REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CRIMINAL APPEAL NO. 7 OF 2020

DAVID MUTHURI KIMATHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of Hon. S.M. NYAGA (SRM) in the Senior Principal Magistrate's Court at Marimanti SOA No. 15 of 2018 delivered on 18th December, 2019)

J U D G M E N T

Introduction

1. **David Muthuri Kimathi** the appellant was charged with the offence of rape of rape contrary to **Section 3(1) (a) (b) (3) of the Sexual Offences Act No.3 of 2006**. The particulars are that the appellant on the 22nd day of July, 2018 in Tharaka South Sub –County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PKK a woman aged 19 years without her consent.

2. He also faced an alternative count of committing an indecent act with an adult Contrary to **Section 11(A) of the Sexual Offences Act No. 3 of 2006.** And further, that the accused person on the same date, place and time as above intentionally touched the vagina of PKK with his penis.

3. He denied the charges and the case proceeded to full hearing after which he was found guilty, convicted and sentenced to Ten (10) years imprisonment.

4. He was aggrieved by the judgment and filed this appeal raising the following amended grounds: -

> (i). That the learned trial magistrate grossly erred in law and facts by convicting the appellant notwithstanding the fact that he was a child at the time he committed the offence, thus conviction and sentence were in contravention of Article 53 of the constitution and other provisions of the law.
>
> ii). That the learned trial magistrate grossly erred in law and facts by failing to note that the light used at the scene was not properly analyzed.
>
> (iii)That the learned trial magistrate erred in matters of law and fact by failing to take into account the appellant's defence and the evidence of his defence witnesses.
>
> (iv)That the learned trial magistrate grossly erred in law and facts by failing to note that there was a possibility of a mistaken identity.

He prays that the conviction be quashed the sentence be set aside and be set at liberty. The brief facts of the case are that the complainant PKK (PW1) used to take care of an old lady. The appellant used to visit the home where the complainant was employed. On 22nd July 2018 the complainant was asleep when at about midnight the accused went and broke the door then entered the room where she was sleeping. PW1 managed to see the appellant as she had a spotlight. The appellant ordered her to switch off the spotlight. He then removed a knife from his pocket and threatened to kill her if she did not switch off the torch. The appellant then proceeded to have sex with her by force and without her consent. The appellant had sex with her twice and ejaculated on each occasion. The appellant had stripped her naked unzipped his trouser then had sex with her.

The next morning, the complainant reported to her neighbor SK (PW2) and identified the appellant to him. She also called her employer through phone and informed her. She then reported at the A.P's camp and was referred to Marimanti Police Station where she went and reported. She then proceeded to Marimanti Level 4 hospital where she was treated. The complainant knew the appellant before as he used to visit the home where she was working and his home was near the home where she used to work. The complainant was examined by Benard Chabari (PW3) a clinical officer at Marimanti Level 4 Hospital on 23rd July 2018. She gave a history of having been raped by a person she knew very well. The underwear was unchanged and dirty. She alleged that the person ejaculated twice and did not use any protection. No bruises or lacerations were noted on the original wall. The hymen was broken but not freshly. Laboratory investigations revealed presence of spermatozoa. He confirmed that there was evidence of penetration due to the presence of spermatozoa. He produced the treatment notes and the P3 form.

The investigating officer PW4 received the report from PW1 and found that the appellant broke into her house and raped her. PW1 claimed that she had a torch and managed to see the appellant who he knew before by appearance but not by name. The appellant was arrested and charged.

5. The appellant gave a sworn statement of defence and told the court that on the material day he spent the day and night at the home of Mburi. He went home at 9.00 a, and later in the evening he was arrested. He said he did not know PW2 before and only saw her in court. He testified that he had a grudge with PW2 as he had refused to work for him. The appellant called two witnesses DW2 and 3 who after they testified he told the court they were confused and closed his defence. The trial magistrate found the appellant guilty and convicted him for the offence of rape. He then sentenced him ten (10) years imprisonment.

The Evidence for the prosecution Before the Trial Court

6. At the trial, the prosecution called four witnesses. The first witness for the prosecution who testified as PW1 was the complainant **P.K.K**. According to her, on 22ndJuly, 2018 at around midnight the appellant went to the house where she was sleeping.

7. She narrated that, the appellant broke the door to the house where she slept alone and entered. She further testified that she saw the accused person well since she had a spotlight.

8. She told the court that the appellant ordered her to switch off the spotlight and she complied. The appellant threatened her with a knife and had sexual intercourse with her without her consent. That during the ordeal, he stripped her naked unzipped his trouser and had sex with her. This according to the complainant was done on the floor. The accused person had sex with her and even ejaculated inside her twice.

9. SK as PW2 was a neighbour to PW1. He testified that he knows PW1 who had been recently employed by his neighbour roughly within a period of one month.

10. That on the 23rd day of July, 2018 at about 7.30 a.m. in the morning, PW1 requested him to use his phone since she wanted to inform her employer of the rape ordeal.

11. That he advised her to go report the same to the police. That PW1 decided to go and fetch water first and on her way back she recognized the appellant and shared the same with the PW2. PW1 immediately reported to a nearby AP camp.

12. PW3 was **Benard Chabari**, is a clinical officer at Level 4 Marimanti Hospital. According to him, he is not the one who filled the P3 form since the same was filled by his colleague one Evans Munene. The appellant did not object to the production of the P3 form by PW3 who had treated the complainant and made clinical notes which were relied on to fill the P3 form.

13. According to PW3, PW1 was seen on the 23rd July,2018 where PW1did claim that she had been raped the previous night by a person well known to her; Med/Ref. No. [Particulars Withheld].That PW1 underwear was unchanged and dirty. That the appellant had forced her into sex and ejaculated on her twice and that he never used any protection.

14. PW3 also testified that there were no bruises or lacerations noted on the vaginal wall. The hymen was broken but not freshly; there was no vaginal discharge. On lab investigation, there was no pregnancy or syphilis but they managed to see a spermatozoa.PW1 was thus treated with family planning and PEP and STI medicine.

15. In his opinion, there was evidence of penetration as she had spermatozoa seen through vaginal swap and the probable object was a penile shaft.

16. **PC No.112093 Josephine** Thuo of Marimanti Police Station and the investigation officer herein testified as PW4. According to her, on the 23rd .07.2018, while at the report office when she was allocated this matter having been reported by PW1.

17. She took PW1 to the hospital for examination at Mariamanti Hospital. She recorded the statements of the complainant who identified the appellant and PW4 arrested him; thereby consequently charging him.

Evidence for the Defence

18. At the close of the prosecution case the appellant was put on his defence. Section 211 of the CPC was explained to the appellant herein; in his sworn evidence, the appellant indicated that he had two witnesses to his case.

19. DW1 in his sworn statement, indicated that he was 17 years of age and he had a birth certificate. The court thus ordered for age

assessment to be done. In his statement, provided an alibi. He indicated that, on the material day, he spent the day at the home of the former member of parliament's father one Mburi since there was a function. That he even spent the night there.

20. That the following day, he left for his home at 9.00a.m. or thereabouts, he further spent his whole day in the farm and when evening came, he went to watch a football match.

21. He further stated that he doesn't know the complainant and in regard to the PW2, they notably had a grudge since he had refused to work for him. Therefore, he was being framed since PW1 had demanded more than Kshs. 20,000.00 (Twenty Thousand) from him to withdraw the matter before court.

22. According to DW2 one Mpuri Mwiru, he knows the appellant herein and on the 22nd.07.2018,he had a ceremony where he had invited the appellant to help him in cooking. The appellant arrived at 8.00 a.m. in the morning and thereafter spent the day at his home upon which the appellant left his home at 9.00 a.m. or thereabouts the following morning.

23. According to DW3 who goes by the name of Nicholas Ntuara, he equally stated that he knows the appellant and on the 22nd July 2018, he was with the accused at the home of DW2 - at 7.00 p.m. - who had visitors.

24. That they spent the whole day there till midnight; he notes that the day was a Sunday and the date being 22nd July 2018. That the following day, they left after he made breakfast for them.

The appeal proceeded by way of written submissions. The appellant submits that the court failed to take into consideration of the fact that he was a minor at the time he committed the offence. The trial magistrate proceeded to convict him on the charge of rape and therefore violated his rights. The appellant submits that the light which the complainant relied on to identify her was not sufficient and could not have enabled her to positively identify him. He further submits that the trial court failed to consider the identity of the person who penetrated the complainant as the medical report did not link him as the person who caused penetration. The respondent opposed the appeal and in their submissions contend that the charge against the appellant was proved beyond any reasonable doubts based on the evidence of the four prosecution witnesses especially PW1 & 3. The respondent contends that it was upon the appellant to tender evidence before the trial court to show that he was a minor which he failed to do.

The respondent further contends that the appellant took advantage of the complainant who was new in the area and raped her. The respondent urges the court to find that the defence tendered was contradictory and not plausible. It is the contention by the respondent that they proved beyond any reasonable doubts and the court ought to uphold the conviction and the sentence.

25. I have considered the proceedings before the trial court, the petition of appeal and the submissions. This being a first appeal it is the duty of this court to evaluate the evidence analyse, it then come up with its own independent findings. This court is enjoined to evaluate the evidence afresh and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. This was the holding in ***Okeno -v- Republic (1972) E.A 32***. This was further reiterated in the case of ***Kiloly & Another -v- Republic (2005) 1 KLR*** where the court stated that it is required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. That the task must have regard to the fact that he never saw or heard the witnesses when they testified. The issues raised by appellant in his ground of appeal which requires consideration is whether there was proper identification. In this case the issue was not identification of a stranger but recognition of a person who was known to the complainant.

26. With respect to the evidence on recognition of the perpetrator, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the court of appeal in **Martin Nyongesa Wanyonyi vs Republic Criminal Appeal no. 661 of 2010, (Eldoret), D. K. Maraga, J (as he then was), D. Musinga & A. K. Murgor JJA** citing **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

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

27. The circumstances under which the identification was allegedly done must be carefully tested. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

28. From the evidence adduced P.W.1 was the only identifying witness. PW1 narrated how while she was asleep at night, the appellant herein broke the door to the house where she slept alone and entered.

29. She says that the appellant ordered her to switch off the spotlight which she did and then had a forcible sex with her. That during the ordeal, he stripped her naked unzipped his trouser and had sex with her. The same happened on the floor. The accused person had sex with

her and even ejaculated inside her twice.

30. Further to that, time of incident was at night and that she had a spotlight that she used to identify the appellant herein. That the appellant lived not far from where she was employed to take care of the elderly woman. She further narrates that the appellant herein used to visit the home where she was employed then.

31. The appellant complained that the medical evidence did not implicate him and it was necessary for a DNA test to be done. As the Court of Appeal noted in ***Geoffrey Kioji v Republic*** **NYR Crim. App. No. 270 of 2010 (UR)**;

> *Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to* ***section 124 of the Evidence Act, Cap 80 Laws of Kenya,*** *a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

32. **Section 124 of the *Evidence Act*** makes this quite clear that:

> *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 person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

33. However as was held in **John Mutua Munyoki vs. Republic** (supra)

> **"What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?"**

34. This is what she explained in line with the proviso to ***Section 124 of the Evidence Act*** at page 5 lines 9 - 10 of the judgment:

> **"*I noted that PW1 was very consistent both during report of incidence (as told by PW4) and in court. She was very firm and sill looked traumatized during trial, and I believed her line of the story."***

In this case, the Learned Trial Magistrate expressed herself as hereunder:

> *''I noted that PW1 was very consistent both during report of incidence (as told by PW4) and in court. She was very firm and still looked traumatized during trial, and I believed her line of story''.*

35. It is therefore clear that not only did the court find that the complainant was truthful but also recorded the reasons for the said belief.

The complainant in her testimony told the court that she had seen the appellant on 18th, 19th and 20th of July 2018. The offence was committed on 22nd July 2018. It was the complainant's testimony that she had a torch or spotlight which enabled her to see and recognize the appellant who she had seen two days before the ordeal. Apart from that the appellant had frequented the home where the complainant was working. It is trite that where the trial court makes a finding of fact, the appellate court will normally not interfere with such finding unless it was based on no evidence. The trial court had the privilege of making such finding as he had the chance to see the witness and assess her demenour. In this case the trial magistrate found that the PW1 was truthful and he could therefor rely on his evidence. I am of the view that the complainant, with the help of a torch could not have failed to recognize the appellant who she had seen before. Indeed the complainant with the help of the said light was able to see that the appellant was armed with a knife. I find that there was sufficient light which enabled the complainant to recognize the appellant. The evidence is direct and links the appellant to the commission of the offence. The complainant met PW2 soon after the ordeal and descried the appellant who also happened to pass by.

The appellant was placed at the scene of the crime and the possibility of mistake was ruled out as recognition is more reliable than the identification of a complete stranger. I hold that the appellant was identified as the perpetrator of the crime.

36. The appellant has raised the issue that he was a minor at the time the offence was committed. The proceedings before the trial court was initiated vide a charge sheet which was filed in court on 30th July 2018. The charge sheet indicated that the apparent age of the appellant was an adult. The trial proceeded and the issue of his age did not arise until after he was put on his defence when the stated that he was seventeen (17) years. The trial magistrate ordered he be escorted to hospital for age assessment. Before that on 22nd August 2019 the appellant informed the court that he was an adult, -page 35 of the record. The lower court record has some documents showing that the appellant had applied for identity card. These documents are not reliable because wherever the date of birth appears, there are some alterations. This is evidence of attempts to mislead the court. I did not come across any document showing the date of birth of the appellant apart from the charge sheet which indicated that he was an adult. The trial magistrate interacted with the appellant during trial and he never at any point doubted that the appellant was an adult.

37. Age may be proved by age assessment report by a doctor, birth certificate, parents or guardians, by observation and common sense. Others are birth notification and immunization cards. There are therefore various ways of proving age. In ***Francis Omuroni -v- Uganda,***

Court of Appeal, Appeal No.2/2000, the court observed that;

> ***" Apart from medical evidence age may also be proved by birth certificate, the observation and common sense……."***

In assessing age a holistic approach must be undertaken, taking into account a wide range of information including not just medical opinion but a variety of other information and circumstances. The court will frown on mere averment of age without any plausible evidence thereof. In this case there was no material placed before the trial magistrate to prove age other than the charge sheet. The appellant himself was not candid as at one point he said he was minor and upon the court requesting for age assessment, he confirmed that he was an adult. I find that in the absence of any evidence that the appellant was below 18 years his rights were not violated.

On a charge of rape, there key ingredients must be proved. These are:-

1) Penetration

2) Perpetrator

3) Consent

I will proceed to analyze these issues.

Issue No (i) Penetration

Section 3 of **the Act** defines '**rape'** as follows:

> ***(1) A person commits the offence termed rape if –***
>
> ***(a) he or she intentionally and unlawfully commits an act which cause 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."***
>
> **Section 2** of **the Act** defines '**penetration**' as:
>
> ***the partial or complete insertion of the genital organs of a person into the genital organ of another person.***

38. In demonstrating this particular ingredient of the offence, the PW1 narrated how while she was asleep at night, the appellant herein broke the door to the house where she slept alone and entered.

39. She says that the appellant ordered her to switch off the spotlight which she did and then had a forcible sex with her. That during the ordeal, he stripped her naked unzipped his trouser and had sex with her. The was done on the floor. The accused person had sex with her and even ejaculated inside her twice.

40. The Clinical Officer (PW3) confirmed that on examination of the PW1's vagina there were no bruises or lacerations noted on the vaginal wall. The hymen was broken but not freshly; there was no vaginal discharge. On lab investigation, there was no pregnancy or syphilis but he managed to see spermatozoa. PW1 was thus treated with family planning and PEP and STI medicine.

41. In his opinion, there was evidence of penetration as she had spermatozoa seen through vaginal swap and the probable object was a penile shaft.

42. The fact of penetration into the genital organ of the complainant was proved beyond any reasonable doubt.

Issue No (ii) Consent:

43. On the aspect of the **consent, Sections 42, 43, 44** and **45** of the Act deals with that aspect at length. **Section 42** states as follows:

> ***For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice***

44. **Sections 43, 44** and **45** of the Act goes into great detail in describing instances where one's consent cannot be said to have been obtained.

45. **Due to the fact that the appellant threatened PW1 with dire consequences should she raised an alarm only buttresses the fact that he forced himself into her. The appellant had armed himself with a knife.**

46. The evidence of P.W.1 clearly confirms that the sexual activity was without consent. This is proved when she categorically state that the appellant used force and threats that he would kill her should she raise alarm. The fact that she immediately reported the ordeal only buttresses the fact that she never consented to the sexual activity.

47. The moment the day dawned, she left the house from where she was raped and did the following:

- She informed P.W.2 who was the first person she met and gave him the appellant's description and the supposed happenings that took place at night.

- She reported to the police the next morning and gave the name of the appellant.

The prosecution discharged the burden to proof that there was no consent to the sexual intercourse. Simply stated, the appellant raped the complainant.

On the identity of the perpetrator, I have already dealt with the issue at length and I need not analyze it again. The prosecution proved beyond any shred of doubts that the appellant was the perpetrator. This is not helped by the fact that the appellant had offered to reconcile with the complainant by giving her money but she declined when she was threatened and she realized that she would not live in peace. As for the defence of the appellant, it was a circus of sorts and the witnesses could not give candid evidence prompting the accused himself to discredit them by saying that they were confused. The defence was not plausible.

In conclusion I find that the charge was proved beyond any reasonable doubts. The appeal lacks merits and is dismissed.

Dated, signed and delivered at Chuka this 25th day of February 2021.

L.W. GITARI

JUDGE

25/2/2021

Ruling has been read out in open court.

L.W. GITARI

JUDGE

25/2/2021