REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 14 OF 2019

(***From Original Conviction and Sentence by Hon. P. Achieng, SPM) in Bomet Principal Magistrate's Court Criminal Case Number 19 of 2018)***

JOHN CHERUIYOT CHEPCHILAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was convicted by Hon. P. Achieng, Senior Principal Magistrate of the offence of rape contrary to Section 3(1) b as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006, Laws of Kenya. The particulars of the charge against the Appellant were that on 18th May 2018 in Kapkimolwa location, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of JL without her consent.

2. The Appellant faced 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 of the alternative charge were that on 18th May 2018 in Kapkimolwa location within Bomet County, he intentionally touched the vagina of JL against her will.

3. The Appellant pleaded not guilty to both charges and the case went to full trial in which the prosecution called four (4) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the accused person and he was accordingly put on his defence. He gave an unsworn statement and did not call any witnesses in his defence.

5. At the conclusion of the trial, the Appellant was convicted on the main charge and sentenced to serve 10 years' imprisonment.

6. Being dissatisfied with the conviction and sentence, the Appellant appealed to this court and raised several grounds of appeal which can be summarized as follows:-

i. That the complainant concocted evidence to frame him.

ii. That the case was not proved beyond reasonable doubt.

iii. That the court relied on hearsay evidence.

iv. That the sentence was harsh and excessive.

7. As a first appellate court, I am conscious of the duty to re-evaluate the evidence given at trial. This duty was succinctly stated by the Court of Appeal in **Okeno –Vs– Republic (1972) EA 32** as follows:-

> ***"Am appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court 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 the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"***

8. The Appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 24th November 2020. He Appellant submitted that he did not dispute that the complainant was raped. It was his contention however that he was not involved in the offence as he was at home and not at the scene of crime. The Appellant submitted that the complainant did not go to the hospital on the material day but went the following day. On identification, the Appellant submitted that the complainant was unable to adequately identify her attacker as she relied only on his voice to identify him.

9. The Appellant further submitted that the complainant went home to her husband on the material day and this raised the possibility of her having engaged in sexual intercourse with her husband which led to the finding that there was penetration. The Appellant stated that both the complainant's husband and himself were not tested or medically examined by PW3 to confirm who between them had penetrated the complainant.

10. On the ground that he was framed, the Appellant submitted that that the complainant was driven by malice and a grudge and she was looking for a chance to take revenge against him for having declined to marry her in 2016. In addition, he submitted that the trial court failed to take into consideration that there was a land dispute between him and PW2.

11. Finally, the Appellant concluded by submitting that the judgment issued by the trial court was inconsiderate, erroneous, unlawful and untenable in law.

12. In submissions filed on 22nd December 2020, the Respondent submitted that the prosecution had proved its case beyond reasonable doubt. On the evidence before the trial court, the Respondent stated that the complainant had gone to collect vegetables from the Appellant's home when he attacked her and proceeded to rape her. That the rape was confirmed by PW3, the medical officer who filled the medical report (Exhibit 2). The Respondent submitted that the sentence of 10 years' was just in the circumstances. He relied on the case of **Wanyama Vs Republic (1971) E.A 494.**

13. I have considered the grounds of appeal and the submissions of the parties. The appeal raises two main issues for my determination:-

(i) Whether the case was proved to the required legal standards.

(ii)Whether the sentence issued against the Appellant was lawful and just.

14. For the offence of rape to be established, the following elements must be demonstrated:-

(i) The intentional and unlawful penetration of the genital organ of a person by another.

(ii) The absence of consent.

(iii) Where consent is obtained by force or by means of threat or by intimidation of any kind.

15. I will start with the question whether or not the three key elements of the offence were proved. In analysing the prosecution evidence, I shall keep in mind the defence evidence. As stated by the court of appeal in **Ouma Vs Republic (1986) KLR 619**:-

"***At the time of evaluating the prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person"***

16. The Appellant confirmed that the complainant was known to him. According to his unsworn defence, the complainant had wanted him to marry her sometimes in 2016 but neither himself nor his parents wanted her. She hated him as a result. He further stated he had a land dispute with PW2 and that the complainant therefore teamed up with PW2 to frame him. The Appellant did not call any witnesses in his defence.

17. The primary witness in the prosecution case was the complainant who testified as PW1. She told the court that on 18th May, 2018 she had visited the home of the Appellant to get vegetables. That the accused's mother harvested the vegetables for her and she left. She said that the Appellant followed her and when she got to Abiyet River he held her, pushed her to the ground and held a knife to her. He undressed her and proceeded to rape her. PW1 said that she ran home after the incident and reported to her mother Josephine Kilel. She also told her husband and thereafter went to Longisa hospital for treatment.

18. The clinical officer who treated the complainant was one Julius Magut who testified as PW3. He told the court that he examined the complainant on 21st May 2018 and filled the P3 form. The complainant had been treated at the facility on 19th May, 2021 with a history of having been raped on 18th May, 2021. He found injuries to her labia minora and a broken hymen. PW3 observed that the breaking of the hymen was not recent. The urine test showed presence of epithelial and pus cells. PW3 formed the opinion that there was penetration. He produced the treatment notes (Exhibit 1) and P3 (Exhibit 2).

19. PW2 was one Priscilla Sigilai. She testified that the complainant and Appellant were known to her as they were her neighbours. She said that the complainant passed near her home on 18th May, 2018 around 6pm and told her that she was on her way to John Kalya's home to get vegetables. She said that the following day she heard from the complainant's husband that the complainant had been raped by the Appellant.

20. The evidence of the complainant reproduced above is believable. Firstly, the fact of her having visited the Appellant's home to get vegetables is corroborated by the evidence of PW2 who stated that she conversed with her as she passed by her homestead and that the complainant informed her that she was going to the homestead of John Kalya to get vegetables. The Appellant himself also stated in his submissions that the complainant went to his home on the material day but that he himself was not at home.

21. The fact that the complainant was penetrated is corroborated by the medical evidence produced by PW3, the clinical officer who filled the P3 form. The issue therefore is whether there was lack of consent and who in fact penetrated her. In this regard, the Appellant while denying that he raped the complainant, submitted that the complainant was a married woman and that she had spent the night at home with her husband before going to the hospital for medical examination. It was the Appellant's submission that she may have had sexual intercourse with her husband. The Appellant further submitted that neither he nor the complainant's husband was subjected to medical examination to determine who between them had sexual intercourse with her.

22. It is true as submitted by the Appellant that medical evidence would have resolved the question whether the complainant had sexual intercourse with him or with her husband. However the Sexual Offences Act does not make DNA testing mandatory to prove a sexual offence. Section 36 (i) thereof provides:-

> ***"….where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.***

23. I have considered the entire evidence on record. The twin issues are whether the complainant's evidence was believable, and whether the Appellant's allegation of a frame up was credible. As already stated, the complainant's testimony was that she was trailed by the Appellant as she left his home and grabbed her near the river where he forcefully stripped her and had sexual intercourse with her. I find the complainant's testimony that she was trailed and raped by the river credible. It is clear from her testimony that she did not consent to the sexual intercourse.

24. Consent is defined in Section 42 of the Sexual Offences Act as a person agreeing by choice or has the freedom and capacity to make that choice. The complainant in this case did not have the freedom nor the capacity to make that choice as she was held by force and threatened with a knife. The Appellant used force, threats and intimidation to achieve penetration. This was unlawful and intentional according to Section 43(1) (a) SOA.

25. The final element is whether the Appellant was positively identified as the perpetrator. It is trite that evidence of identification must be carefully scrutinized before a person can be convicted of an offence. The court of appeal sounded this caution in **Cleophas Otieno Wamunga vs Republic, 1989 KLR 424**, in the following words:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".***

26. In this case it was the Appellant's submission that the complainant was not in a position to identify the person who raped her because she was attacked from behind. It was also the Appellant's submission that evidence of voice identification was not full proof as anyone could easily have imitated his voice.

27. Evidence of voice identification is receivable and admissible by the court as long as the court satisfies itself that it was free from error. In **Karani v. Republic (1985) KLR 293,** the court of appeal held that:-

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care must be taken to ensure that the voice was that of the Appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring such safe identification"***

28. In this case, the complainant testified that she knew the Accused as he was her neighbour. She had seen him at his home when she went there to get vegetables. She further stated that she knew his voice and identified him when he grabbed her and pushed her to the ground.

29. In **Peter Musau Mwanzia Vs The Republic 2008 eKLR** the Court of Appeal expressed itself on this issue as follows:-

> ***"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"***

30. It is clear in this case that the complainant adequately established circumstances which proved that the Appellant was not a stranger to her. From PW2's testimony, it was clear that she knew both of them and both were known to each other as they were neighbours. Other than the prosecution's evidence, the Appellant admitted that he knew the complainant. According to him, the complainant wanted him to marry her sometimes in 2016 but both himself and his parents did not want her. He stated that she went to his home to collect vegetables with ill motive.

31. From the foregoing, I am satisfied that the Appellant was positively identified and there was no danger of mistaken identity. They were long term acquaintances with the complainant.

32. I have considered the Appellant's defence. He stated that the whole case was a frame up by the complainant whom he had refused to marry and PW2 with whom he had a land dispute. The record shows that the Appellant cross examined the complainant extensively and he did not mention the issue of an aborted desire for marriage. The record also shows that the Appellant did not cross examine PW2 when she testified and instead told the court that he had no questions. I therefore find his defence to be an afterthought. His allegations against both the complainant and PW2 are unsupported and do not in any way cast doubt on the prosecution case which I have found proven. It is also not true that the trial court did not consider the Appellant's defence. The record shows that the trial court considered and dismissed the same.

33. Following the above, I am satisfied that the case against the Appellant was proved to the required legal standard. I uphold the conviction.

34. With respect to sentence, the Appellant has stated in his grounds of appeal that the sentence meted on him was harsh and excessive.

35. In this case the appellant was charged under Section 3 (1) (b) as read with section 3(3) of the Sexual Offences Act which provides:-

> ***(1b) a person commits the offence termed rape if the other person does not consent to the penetration.***
>
> ***(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.***

36. The Appellant was sentenced to the minimum sentence of ten years' imprisonment. The record shows that the Appellant did not offer any mitigation and only reiterated that he did not commit the offence. In sentencing the Appellant, the trial court stated that it had considered the mitigation and the fact that the accused was a first offender. The court nevertheless went ahead to impose the minimum sentence of 10 years as provided.

37. Recent jurisprudence from the court of appeal has however adopted the decision of the Supreme Court in **Francis Karioko Muruatetu & another V.Republic (2017)eKLR** in faulting the mandatory sentences in the SOA for taking away judicial discretion in sentencing. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where it stated thus:-

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."***

38. In the present case, the Appellant was said to be a first offender. There were also no aggravating circumstances. I find it justifiable to interfere with the sentence which, in the circumstances of this case though legal, was excessive.

39. In the final analysis, I uphold the conviction. I however reduce the sentence to 5 years' imprisonment from date of conviction and sentence by the trial court.

40. Orders accordingly.

Judgment delivered, dated and signed at Bomet this 31st day of March, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the virtual presence of the Appellant, Defence Counsel Mr. Koske, Mr. Waweru for the Respondent and Kiprotich (Court Assistant).