REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 14 OF 2019

DAVID KEMBOI KOSGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in Kapsabet PMCC No 846 of 2017)

JUDGMENT

1. **DAVID KEMBOI KOSGEI** (the appellant) was convicted on a charge of rape contrary to section 3(1) (a) (c) as read with section of the Sexual Offences Act, the particulars being that on the 28th day of March 2017 at [Particulars Withheld] village in TINDERET sub-county within NANDI county, intentionally and unlawfully caused his penis to penetrate the vagina of TJ* by the use of force. He denied the charge.

2. He was also convicted on a charge of stealing contrary to Section 268 as read with section 275 of the Penal Code, that on the same date and place, he stole a mobile phone worth Kshs. 2000/- from TJ He denied this offence as well.

3. After a trial in which 5 witnesses testified in support of the prosecution case, and the appellant was the only defence witness, he was convicted on both counts. On Count I he was sentenced to serve 30 years on the 1st count, and 4 years on the 2nd count, giving a total of 34 years imprisonment which was to run concurrently.

4. **TJ (PW1)** a farmer in [Particulars Withheld] **,** was on her way to [Particulars Withheld] using a road through a sugar-cane plantation on 23/3/2017 at 4.00pm, when she met someone unknown to her. He greeted her, then held her and threw her to the ground and strangled her. He pushed her into the sugar-cane plantation lifted up her skirt, and as she was not wearing an under-pant, he forced her legs open, even as she resisted, placed his full weight on her chest, and raped her for a long time. He then took away her phone which was also produced in court as an exhibit.

5. In court, she identified the soiled garments she had worn on that day. After the appellant left PW1 got up but had difficulty walking, and on the way, she met her daughter-in-law M, who had been alerted by neighbours who noticed the state PW1 was in. She was taken for medical examination and TOM KIPKOSGEI KILEL (pw4), a clinical officer at NANDI HILLS county hospital who produced the P3 form described the victim as a 70 year old woman who exhibited bruises on both walls of a reddened vagina, and bruises inside the cervix. She also had a yellow foul smelling mucoid discharge from the vagina, which findings were consistent with rape. On cross examination, he confirmed that there was evidence of penetration.

6. **MONICAH CHERONO TUWEI** (PW2), stated that while at home at about 5pm, a neighbour told her that the grandmother (gogo), had been hurt. She rushed out and saw PW1 (whom she referred to as her mother-in-law, being supported, even as a crowd converged. She noticed that PW1's clothes were soiled with mud, she was crying and complaining about pain in her chest. PW 1 disclosed that she had been raped, and the assailant whom she described as wearing a yellow shirt, and a hat with contrast colours, and spotting a wound under his chin had also taken away her phone.

7. PW2 relayed information about the incident (including where it occurred) to **MB** (PW3) her brother-in-law cum son of the complainant. He was also given a description of what the assailant was wearing, and that he had a wound under his chin. He boarded his motor cycle and went to carry out a manhunt at around the area where the incident had occurred. When he got to [Particulars Withheld] , he found that the appellant had already been apprehended by a mob. His dress and the injury under his chin matched the description PW3 had been given.

8. The appellant was escorted to MBERERE police post by the crowd who alleged that he had stolen a blue phone. As the officer was attending to the report, PW1 arrived at the post and said she was attacked at 4pm by the appellant whom she identified as the one who raped her and took away her phone. She identified the recovered phone, and also handed over to the police the clothes she had been wearing, and which were soiled with mud.

9. In his defence, the appellant stated that he did not understand the case well, although he confirmed that he had heard what the witnesses had said in court.

10. In the judgment, the trial court noted that the medical record found that the complainant had injuries in her genitalia, which was suggestive of forceful sex. That PW1 gave a description of attacker which was consistent with that of the appellant, and the incident took place during the day, and lasted for over an hour, thus giving the complainant time to identify him him. The court noted that PW1 did not know the appellant before the incident, so there would have been no reason for her to make up a description which matched him.

11. Further, that he was infact arrested the same evening, and in possession of a phone which the complainant identified as the one he had taken away from her. The trial court that the said phone was positively identified by PW2 and PW3.

The record shows that the appellant's defence was mentioned.

12. Being aggrieved by the outcome, the appellant contested the decision on grounds (which include the amended grounds) that the investigation was shambolic, and the evidence did not prove the charge. He also faulted the evidence presented by the prosecution witnesses, saying they were inconsistent, and that the evidence on identification was flawed. He also faulted the trial court, saying the record did not show the language used by PW 1-3, and that the trial magistrate dismissed his defence without any cogent reason.

13. He also complained about the 34 year sentence which he lamented was too long, and that the trial court failed to take into consideration the period he had spent in custody while awaiting trial.

In the appeal which was canvassed through written submissions, the appellant argues that there was no positive identification as the complainant had told the trial court that she had met a person whom she did not know, and that it was left to dock identification. That she later changed this narrative and claimed she knew the appellant and even knew where he came from. That the appellant never stated in her evidence in chief that she had volunteered information describing her assailant and the trial court ought to have been hesitant in accepting that evidence. He referred to the decision in **JOSEPH NGUMBAO NZARO VERSUS REPUBLIC [1991] KAR** , which set out factors a trial court to consider on the evidence regarding opportunity for identification.

14. The appellant urged this court to find that the identification based on the mode of dress was not satisfactory, drawing from the case of **STEPHEN OWINO OPERE VS REPUBLIC [2016] eKLR** where the court rejected identification based on the colour of the accused's T-shirt on grounds that such attire was readily available as a commodity of trade, and the witness was not able to pick out any special mark. However of greater significance in that case, was the fact that the appellant was not arrested immediately, or at the scene of the robbery.

15. It was also contended that although complainant claimed that the phone recovered from the appellant was the one stolen from her during the incident, there was no receipt or special mark pointed out at the trial, to prove that the one was hers. In support of this argument, the appellant referred to the case of **ISAAC NGANGA KAHUGA VERSUS REPUBLIC CRIMINAL APPEAL NO 272 OF 2005**

Further, that although the evidence was circumstantial, it was too weak to conclusively draw an inference of guilt or sustain a conviction.

16. He relies on the decision in **Muruatetu v Republic Petition No 15 of 2015** to urge the sentence not to be blinded by the mandatory minimum sentence.

In opposing the appeal. Miss Okok on behalf of the DPP submitted that the rape ordeal took long, thus giving the victim ample opportunity for identification. Further, that the fact of rape was proved by the victim's evidence, plus the medical evidence presented.

That the appellant was arrested a few hours after the incident with PW1's phone.

17. This court is urged not to interfere with the sentence, bearing in mind the advanced age of the victim, and traumatized she was by the incident. The court is asked to note that the appellant is not even remorseful

On the issue of identification, it is significant to note that the incident took place at day –time and although the typed proceedings record 10.00pm, the entire testimony of all the other witnesses, and the handwritten proceedings show the figure 10 is cancelled and 4 is inserted. This is further confirmed in the judgment where the trial court observed that the incident took place at 4pm. PW1 told the trial court that she had opportunity to see the appellant's face as he raped her, and the ordeal went on for over an hour.

18. Whereas the case of **STEPHEN OWINO OPERE VS REPUBLIC [2016] eKLR** faulted identification by mode of dress as a flawed form of identification, it was qualified with other observations. Unlike that case, in this case, the appellant was apprehended a few hours after the incident within the vicinity, it was not just the colour of the shirt that gave him away, not just the hat with contrast colours, but there was also the wound under his chin….surely a wound under the chin of a man wearing a yellow shirt and a hat with contrast colours cannot be a common occurrence as was reasoned in the Opere case (supra).

19. The appellant also argues that the witnesses were inconsistent, but does not point out which aspect of their evidence was inconsistent. The only inconsistency would be when PW1 in evidence in chief stated that she did not know him, but on cross-examination she said she knew him. To understand PW1's meaning I have read though and considered what PW2 stated-at the time of the incident,

PW1 did not know the attacker, whom she saw very well, but after disclosing the incident and his apprehension, she got to realize that she knew his family. I do not consider this so fatal as to render the witness evidence unacceptable

Apart from the identification by dress, there was the blue phone which was recover from the appellant, and which PW1 had told those who

helped her home, that the attacker had taken, Whereas she did not produce any receipt to prove ownership, it is not lost to me that:

a) the appellant did not deny that the phone was recovered from him

b) he did not claim that it was his phone

c) he did not give an account as to how he got to be in possession of that phone

20. My own assessment is that the circumstances and strands of evidence and events, inculpably pointed to the guilt of the appellant, and no one else.

As regards language, whereas it is true that the trial court did not record the language used by PW1-PW3. I take note that in cross-examination the appellant asked questions related to what the witnesses are recorded to have said. I detect no prejudice.

21. On sentence, I take into consideration the age of the victim being a 74 year old woman, and the trauma she suffered from the ordeal, I am persuaded that this is a situation where punishment, and deterrence was warranted, and the sentence meted out on count was apt, and I decline to interfere. On count 2 the maximum sentence for stealing under section 275 of the Penal Code is 3 years, so in that regard, the sentence was manifestly excessive and is set aside and taking into consideration the nature of the object stolen and its value, I reduce the sentence to 6 months imprisonment.

I notice that the appellant was first arraigned in court on 3/4/2017, and remained in prison custody until the conclusion of the trial on 22/1/2019 when judgment was delivered. I think it is fair to take the period spent in remand custody into consideration. So the sentences shall run concurrently from the date of arrest. The appeal on all the other aspects is dismissed save for sentence.

DELIVERED AND DATED THIS 17TH DAY OF MARCH 2021 AT ELDORET

H. A. OMONDI

JUDGE