Case Number:	Criminal Appeal 12 of 2008
Date Delivered:	14 Dec 2009
Case Class:	Criminal
Court:	High Court at Malindi
Case Action:	Judgment
Judge:	N/A
Citation:	KOMBE KITI v REPUBLIC [2009] eKLR
Advocates:	-
Case Summary:	Criminal Law- Rape-convicted on a charge of rape contrary section 140 Penal CodeCriminal Law-Appeal- Sentence-the conviction and sentence -mitigating factors-leniency-whether the judge while looking back into the evidenced adduced erred in law since the appellant only appealed against the sentence and not evidence adduced-validity of orders
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 12 of 2008

KOMBE KITI ….……..... APPELLANT

- Versus -

REPUBLIC…….…….… RESPONDENT

J U D G M E N T

Kombe Kiti alias Kitusi (hereinafter referred to as the appellant) as convicted on a charge of rape contrary section 140 Penal Code and sentenced to serve ten years imprisonment.

The appellant had denied the charge whose particulars were that on 24th day of August 2005 at about 11.00pm in Malindi District, unlawfully had carnal knowledge of K.M, without her consent. She testified as PW1 and told the trial court that on 24-8-05 at about 11.00pm, she was walking home accompanied by K.N (a woman) when they found the appellant at the road – he was drunk. They walked on not realizing that appellant was following them when they got near a school, PW1 went to answer a call of nature and upon getting back to the road, she met appellant who told her to stop – she did not. There was moonlight. PW1 had a lesso slung over her shoulder, which the appellant pulled from behind. PW1 turned and faced appellant and each begun pulling at the lesso. When he was about to outdo her, Pw1 raised the alarm as K was ahead. Appellant held PW1 by the throat and knocked her down. K rushed back, appellant tore her underpants and forced her into sex thereby raped her. People came and appellant fled. PW1 told the trial magistrate she did not consent to the act. A vigilante group helped to track and arrest the appellant.

PW1 threw away the torn panty and took a bath before going for a medical examination.

On cross-examination PW1 stated that she used to see the appellant at Jeisi, at the shopping centre of M, she used to see the appellant, as she went about in the village – such that she knew the appellant by physical appearance but not by name.

She had gone for a long call of nature, so K had taken a few steps forward to go and wait for her. K.N (PW2) confirmed having accompanied PW1 on the night of 24-8-05 – PW1 is her aunt. Her evidence is similar to that of PW1 about their movement and she says she saw the appellant as he held PW1 and when PW1 screamed, PW2 rushed to her and that appellant produced a knife, while PW1 was on the ground, so PW2 screamed, and other people came and he fled PW1 informed her that she had been raped.

On cross-examination PW2 confirmed that she knew the appellant as his step mother is PW2's sister and she had known the appellant for two years. She said *"I saw you feel her and hold her"*.

Joel Gerald Mutiria (PW3) a member of a community policing group, was on patrol with Daniel Mango, when they heard the voice of a woman shouting. They ran towards the direction of the sounds and as they got to the scene, they saw someone flee into a bush. They found PW1 who told them she had been raped by the man – whom PW3 knew as he was from the village and PW3 gave his name as Konde Kiti saying:

"The man is called Konde Kiti, and other many names he uses."

They traced and found appellant at 4.00am hiding in a bush. It was his evidence that upon arrival at the scene PW1 was just rising up from the place she had fallen and been raped. Daniel Mangi Yaa (PW4) a member of the community policing group stated as follows;

"upon arrival there, we saw accused and he was armed and we retreated. He was armed with a knife…we saw the woman he had raped, and she had bruises…"

PW4 also confirmed on cross-examination that he knew the appellant very well and that they found him as he was getting away from PW1 and appellant had a knife. Further, that when PW4 first saw appellant, he was just rising from PW1.

Pc Mwalimu Abdalla (PW5) collected the appellant from the village elders in M and that the doctor said there was no need to examine appellant. Dr. Anisa Ahmed Omar (PW6) who produced the P3 form on behalf of Dr. Wambeya told the trial court that on examination by PW1, there were no physical injuries of the genitalia, and no blood discharge. The injury was not quite classified.

The appellant in his defence told the trial court that on 24-8-05, he was at his place of work where he worked as a wine tapper, when the complainant went there with her friends. They ordered for two bottles of wine and discussed land matters with the appellant and a misunderstanding arose and the next morning he was arrested on allegations of having raped PW1. He denied having raped or even had the intention of raping PW1, saying it was all about land.

The trial magistrate took into consideration the fact that PW1 had thrown away the alleged torn underpant, and that the P3 form was of no probative value as it did not show any injuries. He also considered the appellant's defence and said there was no evidence of his encounter with PW1 at a m club and that in any case that evidence was rebutted by the evidence of PW2, PW3 and PW4 who were all eye witnesses. He noted this

"Complainant is an adult and a grandmother. She knows what rape is. She said accused raped her. Absence of spermatozoa is explained. She washed as she could not sleep with the contamination as she called it. Absence of spermatozoa is not absence of evidence of rape. I do believe PW1, PW2 and PW3 as well as PW4 as facts at witness. The evidence is consistent, mutually corroborative and firm"

Appellant contested the conviction and sentence which basically seemed to be mitigation and appeal for leniency. However as a court of first appeal, I am duly bound to examine the entire

evidence and consider whether conviction was proper. Appellant relied on written submissions saying although the offence was not proved, he was found guilty and could only express remorse and urge the court to reduce his sentence saying the sentence was harsh and excessive especially for one who was a first offender.

From the evidence on record, the offence took place at night, only PW1 referred to there being moonlight, however an encounter between appellant and complainant on the said date, at exactly the time stated by PW1, did take place (as even confirmed by the appellant) – only that whereas PW1 said it was along the road, appellant said it was at a m club. There were witnesses who claimed to have seen the appellant at the scene on the road, although they did not disclose how they were able to see and identify or/recognize him at that hour of the night, which would by all normal standards be dark. This however did not rule out the fact that there was an encounter between appellant and the complainant.

The learned trial magistrate also correctly found that the P3 form was of no probative value as it made no significant finding regarding the complainant – no evidence of injuries to the genitalia and no classification of any injury. So how then did the trial magistrate come to the conclusion that rape was proved" Certainly the absence of spermatozoa does not in itself prove the absence of rape – yet one merely claiming that she has been raped, is not proof either. There must be evidence of penetration – yet it seems the medical examination made no such finding. Indeed even the undergarment which appellant purportedly tore was not available for examination or presentation as exhibit in court and it seems there were no efforts made by police to go back to the scene and look for/recover the same – if at all it had been thrown away by the complainant. So what proved that PW1 had been raped, apart from her alleging so" The answer truly is that there is no proof, the trial magistrate simply believed there was rape because PW1 is an adult and a grandmother so if she says she was raped, then she must have been raped.

But perhaps one would wish to consider other evidence of the prosecution witnesses – did any of them witness appellant raping or doing acts consistent with rape"

PW2’s evidence on cross-examination was that:

“I saw you feel her and hold her”

In her evidence in chief she stated:-

"As she (PW1) returned from answering a call of nature, she was grabbed by accused in the deck….I saw accused as he held auntie…...accused took out a knife while she was on the ground…auntie told me he raped her….the accused run off"

It was not established in the evidence before the trial court what this "feel her" is all about – was it a caress, was it an indecent touching of the complainant's body parts, was it a body search"

Then there is the position of complainant – being on the ground, did that prove that appellant had raped her" Did PW2 for instance notice a shift or adjustment by the appellant of his trousers, so as to enable the trial court find that appellant had raped PW1.

It is significant that when PW3 arrived all he saw was PW1 rising from the ground and appellant running away – whether she had just been raped, or just been pushed onto the ground, could not be established by what PW3 saw. At the end of answers in cross-examination he said *"When I first saw you, you were rising from her"* - rising from complainant in relation to what- having forcefully had sex with her, or having knocked her down and preparing to rape her, assault her, rob her – Those possibilities were not resolved by the trial magistrate.

My re-evaluation and re-assessment of the evidence tendered before the trial court is that the evidence did not sufficiently prove a charge of rape and suggested several possibilities of what may have taken place in the encounter between appellant and complainant. Subsequently I find that the conviction was not safe and I quash it. It thus follows that the sentence must be set aside, and appellant shall be set at liberty forthwith, unless otherwise lawfully held.

Delivered and dated this 14th day of December 2009 at Malindi.

H. A. OMONDI

JUDGE

14-12-09