the Evidence Act** it is for the prosecution to decide who they shall or shall not summon as a witness. Counsel urged the court to ignore submissions by the appellant that the prosecution did not call key witnesses.

22. Concerning the evidence of PW4 the Clinical Officer, counsel submits that it is not mandatory to indicate the name of the victim or to give a sexual history of the victim. All that doctors and clinical officers are required to do is to treat the victim, and that though PW4 noted there were no lacerations, the same can be explained by the fact that the complainant was married and had one child.

23. Counsel also submits that the appellant's defence was not credible as it comprises mere denials, which have been dislodged by the evidence of PW1 who testified that she knew the appellant as a guard in the estate where he lived.

Issues, Analysis and determination

24. The appellant was charged with the offence of Rape contrary to **Section 3(1)(a)(b)** as read with **Section 3(3) of Sexual Offences Act no. 3 of 2006**.

i. "3(1) A person commits the offence termed rape if-

a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs.

b) the other person does not consent to the penetration; or

c) the consent is obtained by force or by means of threats or intimidation of any kind.

25. The decision of the learned trial magistrate was as follows;

i. "In order to prove its case under Section 3(1) of the Sexual Offences Act no.3 of 2006 the prosecution must show that the

accused did an act that amounted to penetration to the complainant without her consent. Penetration under **Section 2 of the Act** means, “**The partial or complete insertion of the genital organs of a person into the genital organs of another person**” PW1 testified of how she was fetching firewood in the bush when the accused person, who takes care of the farm got hold of her, removed her trousers and pants and inserted his penis into her vagina. She tried to struggle but the accused who was armed with a panga threatened her. PW1 informed her mother and went for treatment. PW4 a clinical officer produced treatment notes (Pexhibit 1) and a P3 form (Pexhibit 2) and PRC form (Pexhibit 3) showing there was no bruises noted on the labia majora, minora, vagina and cervix as PW1 was on her menstruation at the time of the alleged incident and had taken a bath. **She further explained that the lack of injuries could be attributed to the fact that PW1 is an adult.** The testimony of PW1 was clear and remained unshaken during cross examination. The testimony of PW1 does not require corroboration under the **proviso of Section 124 of the Evidence Act** where in a criminal case involving a sexual offence the only evidence is that of the alleged victim the court shall proceed and convict the accused if the court is satisfied that the alleged victim is telling the truth. I had the opportunity of assessing PW1 and I find her to be a credible witness. It is the view of this court that penetration and lack of consent was proved.....

ii. On the issue of identification I wish to rely on the findings of the court in **R-versus-Turnbull (1967) 3 ALL ER 549** where the court held that the court must make inquiries as to the presence and nature of light, intensity of such light, location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him. The incident occurred at around 10 am during the day making the circumstance favourable for positive identification hence PW1 was able to see the accused clearly hence. Furthermore, the accused had some form of conversation with PW1 which further affirms his identification.”

26. **Section 43(1) of the Sexual Offences Act** outlines what constitutes intentional and unlawful acts. That is to say:-

a) **In any coercive circumstance.**

b) **Under false pretence or by fraudulent means; or**

c) **An act which causes the offence.**

2) **The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is-**

a) **Use of force against the complainant or another person or against the property of the complainant or that of any other person;**

b) **Threat of harm against the complainant or any other person or against the property of the complainant or that of any other person; or**

c) **Abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.**

3) **False pretences or fraudulent means, referred to in subsection (1)(b) include circumstances where a person-**

a) **In respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;**

b) **In respect of whom an act is being committed, is led to believe that such an act is something other than that act; or**

c) **Intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life threatening sexually transmissible disease.**

4) **The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of the act-**

- a) *Asleep;*
 - b) *Unconscious;*
 - c) *In an altered state of consciousness;*
 - d) *under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;*
 - e) *mentally impaired; or*
 - f) *a child.*
- 5) *This section shall not apply in respect of persons who are lawfully married to each other.*

Section 44) (1) If in proceedings for an offence under this Act, it is

- a) *That any of the circumstances specified in subsection (2) existed; and*
- b) *That the accused person knew that those circumstances existed.*

The complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and that the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.

(2) The circumstances are that:-

- a) *any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;*
- b) *any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;*
- c) *the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;*
- d) *the complainant was asleep or otherwise unconscious at the time of the commission of the act;*
- e) *because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;*
- f) *any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the commission of the act.*

(3) In subsection (2) (a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began."

27. Regarding the evidence of single identifying witness in Sexual offences, the proviso to *Section 124 of the Evidence Act* is that

“Where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.”

28. However in addition to the court relying on the evidence of a single identifying witness courts ought to be careful as to the other circumstances surrounding the case. This was reiterated in the case of **John Muriithi Nyagah v Republic [2014] eKLR**, where the court noted that:-

“The only evidence before the Court on the basis of which the trial Court convicted the appellant was by the complainant. Evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with the greatest care especially where the life of an accused person is at stake and the predecessor of this Court in the case of Abdala bin Wendo and Another V.R. [1953] 20 EACA 166, held that what is needed in such circumstances is “other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, though based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

29. One of the essential ingredients in proving the offence of rape is penetration. In this case the evidence of the complainant was the only evidence that guided the trial court in convicting the appellant. Her identification was all that the investigating officer used in arresting the appellant. All the witnesses testified that they were informed by the complainant of what had transpired. However the testimony by the Clinical Officer, which is very crucial in such offences was that penetration could not be ascertained because the complainant was a sexually active adult who was at the time of examination on her menses. In addition to that, the complainant took a bath before she proceeded to get a medical examination carried out on her allegations, hence the findings in the treatment notes (pexhibit) that no spermatozoa was seen. In this court’s considered opinion, there was reasonable doubt as to whether the complainant was raped. Secondly, her conduct after the alleged ordeal was what I can call strange. The conduct may have been influenced by ignorance, but then ignorance is not a defence in law. The appellant may very well have committed the offence but the evidence did not flow properly to fix him to the commission of the same.

30. On the basis of the above, and in light of the statutory provisions cited above, I find and hold that the conviction of the appellant was not safe.

31. For the reason that the conviction of the appellant was not safe, I allow the appeal, quash the conviction and set aside the sentence of 10(ten) years imprisonment. Unless he is otherwise lawfully held, the appellant shall be released from prison custody forthwith.

32. Orders accordingly.

Judgment written and signed at Kapenguria

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on 20th day of December, 2018

HON. A. MSHILA

JUDGE.

In the Presence of

In person for the state

None for respondent

Rahab – Court Assistant



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