REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 32 OF 2020

JOSEPH MUNGUTI MUNYAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by C. K. Kisiangani, Resident Magistrate delivered vide judgement in Machakos Chief Magistrates Court Criminal Case (SOA) No.29 of 2017 on 2.8. 2018)

BETWEEN

REPUBLIC.....STATE

VERSUS

JOSEPH MUNGUTI MUNYAO.....ACCUSED

JUDGEMENT

1. This is an appeal that was lodged herein on **2nd August, 2019** by the Appellant, **Joseph Munguti Munyao**, against the conviction and sentence imposed by the Resident Magistrate, **Hon. C. K. Kisiangani**, in Machakos Chief Magistrate's **Criminal Case (SOA) No. 29 of 2017**. The Appellant had been charged before the lower court with the offence of Rape contrary to **s**ection **3(1) (a) (b)** of the **Sexual Offences Act**, **No. 3 of 2006**. In the alternative, he was charged with indecent act with an adult, contrary to section **11(a)** of the **Sexual Offences Act**. The offences were alleged to have occurred on **9th September, 2017** in Machakos sub-county within Machakos County.

2. The Appellant, having denied the allegations against him, was taken through the trial process and a Judgment was subsequently rendered by the learned trial magistrate on **2nd August 2018.** The Appellant was found guilty of the offence of rape, was convicted thereof and sentenced to serve 10 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal that challenged the lower court decision on the following grounds:

a. the charge of rape against the appellant was not proved beyond any reasonable doubt;

b. The appellant's defence case was not considered;

c. That the appellant was not properly identified as the perpetrator;

d. That the prosecution evidence was contradictory.

3. Accordingly, the Appellant prayed that the appeal be allowed, the conviction be quashed and sentence set aside.

4. In his written submissions, the Appellant submitted that the charge against the appellant was not proved beyond all reasonable doubt. He submitted that he was not properly identified as perpetrator; reliance was placed on the case of **R v Turnbull & Others (1976) 3 All ER 549**. It was submitted while appreciating the case of **Abdalla Bin Wendo v R 20 EACA** that the identification evidence was not credible and correct. According to the appellant, he had not been arrested for the offence of rape but nonetheless charged with the said offence. The

appellant took issue with the failure to tender DNA evidence as provided for under section 36 of the Sexual Offences Act.

5. The appeal was opposed by the Respondent. Counsel submitted that the treatment notes and PRC form (Pexh 2 and 3) proved rape. It was submitted that the identification parade conducted on 24.11.2017 enabled the appellant to be identified as perpetrator and that lack of consent was proven when the prosecution evidence was to the effect that the victim was accosted by the appellant who was armed with a metal rod. It was pointed out that there was an error in drafting the charge sheet by failing to indicate that "as read with section3(3) of the Sexual Offences Act no. 3 of 2006" but however it was submitted that the same was curable under section 382 of the Criminal Procedure Code. Counsel submitted that the sentence of 10 years ought to be enhanced.

6. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions. In **Okeno v Republic [1972] EA 32,** the Court of Appeal for East Africa rendered itself thus:

> **"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 whole 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 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 had the advantage of hearing and seeing the witnesses..."**

7. The Appellant had been charged with rape contrary to section **3(1)(a) (b)** of the **Sexual Offences Act**. In the alternative, the Appellant was charged with indecent act with an adult contrary to **s**ection **11(a)** of the **Sexual Offences Act**.

8. The Prosecution called a total of five witnesses in support of its case. The first witness was the Complainant (**PW1).** Her evidence was that on 9.9.2017 she was on her way from [Particulars Withheld] Prayer Center when at 6.00 am she saw someone wrapped in a maasai sheet. She testified that she waited for the person to pass only for the person to ask her as to where she was coming from; she testified that the man unwrapped his maasai sheet and showed her a metal bar that he threatened to use it on her. She recounted how the person searched her, took her phone then pounced on her and ordered her to lie on her back; it was then that she got an opportunity to see him. She testified that he unzipped his trousers removed his penis and inserted it in her vagina then he ejaculated. She testified that after the ordeal she went in the direction of her house and saw a person whom she recalled as the one who had harmed her as he had already discarded the maasai sheet and so she did not tell him anything. She testified that she went to Machakos police station and after reporting the matter she went to Machakos Level 5 Hospital where she was referred for tests at Linten Laboratory. She testified that she was to return to the Hospital after seven days and on her return she was issued with a P3 form and PRC form. She told the court that she was also referred to Bishop Kioko Hospital for some tests on 12.9.2017 and she was given the results. It was her testimony that she knew the person who had sexually assaulted her; that he was dark and had a gap on his teeth. She told the court that she went to the police station to identify the appellant had been lined up with others in an open space; she was able to touch him because she remembered the gap on his upper teeth that she had seen when the appellant was raping her. On cross examination, she testified that she was able to identify the appellant when he was raping her and in reexamination she testified that she could not scream because the appellant had threatened to kill her.

9. PW2, FNW, testified and told the court that Pw1 was his church mate and were together on the 8.9.2017 for a night vigil. He testified that he left the vigil at 5.00 am and that he was informed later that Pw1 was crying at his gate. He recalled that he went to her and who informed him that someone had raped her and that he had gaps in his teeth. He testified that he accompanied Pw1 to Machakos Level 5 Hospital and later Pw1 informed him that she was able to identify the appellant.

10. Pw3 was **Cpl Jane Ewoton** from Machakos Police station was the investigating officer who testified that she received a report on 9.9.2017 from Pw1 to the effect that she had been raped while on the way from a church night vigil at [Particulars Withheld]. She testified that Pw1 gave her treatment notes, a P3 and PRC form and that Pw1 informed her that she was able to identify the perpetrator. It was her testimony that the perpetrator had gaps in his teeth and so an identification parade was conducted in which the appellant was identified by the complainant by touching him. She testified that an ID parade report was prepared and that the appellant had no objection to the same. On cross examination, she testified that she was not the one who prepared the identification parade report.

11. Dr. John Mutunga (PW4), told the court that he examined the complainant and that the lab examination revealed that there were spermatozoa on her private parts. He testified that he filled the P3 form on 14.9.2017 where he found that the injury noted on her was caused by a penile shaft. He told the court that he relied on the laboratory reports from Machakos Level 5 Hospital (Pexh 1d), Bishop Kioko (Pexh 1b), Real Time Hospital (Pexh 1a and b) as well as treatment notes (Pexh 1c) when filling in the P3 form that was tendered as Pexh3. He testified that he had the PRC form that was filled by Eunice Mutisya on 9.9.2017 and he tendered the same as Pexh 2.

12. Pw5 was **IP David Kemboi**, who testified that he conducted the identification parade in which the complainant positively identified the appellant by touching him whereupon the appellant appeared to get shocked. He stated that the complainant had already given a description of the appellant when she reported the case.

13. The court found that a prima facie case had been established against the appellant who was placed on his defence. In his defence, the appellant told the court that the charges were false. He questioned why Pw1 did not scream when she was being raped. He questioned why he was arrested in November and yet the rape happened on 9.9.2017. He admitted seeing Pw1 during the identification parade and that he was identified as having a gap in his top teeth; he testified that he was at his work place that was a car wash and did not see how he was involved in the rape. On cross examination he testified that his home is near the carwash; that on 9.9.2017 he did not remember where he had been and on reexamination he testified that he did not understand the parade.

14. From the foregoing summary of the evidence adduced before the lower court, issues for determination are:

[a] Whether sufficient evidence was adduced to prove the ingredients of the offence of Rape to the requisite standard;

[b] Whether the appellant was properly identified

[c] Whether the appellant's defence was considered.

15. On the first issue**,** section **3** of the **Sexual Offences Act** provides for the offence of Rape in the following terms:

"(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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person 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."

16. Hence, the prosecution was under obligation to prove its allegations that there was penetration of the complainant's genital organ and that consent for such penetration was procured by force. In this respect, the prosecution adduced evidence that was not disputed or challenged by the appellant that the complainant was alone on her way from a church night vigil and met the appellant who accosted her and raped her.

17. The doctor who examined the complainant and filled the P3 form in her case, found normal genitalia but found spermatozoa that was indicative of recent sexual activity and a torn hymen that was indicative of harm caused by a penile shaft. That evidence is therefore corroborative of the complainant's evidence that she was subjected to penetration however not in the manner envisaged by section **3(1)(a)** as read with the definition thereof set out in section **2** of the **Sexual Offences Act**. The Appellant's defence before the lower court being that he was at work did not shake the prosecution evidence nor did it create any reasonable doubt in the evidence of the prosecution.

18. I do note that the appellant in his grounds of appeal seemed to take issue with failure to subject the semen to DNA profiling. Whereas section **36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu v Republic [2016] eKLR** the Court of Appeal stated:

"...section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

19. Similarly, in **AML v Republic [2012] eKLR** the Court expressed the view that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

20. I therefore find no merit in this ground raised by the appellant.

21. It appears that the evidence relied upon by the trial magistrate was the circumstantial evidence as corroborated by the direct evidence of the victim. With regard to the evidence of the victim, I am convinced that she was truthful; her account to Pw2 and to Pw3 was cogent and consistent; her account to Pw2 was to the effect that she appeared shaken and traumatized after the ordeal and I cannot fault the trial court for believing her. Furthermore, the appellant's evidence did not create circumstances which would weaken or destroy the inference of guilt on him; he simply indicated that he was not aware of what happened on the day of the offence which to me did not appear as candid. The complainant could not just rush to the police to lodge a report of rape if it did not happen and also pick randomly a guy as the perpetrator. I find there was truth in what she alleged and that she positively identified the appellant as her assailant.

22. The appellant at length took issue with the evidence on identification of him as perpetrator.

23. I will start with direct identification evidence as contained in the testimony of Pw1. Pw1 saw the appellant on the material day and when he was raping her and after the ordeal when she was leaving the scene. Her evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

i. The length of time the appellant was under observation;

ii. The distance between the complainant and the *appellant;*

iii. The lighting conditions at the time; and

iv. The familiarity of the complainant with the appellant.

23. In **Donald Atemia Sipendi v R (2019) eKLR** Justice Mativo observed that 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?

25. As regards the length of time the appellant was under observation, it was more than a fleeting glance since he engaged her in some conversation before proceeding to rape her. And for the distance between them, they were close enough when he was raping her and also when she left the scene after the ordeal. As for the source of light at the time, the act occurred during dawn. As to the familiarity of Pw1 with the appellant, there was nothing. The complainant was able to give an accurate description of the appellant to the police and most especially that she noted the gap in his teeth; the combination of these factors lead to a conclusion that the identification of the appellant was free from error. The appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. He raised an alibi that he was at work but however in my view, this was identification made under favourable conditions and which was later fortified by the complainant identifying the appellant during the identification parade. I am of the view that Pw1 had no doubt in the identity of the appellant as the person who raped her. I find therefore that the appellant was not an innocent stranger picked out by the complainant but that he was the real culprit.

26. The evidence at the identification parade was in my view independent corroborative evidence as the direct evidence was satisfactory. This means that the appellant's challenge of his identification during the identification parade lacks merit. The appellant also raised an issue that he had been arrested for a different offence not the alleged rape. I find it was immaterial whether that might have been the case as he could have had other cases but as far as the offence of rape is concerned the prosecution proved the same against him beyond reasonable doubt.

27. In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Rape contrary to section **3(1**) (a) as read with section 3(3) of the Sexual Offences Act was based on sound evidence. Even though the charge sheet did not indicate the penalty section namely section 3(3) of the Sexual Offences Act I find that the anomaly was not fatal to the prosecution's case since the same did not occasion any prejudice to the appellant in any way as he got to know the charges he faced and duly cross examined the witnesses from start to finish. He understood the nature of the offence he faced and further, the error is curable under section 382 of the Criminal Procedure Code. As regards the sentence imposed, I find the same is not excessive as it is the minimum possible in law. I find no reason to interfere with it.

28. I find no merit in the Appellant's appeal. The same is hereby dismissed. The conviction and sentence is affirmed.

It is so ordered.

Dated and delivered at Machakos this 19th day of January, 2021.

D. K. Kemei

Judge