REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL 6 OF 2019

(CORAM: F.M. GIKONYO J.)

From the conviction and sentence by Hon. W. Juma Chief Magistrate in Narok sexual offences Case No. 47 of 2017 on 25th January 2019

DANIEL KABERU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Charge.

[1] The Appellant was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are; that on 17th September 2017 in Narok North sub county of Narok County, intentionally and unlawfully caused his penis to penetrate the vagina of ANK without her consent.

[2] He was also charged with an alternative charge of committing an indecent act with an adult contrary to section 11(a) of the Sexual Offences Act no. 3 of 2006. The particulars thereof are; that on 17th September 2017 in Narok north sub county within Narok county, intentionally and unlawfully touched the breast, buttocks and vagina of ANK with his penis against her will.

Grounds of appeal

[4] Being dissatisfied with the said conviction and sentence he preferred an appeal on grounds set out in his amended grounds of appeal but which may be collapsed into the following complaints: -

i) That the prosecution did not prove their case beyond reasonable doubt;

ii) That the medical evidence did not support the charge;

iii) That his defence raised reasonable doubt to the prosecution’s case; and

iv) That the sentence was harsh and excessive.

Appellant's submission

[5] The appellant submitted that he pleaded not guilty to the charges against him and after full trial the trial magistrate sentenced him to 15 years.

[6] The appellant submitted that PW1 told the court that it was Ade who offered to take her to her boyfriend and not him. That it was PW1 's evidence that she requested Santel to escort her. That Ade and him had no common intention. Therefore, *mens rea* to commit the offence was formed and executed by the said Ade and not the appellant. As such the notion of there being a gang rape is non-existent.

[7] The appellant further submitted that his behavior as described by PW1 asserts his innocence. In addition, he submitted that when police came looking for the them, he did not run away like Ade whose first reaction was escape from the sight of the police. Based on this, he claimed that he was neither guilty nor harboured a guilty conscience.

[8] The Appellant submitted that he was not positively identified by **PW1**; and that the use of a cap as a form of identification was grossly erroneous. The alleged cap is not unique. **PW1** did not state what was special about the cap that would enable her identify the wearer. According to him, caps are readily available in the market in various shapes, designs and colours. He was of the view that **PW1** did not describe the cap that the appellant was wearing to the police at the initial time of reporting. He suggested that **PW1**'s evidence would have been more credible if it had more details relating to the appellant's description that pointed him as her assailant. That the findings by the trial magistrate was that **PW1** could not identify her assailants and the same was indicated in the judgement. **PW3** also stated that pw1 stated that she was raped by Ade and another she can identify physically. He relied on the case of ***Terekalli And Others Vs Republic 1952 Vol.19 pg. 259*** to support his argument that assailant's identification in any criminal offence has to be positive and devoid of error. He concludes his argument that his identification was erroneous and as such cannot sustain a safe conviction.

[9] The Appellant submitted that the medical evidence adduced by **PW2** did not corroborate the charge of rape as drawn. That the same failed to establish that there was penetration of **PW1**'s genitalia. That it is the duty of the prosecution to prove that penetration took place in an offence of rape and he relied on the case of ***Daniel Kiplimo Cherono Vs Republic (2014) eKLR***., ***Mwangi Vs Republic [1984] KLR 595*** and ***Julius Kioko Kivuva Vs Republic [2015] eKLR.***

[10] The Appellant submitted further that the trial court failed to consider his mitigation in spite of him having no previous criminal records. That the court went ahead to sentence him to three years above the mandatory of 15 years minimum. According to him, the sentence meted on him is not cast in stone and the court has the discretion to look at the prevailing circumstances and vary the mandatory minimum sentence. He therefore has asked the court to consider the decision in the following authorities;

a) Hamisi Bakari & Another Vs Rep [1987] eKLR

b) Criminal Appeal No. 262 Of 2012 Hamisi Mwangeka Mwero Vs Republic

c) S Vs Malgas 2001 (2) SA 1222 SCA 1235 Paragraph 25

d) S Vs Mofokeny 1999(1) SACR 502 (W) At 506 (D)

e) Francis Karioko Muruatetu & Another Vs Republic Petition No. 15 Of 2015

f) Evans Wanjala Wanyonyi Vs Republic [2019] eKLR

g) Paul Ngei Vs Republic [2019] eKLR

h) Dennis Kibaara Vs Republic [2019] eKLR

i) Jarso Guyo Vs Rep[2019]eKLR

j) Jared Koita Injiri Vs Rep [2019] eKLR

k) Dalmas Wafula Kilwake Vs Republic [2018] eKLR

[11] The Appellant therefore prays that his conviction be quashed, sentence set aside and appellant set at liberty.

Respondent's submission

[12] M/S Koina, the prosecution counsel, submitted that the burden of proof was duly discharged by the prosecution in the present case.

[13] On the evidence of the prosecution and contradictions therein; Counsel for the Respondent stated that the evidence of **PW1** was corroborated by **PW2,** was consistent and not marred by any contradictions as alleged by the appellant.

[14] She did not see any violation of Section 146 of the Evidence Act as all the 3 prosecution witnesses were examined in chief and the appellant was granted an opportunity to cross examine them and were also reexamined in accordance with the provisions of the said section.

[15] The prosecution counsel also submitted that the ingredients of the offence of gang rape were proved beyond reasonable doubt in the accounts of the complainant and **PW2.** The prosecution proved that the offence of rape was committed and it was committed by Ade who is still at large in association with the appellant herein. That Ade was the first to sexually abuse the complainant followed in turn by the appellant.

[16] According to her, the trial court rightfully formed its opinion on the evidence of **PW2** who is an expert who independently examined the complainant. That there was no need of taking the expert evidence as the witness was the author of the P3 form. The Appellant was granted an opportunity to cross examine the expert on his findings and conclusions. That courts have developed jurisprudence that it is now trite that DNA is not necessary to prove a fact of rape or defilement and has relied on the case of ***Aml- Vs Republic (2012) eKLR (Mombasa)***

[17] She concluded that the prosecution's evidence proved beyond reasonable doubt that the Appellant herein in association with Ade who is still at large committed the offence of gang rape and hence the conviction against the appellant was safe and urged the court to uphold the it as well as the sentence.

<u>ANALYSIS AND DETERMINATION</u>

Court's duty

[17] As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R (1957) EA 336***, ***Ruwala vs. R (1957) EA 570***.

Issues for determination

[18] As this appeal is on conviction and sentence, the issues that arise for determination are: -

1) Whether the offence of gang rape was proved specifically that the appellant committed the offence of rape in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape; and

2) whether there was penetration and

3) whether the appellant was properly and clearly identified as the perpetrator together with others.

[19 Section **10** of the Sexual Offences Act provides that: -

> *Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life,*

[20] Under **Section 10** of **the Act**, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following four elements:

a. Commission of rape; Penetration as defined by section 2 of the Sexual offences act without consent thereof;

b. *In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape*

c. Positive identification of the perpetrator.

[21] Were all these elements proved beyond reasonable doubt?

Penetration

[22] 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.

[23] Case law has explained penetration sufficiently. See the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…. (emphasis mine).

[23] Accordingly, it is not necessarily that medical evidence be availed to prove penetration. As long there is evidence that there was even partial penetration only on the surface, penetration has been demonstrated for purposes of Sexual Offences Act.

[24] **PW2** confirmed that on examination of the **PW1**'s genitalia after the alleged incident he found there was whitish discharge from the vagina, pus cells and red blood cells in her urine. Her labia was normal and was torn long standing. He also testified that there was no presence of spermatozoa revealed in urinalysis. He however stated that the presence of red blood cells can lead one to conclude there was injury but it could not have necessarily been caused by rape.

[25] PW1 stated that she was raped. She gave evidence of penetration. The medical evidence did confirm penetration. Specifically, PW2 stated that there was rape. He gave the pointers thereto to be whitish discharge from the vagina, presence of pus cells and red blood cells in the urine. The evidence of penetration given by PW1 was also partly corroborated by her complaint to the Police immediately the

Appellants set her free. The medical evidence did not find any evidence of spermatozoa in her genital organs. But, this is not a strict requirement for purposes of penetration. Accordingly, there was penetration. According to PW1, the sexual intercourse was not consensual but forced upon her by Ade and Dan. She described the ordeal. Ade pushed her to a nearby thicket with thorns and raped her. When she thought she had freed herself and attempted to flee the scene, Dan, the appellant grabbed her and knocked her down and penetrated her.

[27] Did the appellant and Ade cause the penetration in concert with each other?

Identification of the assailant

[28] The gravamen of this appeal turns on identification of the Appellant by **PW1**. The offence was committed at night. Generally, identification may become difficulty. Nonetheless, PW1 was categorical that she was at De Marcos Club eating chips and meat with her friends Shantel and Naserian. But, when they were just about to leave at midnight, Ade, his boyfriend's cousin together with Dan, the appellant, approached their table. Ade told her that her boyfriend had requested him to take her to him. She agreed to go with them. She asked Shantel to escort her. They boarded motor bikes; Ade and her on one and Dan and Shantel on the other. They alighted at her boyfriend's house at a place called London. The three remained but Shantel left on the motor bike.

[29] She continued to state that Ade knocked the door but no one answered. She requested to take a motor bike and leave. But, suddenly, Ade pushed her into a nearby thicket which had thorns and raped her. She struggled and tried to run away but Dan grabbed her and knocked her down. They pulled her to another point away from where Ade raped her. Dan raped her there. They left her free at about 5.00 am when she left, boarded a motor bike and went to the police and made a report. She was then taken to hospital.

[30] PW3, the IO corroborated the evidence by PW1 in material respect. She stated that PW1 reported the gang rape at 5.00am. she also stated that PW1 reported that Ade and the appellant had raped her. PW1 was taken to hospital. She received information that Ade and the appellant who were suspects in the case were in a pool along Nyawira road. Therefore, they were already aware of the persons they were looking for. They traced the appellant but Ade escaped. Shantel was with them but she refused to record a statement. During cross examination, PW3 stated that the complainant knew the appellant and that she is the one who pointed him out to the police as one of the assailants. It is apparent that PW1 was in the company of the police when the appellant was arrested and she knew him. She stated that the appellant still wore the cap he wore on the fateful night and so she easily recognized him. The appellant in his defence stated that Ade introduced the complainant and her friend to him at De Marco Club where they drank liquor and later left with the complainant's friend to his place at Mungare. This helps to show that the four were together in the fateful night and drank liquor together. The evidence of PW1 is consistent and places the appellant at the scene of crime at the time of the crime; it routs the defence of alibi.

[33] These pieces of evidence show that Ade and the appellant gang raped the complainant. The details in the account by PW1 as corroborated by PW3 clearly identifies the appellant as one of the persons who gang raped the Complainant. Consent cannot be coerced; never implied and cannot be assumed, even in the context of a relationship. The circumstances of this case are such that consent cannot be said to have been obtained. See the case of **Republic vs Oyier**, in which the court of appeal held that: -

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

[35] Therefore, I find his appeal on conviction to lack merit and I dismiss it. What about sentence?

Of sentence

[34] Section **10** of the Sexual Offences Act provides that: -

> *Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.*

[35] The section provides for a minimum sentence. And from the record, the trial court took the view that the court cannot pardon the appellant because the offence carries a minimum sentence. It is apparent the trail court fettered its discretion on the basis of minimum sentence prescribed despite the decisional law in Muruatetu. Accordingly, I set aside the sentence of 18 years' imprisonment. In lieu thereof, I sentence the appellant to 10 years' imprisonment. As the appellant had been in custody since he was arrested, pursuant to section 333(2) of the Criminal Procedure Code, the sentence will commence from 19th September 2017. It is so ordered. Right of appeal explained.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 11th day of February 2021

F. GIKONYO

JUDGE

In the Presence of:

1. Ms. Koima for DPP

2. The appellant

3. Mr. Kasaso – Court Assistant

F. GIKONYO

JUDGE