REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 11 OF 2019

CHRIS MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(A appeal from original conviction and sentence (Hon. E Mulochi, RM), dated 27th February 2019, in Criminal Case No. 20 of 2017 in the Chief Magistrate's Court at Kajiado)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(1) (a) (b) and (3) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on the 5th day of July, 2017 at Kajiado Township in Kajiado County, he intentionally and unlawfully caused his male organ to penetrate the female organ of DS, without her consent.

2. He faced an alternative count of committing an indecent act with an adult contrary to section 11(A) of the Act. Particulars being that on the same day, 5th July 2017 at the same place, he intentionally touched the female organ of DS with his male organ against her will.

3. The appellant pleaded not guilty to both counts and after a trial in which the prosecution called 4 witnesses and the appellant's testimony, he was convicted on the main charge and sentenced to 20 years' imprisonment. He was aggrieved with both conviction and sentence and lodged a petition of appeal on 11th March, 2019, raising 5 grounds, namely:

> ***1. That the learned trial magistrate erred in law and fact when he convicted him in the present case yet failed to find that there was no medical evidence to prove the allegations raised.***
>
> ***2. That the learned trial magistrate erred in law and fact when he convicted him by relying on unsatisfactory evidence advanced by the prosecution side.***
>
> ***3. That the learned trial magistrate erred in law and fact when he relied on highly contradictory evidence to convict him instead of awarding him benefits of doubt.***
>
> ***4. That the learned trial magistrate erred in law and fact when he convicted him yet failed to find that the trial was irregularly conducted in violation of the statute laws.***
>
> ***5. That the learned trial magistrate erred in law and fact when he shifted the onus of proof against him when it fully rested on the prosecution.***

4. The appellant filed amended grounds of appeal together with his written submissions. The amended grounds of appeal were that:

> ***1. The trial magistrate erred in law and fact by holding that the prosecution's case had been proved beyond reasonable doubt yet they had consensual sex***
>
> ***2. That the trial magistrate erred in law and fact in not appreciating tight his fundamental rights to a fair trial were grossly violated***
>
> ***3. That the trial court erred in law and fact by prematurely admitting evidence of character during the proceedings in***

contravention of section 57(1) and (2) of the Evidence Act

4. That the trial court erred in law and fact by failing to declare PW1 an incredible (sic) witness whose testimony could not be trusted

5. The trial court erred in law and fact by failing to consider his water tight defence

6. That the trial court erred in law and fact by imposing a harsh sentence beyond the minimum statutory sentence.

5. In the written submissions, he argued that the trial court was wrong for not finding that the prosecution did not prove its case beyond reasonable doubt, and that the evidence could not sustain a conviction for the offence of rape. The appellant also argued that his constitutional right to affair trial was contravened occasioning him injustice and prejudice.

6. On grounds 1 and 2, the appellant argued that there was no conclusive proof of non-consensual sex. According to him, there were no spermatozoa after PW1 was medically examined after the alleged offence. The appellant argued that PW1 was drunk, hysterical and distressed. She could therefore not afford the shame of having been caught in the act and that was why she alleged that he had raped her yet they had consensual sex. He also argued that the contention that there was a knife that he used to threaten the complainant was an afterthought, since a dwelling house ordinarily has such items.

7. He relied on ***Mary Wanjiku Gichira v Republic*** CRA No. 17 of 1998, for the argument that suspicion however strong cannot be the basis for inferring guilt. A case must be proved by evidence. He also relied on ***Thomas Patrick Cholmondeley v Republic*** [2008] eKLR on what should be done where one has been arrested under reasonable suspicion.

8. On ground 3, the appellant argued that an accused is criminal law's most favourable child who enjoys a fundamental right against innocent conviction. He relied on ***Elizabeth Waithegani Gatimu v Republic*** [2015] eKLR Para.17 to argue that any benefit of doubt should go to an accused and that the guilt must be proved beyond reasonable doubt. He also relied on section 57 of the Evidence Act to argue that admission of evidence of bad character was unlawful and prejudicial.

9. Regarding ground 4, the appellant argued that PW1 was an unreliable witness. According to him if PW1 was raped, she could have raised an alarm when she was being taken out of the bar. He relied on ***Ndungu Kimanyi v Republic*** CRA. No. 27 of 1979, that a witness on whose evidence it is proposed to rely, should not create an impression in the mind of the court that he is not straightforward. On ground 5, he submitted that his evidence was not rebutted.

10. On sentence, the appellant argued that the sentence imposed was harsh, given that there were no aggravating circumstances. He also argued that the trial court did not take into account the period he had spent in remand awaiting trial as required by section 333(2) of the Criminal Procedure Code. He relied on ***Musyeki Lemoya v Republic*** [2014] eKLR (Para. 7)**.**

11. Miss Ireri, learned prosecution counsel, relied on their written submissions dated and filed on 2nd October, 2020. In the written submissions, it was argued that the prosecution proved the ingredients of the offence namely: penetration, use of force and identity of the offender.

12. On penetration, it was argued that the evidence of PW1 confirmed that the appellant raped her twice, thus there was penetration. PW4 testified on behalf of his colleague who examined PW1 on 5th May, 2017 and confirmed that there was presence of discharge from external genitalia which was consistent with penetration.

13. Regarding consent, it was submitted that there was use of force which could be deduced from the appellant's actions. It was submitted that PW1 testified that the appellant used force and threatened her with a panga. With regard to the identity of the attacker, it was submitted that the appellant was arrested at the scene after the police had been notified of the incident and proceeded to the house. The prosecution therefore opposed the appeal, supported conviction and urged the court to dismiss the appeal.

14. I have considered the appeal, submissions and the impugned judgment. I have also perused the record of the trial court and the evidence on record. This being a first appeal, it is by way of a retrial and this court has a duty as the first appellate court, to reevaluate, reanalyze and reconsider the evidence afresh and come to its own conclusion on it. The court should also bear in mind that it did not see the witnesses testify and give due allowance for that. (See ***Okeno v Republic*** [1972] EA 32).

15. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and 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 had the advantage of hearing and seeing the witnesses."

16. In ***Kamau Njoroge v Republic*** [1987] eKLR, the Court of Appeal also stated:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court

cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

17. The Supreme Court of India underscored this duty in ***Garpat v State of Haryana*** (2010) 12 SCC 59 stating that:

"***The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."***

17. PW1, the complainant, testified that on 4th July, 2017 at 11 p.m., she asked Daniel Kantai, a boda boda rider to take her to a bar on her way home. She found three other patrons in the bar. She took a seat and started enjoying herself. At about 3 a.m. she decided to leave and asked Daniel to take her home. Outside the bar she found other boda boda riders who started pulling her but she told them off and left. When they reached Backyard Night Club, they were accosted by the appellant and another person who blocked them using a motor cycle. One of the men was armed with a knife. The appellant held her on the wrist and twisted it. Daniel sensed danger and took off leaving her behind. The appellant and his accomplice sandwiched her on a motor cycle and took her to a house within Kajiado Town. The appellant was armed with a panga.

18. The appellant locked her in and left briefly. The appellant's accomplice came and told her to run away. As she left the room, she met the appellant near the door. He forced her back and locked her in. He again left for about 20 minutes. When he came back, he asked her to undress but she refused. He started to strangle her. She removed her top. He tried pull her closer but she picked something from the ground and hit him. He again started strangling her. He started to pull down her trousers. She pleaded with him to let her go to no avail. She then told him that if he must rape her he should use a condom. He put on a condom and proceeded to rape her. Suddenly someone knocked on the window and asked him to open the door. He opened the door to the room got out of the room and climbed onto the ceiling. She started shouting. The police broke the door and arrested the appellant who was hiding in the ceiling.

19. PW2, No. 63071 SSgt. Joseph Osure, testified that on 5th July, 2017 at about 6.30 a.m. while at the station, a boda boda rider reported that while taking a lady pillion passenger home that morning, they were accosted by two men one armed with a knife. He ran away leaving the lady passenger behind. He saw the attacker take the lady into a house at Majengo within Kajiado town. He recorded the report and left together with a fellow officer, PC Ndungu and the rider to the house. They broke the door to the house after the people inside refused to open the door, entered the house and found PW1 in the house naked. They arrested the appellant who was hiding in the ceiling. They took the two to the station. PW1 appeared drunk, was distressed and hysterical.

20. PW3 DR. Yatib Abdi who testified on behalf of Dr. Chesoni, told the court that PW1 was reported to have been raped. On examination, she was in fair condition and appeared slightly drunk. He produced P3 form on PW1 and also the appellant who had blood oozing from his left ear.

21. PW4, No. 96209 PC Doreen Nkatha Nyaga the investigating officer, testified that on 5th July, 2017 she was instructed by the OCS to take over investigations of a rape case. She went to the report office where she found PW1 and the appellant. PW1 appeared drunk. Her trouser was torn. She assisted her with a veil to cover herself. She took both PW1 and the appellant to hospital for examination. It was established that PW1 had been raped. She recorded statements and charged the appellant with the offence. She produced the knife and jeans as PEX 2 and 3.

22. On being put on his defence, the appellant testified on oath that on 4th July, 2017, he was chewing Miraa at Makuyu bar when PW1 walked in and appeared drunk. She sat near him. He started seducing her and bought her some wine. They enjoyed themselves up to 3 pm. She told him that if he was interested in her he would have to take her to his house. They left the bar at 4 a.m. for his house. They boarded a motor cycle and left. In the house, PW1 told him that she would not have sex without a condom. He left to look for a condom and some cigarettes. He came back and they had sex till 6 a.m. When he left the house to buy breakfast, he saw a police vehicle pass by. It stopped and police officers called him. They told him that he was suspected of selling stolen items and bhang and arrested him. They went with him to his house where they found PW1. They searched his house, took his laptop, phone and bhang from the house. They were taken to the police station and later to hospital. He was thereafter charged with rape. He denied knowledge of the knife (PEX2) or hiding in the ceiling. He maintained that they had consensual sex.

23. The trial court considered the evidence and was satisfied that the prosecution had proved its case beyond reasonable doubt. It convicted the appellant for the main count and sentenced him triggering this appeal.

24. I have reevaluated the evidence on record and considered it myself. The appellant does not contest the fact that he had sex with the complainant. His argument as can be deciphered from his defence and arguments on record was that they had consensual sex and for that reason, the trial court was in error in convicting him for rape. That therefore does away with the issue of penetration and identity of the attacker leaving the issue of whether there was consensual sex.

25. The evidence of PW1 was that she went to the bar and found three patrons. She sat on a table and started enjoying herself. She later left the bar and Daniel Kantai was taking her home when they were accosted by the appellant and another man armed with a knife. They took her to a house where she was locked in. After the appellant left, the other man went and asked her to run away. As she was getting out, she met the appellant at the door. He took her back, locked the door and raped her. She tried to resist but she was overpowered. She however managed to hit the appellant with an object she picked from the ground. Later police came and arrested the appellant and took them to the station.

26. The evidence of PW2 was that they were alerted by a boda boda rider about his pillion passenger who had been taken to a house after they were accosted by armed men and he had run away leaving the lady. He took them to the house and they found the lady in the house naked. They broke the door, entered the house and arrested the appellant who was hiding in the ceiling.

27. PW3, the doctor who produced the P3 form filled by a colleague, testified that the P3 form showed that she had a swelling on the left side of the forehead and tenderness on her wrists. Her cloths were dirty. I have seen the P3 form produced as PEX 1. It showed that both labia manora and majora were lacerated, there was no hymen and there was clear discharge from her private parts.

28. The appellant argued that PW1 found him in a bar and after enjoying themselves, she agreed to go with him to his house where they had consensual sex. He denied raping her and stated that they voluntarily had consensual sex. He also denied using force or threatening her with a Knife.

29. As already stated, the appellant does not deny that he had sex with the complainant. His case was that they had consensual sex which could not be termed as rape. There is also no denial that the complainant was found in the appellant's house. The police had to break the door to gain access because the appellant refused to open the door and hid in the ceiling. The police were tipped of the incident by Daniel Kantai, a boda boda rider who was taking the complainant home but had to run away after they were accosted by the appellant and another man. When the complainant was examined, she had physical injuries on the fore head and wrists. The police also said that the appellant had injuries on his ear. The complainant stated that she had hit him with an object as she resisted the rape.

30. The appellant did not explain why the complainant would have injuries on her hand and face if she did not have a struggle with him. She stated that the appellant had twisted her hands and tried to strangle her. The appellant did not explain why Daniel Kantai would report to the police about him taking the complainant to his house if she willingly went with him. There was also no explanation why the complainant's trouser was torn forcing PW4 to assist her with a veil co cover herself. Nor was there any explanation why the complainant's cloths were muddy. With his own admission that he had sex with the complainant, the appellant's complaint that there was insufficient medical evidence lacks merit.

31. The appellant blamed the trial court for relying on prosecution's contradictory evidence. I have evaluated the evidence on record. I do not find material contradiction that would significantly affect the prosecution case.

32. Regarding the appellant's argument that the prosecution failed to call material witnesses, I see no prejudice suffered by the appellant for this failure. The only other person that featured in evidence was Daniel Kantai, the boda boda rider who was taking the complainant home and who reported the matter to the police that the appellant and another man had accosted him and dragged the complainant to a house. In my view, the issue here was not that the appellant took the complainant to his house, but whether they had consensual sex. Even if the complainant had voluntarily gone with the appellant to his house, that in itself would not amount to consenting to have sex with him. Daniel Kantai would not confirm that the sexual activity between the appellant and the complainant was consensual because he was not there when it took place.

33. The trial court referred to relevant sections of the law and decisions on what amounts to sex by force, including ***Republic v Oyier*** [1985] eKLR, that lack of consent is an essential element of the crime of rape and that the ***mens rea*** in rape is primarily the intention and not the state of mind. That is, the aggressor's mental element is to sexual intercourse, lack of consent notwithstanding.

34. I therefore find no merit in the appellant's argument that he trial court was wrong in convicting him for the offence of rape.

35. On sentence, the appellant faulted the trial court for sentencing him to twenty years imprisonment, exceeding the statutory minimum provided. He argued that the sentence imposed was harsh given that there were no aggravating circumstances. He also faulted the trial court for not taking into account the period he had spent in remand awaiting his trial as required by section 333(2) of the Criminal Procedure Code.

36. The appellant was charged with rape under section 3(1) as read with section 3(3) of the Act. Subsection (3), the penal section, provides that a person guilty of an offence under of rape is liable upon conviction to imprisonment for a term not less than ten years, but which may be enhanced to imprisonment for life.

37. The law is provides a minimum of 10 years imprisonment which may however be enhanced to life imprisonment depending on the circumstances of the case. The appellant has argued that the trial court was wrong in imposing the sentence of twenty years when there was no justification for it. He also faulted the trial court for not taking into count the period he had spent in remand during trial.

38. I have perused the trial court's record on sentence. The trial court called for a pre-sentence report which was prepared and submitted to court. According to the trial court, the report "***put the appellant in bad light"*** and he was not remorseful. The trial court further stated that the complainant was suffering from post-rape trauma and was under treatment.

39. The trial court did not give reasons for enhancing the sentence to twenty years. The pre- sentence report was not evidence and could form the basis for enhancing sentence higher. In any case, according to the **Muruatetu** decision, the court was not obliged to give the minimum sentence though it could still impose that sentence if it though fit.

40. The appellant's complaint that the trial court did not also consider the period he had been in remand when sentencing him is not without merit. The trial court did not at all address itself to the provisions of section 333(2) of the Criminal Procedure Act.

41. In ***Ahmad Aboifathi Mohammed & another v Republic*** (Criminal Appeal No. 135 of 2016 [2018] eKLR, the Court of Appeal stated:

> ***"By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account***

the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."

The trial court did not take this period into account when sentencing the appellant as it should have.

42. From the record, the appellant was arrested on 5th July 2017 and was in remand throughout his trial which ended on 27th February 2019 when he was sentenced, a period of one year and eight months.

43. Having considered the appeal, I find no merit in the appeal on conviction and I dismiss it. On sentence, I am satisfied that the sentence imposed was harsh. The sentence of twenty years is hereby set aside. In place therefor, the appellant is sentenced to 8 years. The sentence of eight years shall run from 5th July 2017 when he was arrested.

Dated, signed and delivered at Kajiado this 22nd day of January, 2021.

E.C. MWITA

JUDGE