Lokolon v Republic (Criminal Appeal E056 of 2021)
[2023] KEHC 19383 (KLR) (27 June 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E056 OF 2021

FR OLEL, J

JUNE 27, 2023

BETWEEN

EVANS TUNYAN LOKOLON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of Rape contrary to section 5 of the *Sexual Offence Act* No. 3 of 2006. The particulars of the offence were that on the 2nd day of January 2019 within Nanyuki township in Laikipia County of the Republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of NK

2. On the alternative charge, the appellant was charged with committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offence Act* No.3 of 2006. The particulars of the offence were that on the 2nd day of January 2019 in Nanyuki township within Laikipia County of the Republic of Kenya, intentionally and unlawfully committed an indecent act with an adult by touching the breasts of NK.

3. On count two the appellant was charged with assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars of the offence were that on 2nd day of January 2019 in Nanyuki Township in Laikipia County of the Republic of Kenya wilfully and unlawfully assaulted one NK causing her actual bodily harm.

4. The prosecution called three (3) witnesses who testified in support of the prosecution case. The appellant was put on his defence and gave unsworn statement. The trial magistrate considered all facts and found the appellant guilty of the offence of rape and convicted him on the same, but acquitted him under section 215 in respect to count 2 for the offence of assault contrary to section 251 of the *penal code*. The trial court proceeded to sentence the appellant to serve 15 years imprisonment. The

sentence was to run from the date of plea and detention being 7th January 2019. The appellant filed his petition of appeal on 29th September 2021 and raised the following grounds of appeal namely;

a. That the learned magistrate erred in matters of law and fact by failing to note that the prosecution evidence was contradicting, inconsistent and uncollaborated.

b. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution failed to prove their case to the required standards.

c. That the learned trial magistrate erred in matters of law and facts by failing to note that key witnesses were not available to testify.

d. That the learned trial magistrate erred in matters of law and facts by failing to note that the evidence tendered by the prosecution was insufficient to sustain and secure conviction

Facts of the Case

5. PW1 NK testified that she resides within Nanyuki town. On 2/1/2019 she was with her auntie's daughter called DL and had gone to harvest grass from Mindee farm, which was to be used to make their manyatta. They had harvested the grass for about 30 minutes, when the appellant appeared. He was wearing a blue shirt, blue trouser, brown shoes with black socks. He was tall, had a dark complexion and had a mark on the left side of his forehead. The appellant told them to stop harvesting the grass as that was a private farm belonging to a Whiteman. PW1 stated that they apologized and told him they needed the grass to repair their manyatta and if they had done a mistake, they were sorry.

6. The appellant insisted that they go with him to his employer. Her niece DL started to follow the appellant but she stopped her. The appellant got annoyed and removed his knife and at that point he told DL to go home least he cut her with a knife. She left and went outside the fence. The appellant then told PW1 that "*nipee*" as he pointed to her private parts. She told the appellant that she was married and had a small child but that did not deter the appellant who proceeded to hold her hand despite her resistance. The appellant slapped PW1 on her right cheek. PW1 further testified that she started to shout/scream continuously and the appellant asked her if she was shouting "*at her mother*". In the process PW1 testified that she managed to free herself and started to run away. The appellant followed her with the knife in hand and tried to hit her with it.

7. The appellant managed to catch up with PW1 and a struggle ensued. He was trying to pin her on the ground and initially was unable to do so. Finally, he manged to trip PW1 by her legs and she fell down. She testified

> " *akanitenga mguu akaniangusha chini*",

while doing so his hands grabbed PW1 throat and he placed a knife on her throat and warned her against shouting for help. The appellant proceeded to remove her panty and small shorts which she had worn. In the process her panty got torn due to the force applied, after removing her panty the appellant spread her legs and used his private part to rape the complainant. PW1 specific evidence was that;

> " *Alitumia kitu yake ya shemu yake ya siri. Aliingiza kitu yake kwa yangu kwa sehemu ya siri*."

> " *Aliingiza kitu yake kwa yangu ambayo mimi utumia kuzaa mtoto. The accused raped me for 30 minutes. All along, when the accused was raping me his knife was placed on my throat."*

8. After the ordeal, he asked PW1 if she had a husband and if she confirmed she did, he would kill her. She replied that she did not have a husband. The appellant released her and told her to get up and go away without looking back. PW1 also testified that the appellant did not use protection while raping her.

9. PW1 further testified that she took her panga and went away. She met PW2 outside the fence and went home while crying. Upon arrival at home, she narrated what happened to her husband (KL) and reported the incident at Kariunga police community patrol base and later was treated at Nanyuki General Hospital. She identified her cloths which she was wearing on the material day, when the incident occurred and the P3 and PRC form. She finished her testimony by stating that she was 20 years old having been born in 1997 and identified the appellant as the person who raped her. In cross examination she stated that there were no witnesses when the incident occurred, but she could identify the accused person as the person who raped her from his appearance and the mark on the face.

10. PW2 DL underwent voire dire examination and was sworn. She stated that she was 13 years old and was a pupil in class 7 at [Particulars Withheld] Primary School. She recalled that on 2/1/2019 at about 2.00om her aunty PW1 called her and requested her to accompany her to go and harvest grass to be put on the house. While at the farm (mindee) a male person appeared and told them to stand up. The man was in a blue t-shirt, blue trouser and brown shoes. He also had a mark on the forehead. When they stood up the man snatched their panga and told them to go to his boss's house (white man) as they were spoiling his work. They asked for forgiveness and mercy but he retorted that they could not be forgiven as they had a habit of harvesting grass. He then told PW2 to pick up her rope and grass and proceed to go home.

11. The man arrested PW1 for being stubborn, while she left and went to wait for PW1 near the "*shamba*". She noted that the appellant had a knife tied on his waist and told PW1 to accompany him to the white man's house. PW2 testified that she waited for PW1 near the fence and she came back after 30 minutes while crying. They went home. She stated that she could properly identify the appellant due to his height, the mark on his forehead and his complexion was dark. PW2 also identified the clothes worn by PW1 on the said date. In cross examination she stated that she had seen the appellant before and where the incident occurred, was not near the white man's house. They could not call for help.

12. PW3 PC Jeremiah Wangila testified that he was stationed at Tarura Patrol base, under Nanyuki police station and was the investigating officer in the case. On 2/1/2019 at around 3.50pm a report was made by PW1 that she had been raped. He recorded PW1 statement and directed her to go for medical check-up at Nanyuki county hospital. According to information received, PW1 had gone to fetch grass and she met a person who forcefully grabbed her and raped her while using a knife to threaten her. PW1 was also accompanied by PW2 but the assailant had directed PW2 to leave the farm and the rape incident occurred thereafter. PW1 was issued with P3 form and he informed her that in case she met the person who raped her, she should immediately contact him via mobile phone.

13. On 4/1/2019, while at work, he received information that the appellant had been seen at Jua kali market going on with his normal business. He went to Jua kali market and met PW1 and her husband who directed him to the shop where the appellant was and he arrested the appellant upon being identified by PW1. He preferred the charges against the appellant before court. Further he testified that he was the one who recorded the OB no.3/2/1/2019 when PW1 reported the incident and she was traumatised though he did not see any visible injuries.

14. PW3 produced the OB report, panty and clothes worn by PW1 on the incident date. In cross examination PW3 stated that the appellant was arrested after being identified by PW1. He did not ask PW1 why the dark complexion alleged turned to be light skin. The appellant was arrested two days after the incident.

15. The prosecution case was closed without calling the clinical officer to come and testify. The appellant was placed on his defence and gave unsown evidence. He testified that on 4/1/2019, he took a vehicle to jua kali and alighted to go and eat. He was arrested by the police over allegations he did not know about. He did not know the complainant and denied the charges as levelled. The trial magistrate, in his considered judgment found that the appellant was guilty on count I being offence of rape and sentence him to 15 years imprisonment.

Appellants Submissions

16. The appellant field his submission on 18th June 2023 and submitted that the charge sheet was defective as section 5 of the *Sexual Offence Act* no.3 of 2006 dealt with Sexual assault exclusively and not rape. The trial court thus misconstrued pertinent provision of the law in the section for which the preferred offences and charges were framed and urged this court to quash the conviction as it was based on a defective charge sheet. The appellant also urged court to look at section 134 of the *Criminal Procedure Code* which stated that the charge or information MUST contain a statement of specific offence. In this instance the wrong section of the law was applied and reiterated that this made the charge sheet defective as the trial court could not fill in, amend or modify such shortcoming in the charge sheet.

17. The appellant also submitted that the medical officer Steve Mugo did not testify despite several adjournments given to the prosecution that a conviction of the offence of rape could not be reached without a medical report which was a fundamental document. The trial magistrate was wrong to hold that he could convict without a medical report being produced and section 124 of the *Evidence Act* could not be a shield for the miscarriage of justice which occurred. Reliance as placed on Court of Appeal at Nyeri Criminal Appeal No. 115 of 2001[205] KLR 175 *Bore Mohammed v Republic* where it was held that

> "where there as insufficient evidence to support a conviction and a material witness was not called, the presumption was that evidence of that witness would not have favoured the prosecution."

18. The final issued raised in submission was that the appellant was not properly identified as the perpetration of the rape offence and identification was not proved beyond reasonable doubt. There could be an element of error as the victim was traumatized and mistook the appellant as her attacker. PW3 also did shoddy investigations and failed to adduce evidence of whereabouts of the appellant on the material day the attack took place nor was it established that he worked for a Whiteman.

19. The appellant also submitted that since PW1 and PW2 were total strangers it was logical that an identification parade should have been carried out to rule out any error. This unfortunately was not done and the trial magistrate wrongly relied on dock identification which disadvantaged the appellant. Further it was trite law, that unless a victim gives a description of her attacker beforehand in her first report and the description fits the suspect then it cannot be said that she made no error in identifying her attacker. In this instant appeal PW1, PW2 and investigating officer on alluding to dark man with a scar on his forehead. A description that failed to match the appellant who had a distinct "scar on his chin" but none on the forehead. He also submitted that he was light skinned and not dark skinned as alleged by PW1 and PW2. Reliance was placed on *Gabriel Kamau Njoroge v Republic* [1982 – 1987] KAR 1131, and *Amolo v Republic* [1991] 2 KAR 254 and *Republic v Tumbull* (1976) 3 ALL ER 349.

20. The appellant concluded by stating that the evidence presented was not cogent and water tight. Identification was not proved and thus he should have been given benefit of doubt as the burden of proof was not discharged.

Respondents Submissions

21. The Respondent file their submission on 23/1/2023 and stated that it was proved that the appellant had forceful sex with PW1 without her consent, there was penetration as proved by PW1 evidence and finally the appellant was positively identified by the appellant as the perpetrator. The incident took place at daytime and it took about 30 minutes which was enough time to adequately identify a person. Finally, on the sentence imposed it was lawful and not excessive. The respondent prayed that this appeal be rejected and conviction and sentence be upheld.

Analysis and Determination

22. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See *Okeno v Republic* [1972]EA 32 & *Pandya v Republic* [1975] EA 366.

23. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (*Shantilal M. Ruwala v R* (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

24. In the case of *Republic v Edward Kirui* [2014] eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & another v State by Prosecutor, Tamil Nadu & Another* [2008] INSC 1688 where the case of *Bhagwan Singh v State of M. P* [2002]4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

25. The appellant initially filed six (6) grounds of Appeal, but later amended the same and filed it together with his submission on 18th January 2023. The new grounds of Appeal raised were that;

    (a) That the learned Magistrate erred both in law and facts by failing to note that the charge sheet was defective, for non – conformity with the evidence adduced as per provisions of the *Evidence Act*.

    (b) That the learned trial Magistrate overlooked the vital evidence of the medical officer in a sexual offence case of this magnitude and the same was never availed to testify.

    (c) That the learned trial Magistrate failed to comply with the provisions of section 107 of the *Evidence Act.*

    (d) That the learned trial Magistrate failed to comply with the police standing orders that pertains identification of suspects/strangers in a criminal case especially in the instance case whose magnitude is profound.

A. Defective Charge sheet

26. The appellant contends that the charge sheet relied on by the trial court to convict him was defective as the charge sheet indicated that he was being charged with the offence of rape contrary to section 5 of the *Sexual Offences Act*, which dealt with sexual assault exclusively and not rape. The charge sheet should have indicated section 3(1), (a), (b) & 3 of the *sexual offences Act* No 3 of 2006 and to that extent the charges as framed were defective and the charge sheet ought to be quashed.

27. The appellant further submitted that section 124 of the *criminal procedure code* provided that the charge or information MUST contain a statement of specific offence(s) with which an accused is charged and information to demonstrate the nature of the offence charged. The information too must cite the correct provisions of the law. In this instance, the wrong section was applied thus making the charge sheet fatally defective. The trial court could not fill in and amend, expound or modify the same to rectify such shortcomings.

28. In determining whether a charge sheet is defective or not the Court of Appeal in *Sigilani v Republic* [2004]eKLR 480 held as follows;

> " The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clean and unambiguous manner so that the accused maybe be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

29. On the other hand, section 134 of *Criminal Procedure Code* provides for what the components/ ingredients of the charge sheet constitutes;

> " Every charge sheet of information shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

30. In the case of *Isaac Omambia v Republic* [1995] eKLR the court of Appeal considered the ingredients necessary in a charge sheet and stated as follows;

> " In this regard, it is pertinent to draw attention to the following provisions of section 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of a charge. Every charge or information shall contain and shall be sufficient, if it contains a statement of the specific offence of offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

31. Further to Court of Appeal in *Peter Ngure Mwangi v Republic* [2014]eKLR quoted with approval that Isaac Omambia case or further stated that;

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from *Archbold Criminal pleadings, Evidence and Practice* (40th Edition) page 52 paragraph 53, this court stated in *Yongo v Republic* [198]eKLR that
>
> > " In England it has been said; an indictment is defective not only when it is bad on the face of it but also;

i. When it does not accord with the evidence before the committing magistrate either because of inaccuracies or deficiencies in the indictment or because the indictment charges/offences not disclose in the evidence or fails to charge an offence which is disclosed therein.

ii. When for such reason it does not accord with the evidence given at the trial."

32. The court of Appeal in *Benard ombuna v Republic* addressed the issue of a defective charge sheet in the following terms;

> "In a nutshell, the test of whether a charge sheet is fatally defective is subjective rather than formalistic. Of relevance is whether a defect on the charge sheet prejudices the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

33. In *BND v Republic* [2017] eKLR it was held as follow's

> "our case law has given crucial pointers. Two cases are pertinent: the case of *Yosefa v Uganda* [1969] EA 236- a decision of the court of Appeal- and *sigilani v Republic* [2004] 2 KLR 480- A high court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence ... The answer from our decisional law is this: The test whether a charge sheet is fatally defective is a substantive one: was the accused person charged with an offence known to law and was it disclosed in a sufficient and accurate fashion to give an accused adequate notice of the charges facing him? If the answer is in the affirmative it cannot be said in any way other than a contrived one that the charges were defective ... The question is did this prejudice the appellant and occasion miscarriage of justice? I do not think so. There is no question in my mind that the accused person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him."

34. Section 382 also gives guidance on whether even with such defect justice could still be met or whether the defect is curable. Section 382 of the *Criminal Procedure Code* provides that;

> "subject to the provision's hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revered or altered on appeal or revision on account of an error, omission, or irregularity in the complaint, summons, warrant, charge proclamations, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question of whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings" .

35. Applying the above test, it is clear that the appellant fully participated in the proceedings and cross examined all the witnessed. This denotes that he understood the particulars of the charge he faced. The

appellant also did not raise any objection as to the facts raised in the charge sheet and a such cannot be said to have been prejudiced in any manner. This ground of appeal therefor cannot hold.

B. Burden Of Proof

36. The appellant did further submit that the trial magistrate overlooked vital evidence of the medical officer, who was never availed to testify. It was his contention that the trial magistrate failed to comply with provisions of sec 107 of the *Evidence Act*.

37. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller v Ministry of Pensions* [1947] 2 All ER, 372 stated as follows;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

38. The conceptual framework for burden of proof to be discharged by the prosecutor is beyond reasonable doubt. Viscount Sankey LC in the case of *H.L Woolmington v DPP* {1935} A.C. 462 pp 481 did describe burden of proof in criminal matters as;

> " Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defendant's insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether {the offence was committed by him} the prosecution has not made out the case and the prisoner is entitled to be acquittal. No matter what the charge or where the trial, the principal that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

39. Under section 3(1) of the *Sexual Offences Act* No 3 of 2006,

> " A person commits the offence of 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."

40. The ingredients of the offence of rape includes intentional and unlawful penetration of the genital of one person by another, coupled with absence of consent. In *Republic v Oyier* {1985} KLR pg 353 the court of Appeal held that;

a) The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not state of mind. The mental element is to have intercourse without consent or not caring whether the woman has consented or not.

b) To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

c) Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the facts.

41. Section 3{1} of the *Sexual Offences Act* should be read jointly with sections 42 and 43{1} of the same *act*, which sections explain the meaning of consent, coercive circumstance's, and false pretence.

42. The appellant did testify that on 2nd January 2019, while accompanied by her Aunties daughter one Disani Lenato they decided to go harvest grass from Mindee farm. After harvesting grass for about 30 minutes the appellant came and told them to stand up. They complied. He demanded to know who gave them permissions to harvest grass from the white man's farm. They profusely apologised but the appellant would not hear of it. He demanded they follow him to his employer's home. Her niece complied and started following the appellant but she stopped her from going, which act infuriated the appellant. The appellant removed a knife and directed the complainant's niece to go home. She left and went outside the fence.

43. The appellant remained with the complainant and told her in Kiswahili; "*Nipee ee*", while pointing at her private part. PW1 answered that she could not do that as she was married and had a small child. The appellant held her hand, but she told him not to touch her. He could take her to the white man's house but she warned him against touching her. The appellant then slapped PW1 who started to shout/ scream. In the process PW1 managed to free herself from the appellants grip and started to run away. The appellant followed her while waving the knife at her and trying to hit her with it.

44. The appellant caught up with PW1 and she started struggling to free herself again. He tried put her down on the ground but she resisted, he eventually grabbed her by her throat and used his legs to twist her legs and fell her down. In her words PW1 stated in Kiswahili that,

> "*Akanitega mguu akaniagusha chini*".

The appellant then placed a knife on her throat and warned her against shouting, he removed her inner cloths, PW1 panty and small black short. While trying to remove her panty, he used so much force that the same got torn. The appellant then proceeded to rape the complainant. Her evidence verbatim was that;

> " After removing panty and my black short he raped me. The accused spread my leg and used his private part to rape me.
>
> *Alitumia kitu yake ya sehemu yake ya siri. Aliingiza kitu yake kwa yangu kwa sehemu yangu ya siri*
>
> *Aliingiza kitu yake kwa yangu ambayo mimi hutumia kuzaa mtoto* The accused raped me for 30 minutes. All along, when the accused was raping me his knife was placed on my throat."

45. The complainant further stated that, the appellant did not use protection while raping her. When done the appellant dismissed the complainant and told her to get up quickly and not to look back. The complainant went and found her niece who was waiting for her beyond the fence. Her niece PW2 confirmed the same and stated that the complainant came back after 30 minutes and was crying.

They went home where the complainant immediately reported the incident to her husband KL. They made a report to Kariunga police community patrol base and thereafter went to hospital. The witness identified the appellant as the person who raped her, and also confirmed the she had not seen him before the incident occurred. In Re-examination, the complainant stated that she was able to identify the appellant by his appearance and mark on the face.

46. PW2 confirmed this incident as narrated by PW1, and confirmed that the person who confronted them at the farm was the appellant. She stated that he was tall, dark and had a mark on the forehead. The witness stated that after being told to go away, she went and,

> " waited for her aunty near the shamba",

but from where she was she was unable to see her aunty and the appellant. Her Aunty came back after 30 minutes and was crying. She reiterated that it is the appellant who stopped them while at the shamba and she was able to identify him by his height, he was dark and had a mark on the forehead.

47. PW3 the investigating officer confirmed that a report was made on 2nd January 2019 at 3.50pm at the patrol base, where a rape incident was minuted. He advised the complainant to go and be attended to in hospital and later, when he got information as to where the appellant was, he went and arrested him. PW3 produced PW1 cloths as Exhibit P1 to P3 and also the OB NO 3/2/1/2019 as Exhibit 6. The appellant in his defence denied the offence and stated that the complainant was a stranger to him.

48. The appellant submitted that it was fatal for the trial magistrate to convict him while noting that the clinical officer did not testify and no medical records were admitted into evidence. There was thus no corroborative medical evidence which was fatal to the prosecution case. The magistrate had erred in using section 124 of the *Evidence Act* as a shield to perpetrate miscarriage of justice.

49. Section 124 of the *Evidence Act* provides that

> " Notwithstanding the provisions of section 19 of the *oaths and statutory declaration Act* (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

50. The trial magistrate did explain in his judgment that he believed the complainants testimony and it was corroborated by the evidence of PW2 who was also present at the scene. Both PW1 and PW2 positively identified the appellant both by the cloths he was putting on and the mark on his face. The incident had occurred in broad daylight and the parties had spent ample time in each other's presence. The appellants defence put up was made of mere denial's and he did not rebut the prosecution evidence presented as against him. For those reasons the trial magistrate found it safe to convict the appellant.

51. The trial magistrate gave reasons and recorded the same in his judgment as required under the provisions of section 124 of the *Evidence Act* as to why he believed PW1 and his decision on that score cannot be faulted. As regards the medical evidence, it is true that the clinical officer did not testify and the medical reports were not produced into evidence. Be that as it may, it is now well settled that

evidence of rape can be proved by oral evidence of the victim or by circumstantial evidence. It is not a must that it be only proved by medical evidence, though preferable the same should be provided.

52. As noted in *Kassim Ali v Republic* [2006] eKLR

> " The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or by circumstantial evidence."

53. Also in the case of *Bernard Odongo Okutu v Republic* [2018] eKLR it was held that;

> " The trial court believed the evidence of PW2 and there is nothing in cross examination or in other evidence adduced that suggested that the appellant could have been framed for the offence. Accordingly, I find that there was proof beyond reasonable doubt that the appellant defiled the complainant."

54. Nothing then turns on this ground of appeal as there was more than sufficient evidence to indeed prove that PW1 was indeed raped by the appellant and even though no medical report was produced. The totality of the evidence presented was concrete and proved that fact.

C.Identification

55. The appellant also submitted at length on this issue of identification. He stated that the law required that the perpetrator be identified beyond reasonable doubt to avoid any element of error or an innocent person being mistook by the complainant as was the case in this instant case, where a traumatized victim mistook him for her assailant and it was clearly a case of mistaken identity. The investigating officer did not prove the whereabouts of the appellant on the material day of the attack and none of the witnesses purported to have seen him anywhere within the vicinity or near the scene of crime. It was also not established that the appellant works for a Whiteman.

56. He further submitted that he was a stranger to PW1 and PW2 and logically it was necessary to conduct an identification parade to rule out error of identification. The dock identification as was carried out in this instance was inadequate and should have been disregarded. The victim had not given the description of the attacker in her first incident report and therefore it could not be said that she made no error in identifying her attacker. The investigating officer ought to have compared her earlier report to confirm that it matches perfectly with appearance of the person arrested. Anything short of that was a mockery of the court process and prejudiced the appellant. The appellant placed reliance on *Gabriel Kamau Njoroge v Republic* [1982-1989] KAR 1131 , *Amolo v Republic* [1991] 2 KAR 254, & *Rep v Turnbull*[1976] 3 ALL ER 549

57. Before addressing the question of identification, it is important to recall that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration. Human memory is not fool proof. It is not like a video recording that a witness needs only to replay to remember what happened. Memory is far more complex and has been described as consisting of three stages: acquisition –"the perception of the original event"; retention - "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval - the "stage during which a person recalls stored information."

58. At each of the above three stages the "information ultimately recovered as 'memory' can be distorted, contaminated and even falsely imagined." At each of these stages, memory can be affected by a variety of factors such as was held in *S v Henderson*:-

(a) Whether the witness was under a high level of stress. Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification.

(b) Whether a weapon was used, especially if the crime was of short duration. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of the subsequent identification if the crime is of short duration.

(c) How much time the witness had to observe the event. Although there is no minimum time required to make an accurate identification, a brief or meeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.

(d) Whether the witness possessed characteristics that would make it harder to make an identification, such as the age of the witness and the influence of drugs or alcohol. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who consumed a small amount of alcohol.

(e) Whether the perpetrator possessed characteristics that would make it harder to make an identification. Was he or she wearing a disguise? Did the suspect have different facial features at the time of the identification. The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification. Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.

(f) How much time elapsed between the crime and the identification? Memories fade with time. The more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.

(g) Whether the case involves cross-racial identification. Research has shown that people may have greater difficulty in accurately identifying members of a different race.

(h) Whether the observation of the perpetrator was close or far. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.

(i) Whether or not the lighting was adequate during the observation. Inadequate lighting can reduce the reliability of an identification.

(j) The confidence of the witness, standing alone, may not be an indication of the reliability of the identification, but highly confident witnesses are more likely to make accurate identifications. Even an identification made in good faith could be mistaken.

59. The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. Evidence from eyewitnesses plays an important role in all contested cases. However, as alluded to earlier, the memory is a fragile and malleable instrument, which can produce unreliable yet convincing evidence. Because mistaken witnesses can be both honest and compelling, the risk of wrongful conviction in eyewitness identification cases is high, and can result in injustices. Our

system of justice is deeply concerned that no person who is innocent of a crime should be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. However, the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate.

60. As was held in *Charles O. Maitanyi v Republic*, it is necessary to test the evidence of a single witness respecting to identification, and, absence of collaboration should be treated with great care. In *Kariuki Njiru & 7 others v Republic* the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

61. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

62. Further in evaluating the accuracy of identification testimony, the court should also consider such factors as: -

(a) What were the lighting conditions under which the witness made his/her observation?

(b) What was the distance between the witness and the perpetrator?

(c) Did the witness have an unobstructed view of the perpetrator?

d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

(e) For what period of time did the witness actually observe the perpetrator?

(f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

(g) Did the witness have a particular reason to look at and remember the perpetrator?

(h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

(i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

(j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

(k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

63. The trial court in assessing the demeanour of a witness is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness. The Court of Appeal in *Toroke v Republic* had this to say: -

> " It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification."

64. The evidence adduced by PW1 and PW2 was clear and cogent, the appellant found them cutting grass at Mindee farm and stopped them from doing so. He sent away PW2 and asked PW1 to go with him to the Whiteman's house. After a short distance he forcefully demanded for sex from PW1 who resisted and tried to run away. The appellant followed her and forcefully forced himself on her, while threating her with a knife placed on her throat. The incident happened in broad day light at about 2.00pm and the incident went on for about 30mins, which was more than ample time for the appellant to properly identify the appellant.

65. Both PW1 and PW2 identified the appellant with the scar on the face, and also recalled the cloths he was putting on, which was a blue shirt, blue trouser and brown shoes. Once the ordeal was over , PW1 retraced her steps back out of the farm where she found PW2, who in her testimony also confirmed that PW1 came back after about 30 minutes and was crying.PW2 also in her testimony also described the cloths the appellant was wearing and by the mark on the forehead.PW1 was a 20 year old woman who by all means was intelligent, her capacity for observation was not diminished in any manner during this unfortunate ordeal. She had a proper opportunity to see the appellant, for a reasonable long period before he violently attacked her and raped her. During the incident the appellant was lying on PW1.The proximity to him was direct and unhindered. She had clear and unobstructed view of the appellant

66. The trial court did fully analyse all the evidence and correctly found that it was safe to convict the appellant on the evidence of PW1 as corroborated by evidence of PW2. The appellant submissions that he was light skinned and had a mark on the chin and not the forehead too, doesn't change the circumstances under which his identification was noted.PW1 in re examination clearly stated that,

> " she could identify the appellant as the person, who raped me from his appearance and the mark on his face."

There was therefore no need for an identification parade to be conducted and no prejudice was occasion upon the appellant by it not being conducted.

67. The aspect of whether he was dark skinned or light skinned is subjective, as one can still be considered brown but a dark shade as compared to the complexion of a person who is brown but lighter shade. Though PW2 stated that the appellant had a mark on the for head, in re-examination PW1 was clear that he had a mark on his face. The appellant testified he had a mark on his chin, which still constitutes part of his face.

68. Having fully evaluated the evidence presented, I do find that the identification by both PW1 and PW2 was safe and free from error. There was no need to have conducted an identification parade. The court also take judicial notice that this incident occurred in a small township/farming environment where the community is small and thus it was not a coincident that the appellant was traced and apprehended within a few day.

D. Sentencing

69. The appellant appealed as against the sentence of 15 years melted out to him, though he did not make any submission on the same. Section 3(3) of the *Sexual Offences Act* No 3 of 2006 provided that any person found guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

70. The principles guiding interference with sentencing by the appellate court were properly set out in *S v Malgas* (1) SACR 469(SCA) at para 12, where it was held that;

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court ... however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".

71. Similarly in *Mokela v the State* [135/11]]2011] ZASCA 166, the supreme court of south Africa held that;

> " It is well established that sentencing remains pre eminently within the discretion of the sentencing court. The salutary principle that the appeal court does not enjoy carte balance to interfere with sentences which have been properly imposed by the sentencing court.in my view, this includes the terms and conditions imposed by s sentencing court on how or when the sentence is to be served."

72. Also in *Shadrack Kipkoech kogo v Republic* Eldoret criminal Appeal No 253 of 2003 the court of Appeal stated that;

> " sentencing is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefor an error of principal must be interfered with (Also see *Sayaka v Republic* [1989]KLR 306."

73. The appellant did not point out any error or any relevant factor or principle which the trial court did not consider nor was there any wrong principal applied by the trial magistrate while sentencing the appellant. The sentence imposed by the trial court given the circumstances of this case was proper and appropriate given the heinous nature of the offence committed by the appellant.

Disposition

74. Having considered the appeal in its entirety I do find that the same is not merited and the said appeal as against conviction and sentence is hereby dismissed.

75. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF JUNE, 2023.

RAYOLA FRANCIS OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 27TH DAY OF JUNE, 2023.

In the presence of;

Appellant

..... for ODPP

..... Court Assistant