REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 112 OF 2019

PHARIS KATHUO NDEMI.....APPELLENT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an appeal from the judgment of; Hon J Kibosia, SRM, on 25th January,2019, in Criminal Case No. 264 of 2017, in Chief Magistrate's Court, Makadara*)**

JUDGEMENT

1. The appellant was charged vide a criminal case number 264 of 2017, at the Chief Magistrate's Court at Makadara, with the offences of; robbery with violence contrary to; section 295 as read with section 296(1) of the Penal Code, in the first count and rape contrary to; section 3(1) (a) (c) and (3) (4) of; the Sexual Offences Act, No. 3 of 2006, (herein "the Act"), in the 2nd count, with an alternative charge of; committing an indecent act with an adult contrary to; Section 11(A) of the Act. The particulars of each count are as per the charge sheet.

2. The charges were read to the appellant who pleaded not guilty to all counts. The matter was then set down for hearing. The prosecution called a total of five (5) witnesses. In a nutshell, the prosecution case is that, on the 27th January 2017, PW 1, herein; "OAA" was at Nat Geo Club, when her phone was taken by one Dennis. The following day, she went to Winners Chapel at south B where Dennis was residing to trace and recover her phone.

3. That, she met the appellant and inquired from him whether he knew Dennis. The appellant acknowledged that, he knew Dennis and offered to assist her trace him. The duo set off towards Mombasa Road. After walking for quite some time, they reached a place known as BAT area. The appellant allegedly told "OAA" to remove her shoes and when she resisted, he strangled her until she peed on herself.

4. That, he then told her to lie down and removed his trouser and raped her. He then took Kenya Shillings Nine Hundred (Kshs900) from her and left. After the incident, the victim sought for help and was taken to Nairobi women's Hospital for treatment. Thereafter, the matter was reported to the police and the appellant was arrested and charged accordingly.

5. At the close of the prosecution case, the trial court ruled that the appellant had a case to answer. He told the court that, he works as a hawker at Kaloleni South B. That, on 31st January, 2017, he was at his place of work when two people approached him. One inquired as to the price of a belt. He gave him one, however the two people, who turned out to be police officers arrested him, as he was "examining the belt." That, he asked them to allow him to inform his neighbour but they declined. He was then taken to a waiting motor vehicle, where he found three women. He did not know them. He was later charged.

6. At the close of the entire case, the Learned Trial Hon Magistrate delivered a judgment dated 25th January 2019, and found the appellant guilty on both main counts, accordingly convicted him and sentenced him to serve twenty (20) years imprisonment on the first count, and ten (10) years imprisonment on count two. The sentence was ordered to run concurrently and the appellant informed of the right of appeal within 14 days, of the date of judgment.

7. The appellant being dissatisfied, on 24th May 2019, filed the appeal herein dated 18th April 2019. In a nutshell he seeks that, the conviction be quashed and the sentence be set aside. The appeal is premised on the grounds reproduced as here below:

> *a) That the learned trial magistrate erred in law and facts when he convicted the appellant in the present when he relied on suspicion of heresy evidence to convict him,*
>
> *b) That the learned trial magistrate erred both in law and facts when he convicted the appellant in the present case yet failed to find that no proper investigations were done in the present case,*

c) That the learned trial magistrate erred both in law and facts when he declined to appreciate the facts that crucial witnesses did not testify,

d) That the learned trial magistrate erred both in law and facts when he convicted the appellant on unsatisfactory evidence advanced by the prosecution's witnesses,

e) That the learned trial magistrate erred both in law and facts when he shifted onus of proof against the appellant to dismiss his plausible defence,

f) That the appellant prays for a copy of the trial record to enable him raise more reasonable grounds and be present during the appeal hearing.

8. The Respondent did not file any response to the appeal save for the filing of the submissions. However, both parties filed submissions which I have considered fully. In a nutshell, the appellant opened the submission. by tendering what is termed as "amended grounds of appeal" pursuant to; Section 350 (v) of the Criminal Procedure Code. He then submitted that, this was a case of; identification and not recognition and therefore an identification parade ought to have been "mounted" to identify the perpetrator of the crime.

9. That, the complainant's evidence was not corroborated. He further submitted that, key witnesses were not called to testify including the arresting Officer. In that regard, the appellant referred to the provisions of; Section 15 of the Criminal Procedure Code, and the case of; *Bukenya & Others vs Uganda (1970) EA 549*, to argue that, the court has a duty to call or summon an essential witness to testify, if not called by the prosecution.

10. The appellant further submitted that, the court erred by shifting the burden of proof to the accused. He referred to the cases of; *woolwington vs DPP (1935) AC, 462, and Republic vs Johnson 1961) ALL ER 969*. Finally, the appellant argued that the sentence meted out was excessive. That, pursuant to; section 333(2) of the Criminal Procedure Code, the trial court failed to consider the period he was in custody. Further the court should have ordered for the sentence to run concurrently and not consecutively.

11. However, the Respondent submitted that, there may have been a defect in the charge sheet as the appellant was charged with the offence of robbery with violence, but it is curable under section 384 of the Criminal Procedure Code, even then that the appellant participated in the trial which means he understood the charges.

12. That, the prosecution proved the case beyond reasonable doubt as required under section 107 of the Evidence Act, (cap 80) Laws of Kenya. In particular, the evidence of "rape constituted personal violence" Further, the appellant was properly recognized as the offence was committed daytime. Finally, all the ingredients of rape were proved. Therefore, the appeal should be dismissed.

13. I have analysed the evidence and/or the arguments of the parties on the appeal and I find that, the provisions of; section 347of the Criminal Procedure Code, (cap 75) Laws of Kenya, provides that any a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court. That, an appeal to the High Court may be on a matter of fact as well as on a matter of law.

14. Further, it is settled law that; the duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and arrive at its own decision, respecting the fact that, it did not have the benefit of the demeanour of the witnesses. In that regard the Court of Appeal stated in the cases of; ***Kiilu & Another vs. Republic (2005)1 KLR 174*, and *David Njuguna Wairimu vs. Republic (2010)* eKLR** as follows:

> ***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 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 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".***

15. It has also been held that, there is no set format for re-evaluation of evidence by the first appellate court. In that regard, the Supreme Court of Uganda in the case of; ***Uganda Breweries Ltd vs. Uganda Railways Corporation (2002) 2 EA 634,*** stated that; "*The* ***extent and manner in which evaluation may be done depends on the circumstances of each case."***

16. Be that as it were, to revert back to the matter herein, **t**he appellant was convicted on the two main counts of; robbery with violence contrary to; section 296(2) of the Penal Code, (cap 63) Laws of Kenya, and rape contrary to section 8(3)(a)(c) and (3) of the Sexual Offences Act No. 3 of 2006.

17. The ingredients of the offence of robbery with violence were set out in the case of; *Oluoch vs Republic (1985) eKLR* , where by the Court of Appeal held that:

> *"Robbery with violence is committed in any of the following circumstances:*
>
> *a) The offender is armed with any dangerous and offensive weapon or instrument; or;*
>
> *b) The offender is in company with one or more person or persons; or*
>
> *c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal*

violence to any person"

18. The use of the word "or" means that; proof of **any one** of the afore ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The question that arise is; did the prosecution prove these ingredients.

19. It is conceded herein by both parties that, the person who attacked the victim was not armed. Further he was alone and therefore not in the company of another person. Therefore, the first two ingredients are not in dispute.

20. However, the third element is in issue. The prosecution was required to prove use of force and/or injury. In that regard, the complainant stated in her evidence that: -

"*He told me to lie down. I sat down and refused to lie down. He pushed me and I fell on my back".*

21. Further, PW 4, Peter Wanyama; a Medical Officer who produced the PRC form told the court that, the victim had superficial bruises on the left shoulder. Similarly, PW 3 who examined her stated that, she had "bruises on the right upper arm caused by trauma"

22. In dealing with this ingredient, the Honourable Trial Magistrate stated as follows:

"*The police doctor, on the other hand intimated that, PW1 suffered when she allegedly fell on a stone. This coincides with the injury PW1 suffered when she allegedly fell down".*

23. In my considered opinion, there was an element of use of violence and the victim was injured during the incident, hence proof of the 3rd element or ingredient.

24. The next question is whether, the prosecution proved theft of the amount stated in the charge sheet. I note that, the Honourable Trial Magistrate did not expressly address this issue. Be that as it were, from the evidence adduced, the victim stated in her evidence that; -

"*He took 900 from me and started walking towards Dennis's house".*

25. The Investigating Officer on her part testified that; "*it was a case of rape initially*". She goes further and states that; "*He had beaten her and stole some money*". She does not state how much money. Finally, whereas the complaint stated the amount stolen was 900.00, the charge sheet states it was; Kshs 950.00. I further find that, there was no effort by the prosecution to establish beyond reasonable doubt that, the money existed before it was stolen. Therefore, there is no adequate proof of the stolen money.

26. The next question as regards count one, is whether the prosecution proved that, the appellant committed the offence. I shall deal with this question after analyzing the evidence on count two. The subject of the charge in count 2, is rape. The offence of rape is provided for under section; 3(1) of the Sexual Offences Act which states as follows:

"*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.

27. **The first ingredient of rape is penetration. The Act** defines '**penetration**' **under section 2** as; *the partial or complete insertion of the genital organs of a person into the genital organ of another person. In that regard, the Court of Appeal stated in the case of;* ***Mark Oiruri Mose vs R (2013) eKLR,*** stated that: -

"*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"*

28. In the instant the case, the complainant testified as follows:

"*He removed my pants and removed his trousers. He inserted his penis inside my private parts, vagina".*

He "raped me and poured sperms on my trouser".

29. In the same vein, PW 4 Peter Wanyama testified that: -

"*She had clothing and dress stained by spermatozoa"*

She further stated that*:*

> *"penile vaginal penetration with physical injuries was (sic) noted."*

30. From the aforesaid, there is adequate evidence of penetration. The next ingredient of the offence is lack of consent. The Act under section 43 (1) and (2)(a) states as follows: -

> *(43) (1) An act is intentional and unlawful if it is committed—*
>
> *(a) in any coercive circumstance;*
>
> *(b) under false pretences or by fraudulent means; or*
>
> *(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence;*
>
> *(2) The coercive circumstances, referred to in subsection (1) (a) include any circumstances where there is—*
>
> *(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;*

31. The complainant in this case testified that, the perpetrator held her leg and told her to remove her shoes, he strangled her till she peed on herself. He pushed her and she fell on her back. This evidence properly points to clear lack of consent.

32. The next question that arises and which was left pending is whether; the appellant was involved in the commission of the offence(s). In that regard, the Honourable trial Magistrate, stated in the judgment, as follows:

> *"The accused person on the other hand did not avail witnesses to corroborate his version of turn of events of that day. It is the complainant's word against his"*

33. **With utmost good faith, the** trial court seems to have shifted the burden of proof to the accused and/or appellant. The **provisions of; section 107 of the** Evidence Act, (cap 80), Laws of Kenya provides that;

> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist;*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
>
> *32. Similarly the provisions of section* **109 states that;**
>
> *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"*

34. As such the burden of proof remained on the prosecution. Be that as it were, it is clear that, when the alleged incident occurred there were only two parties present. The victim and the perpetrator. Therefore, the only direct evidence of the incident is that of the complaint.

35. Be that as it may, it is settled law that; a fact may be proved by the testimony of a single witness. However, as held in; *Roria vs Republic* (19670) EA 583, this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that, the conditions favouring a correct identification was difficult.

36. That, in such circumstances, what is needed is other evidence, whether, it be circumstantial or direct, pointing to guilt, from which a Judge or Jury can reasonably conclude that, the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

37. **Similarly, in the case of; *Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001 (UR)***, the Court of Appeal stated as follows:

> ***"The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances***
>
> ***must be considered (see** R. v. Turnbull [1976] 63 Cr. App. R. 132**). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:***
>
> ***'……It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the***

investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular

circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.'"

38. In that case of; *R vs Turnbull & Others (1976) 3 ALL ER 549,* the court outlined the factors that, ought to be considered, when the evidence is based on identification by a single witness and stated as follows:

> *"... 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

39. The complainant in the instant case testified that, he met the appellant at around 7.00 -8.00 am and walked with him as they talked from Winners Chapel for hours, up to Mombasa road. That she even told him she was tired. PW 2, Ela Musembi who assisted the complainant after the incident testified that, she met her at around 10.00am. The complainant was crying for help and told her she had been raped.

40. It is therefore clear that, the incident herein, occurred in broad day light and the complainant was in the company of the perpetrator for a considerable period of time. Furthermore, after the incident, she took the police to the same area where she met the appellant and he was arrested.

41. The appellant argues in his submissions that; the Investigating Officer should have conducted an identification parade. However, there is a difference between "identification" witnesses, to whom the accused was "previously unknown by sight" and "recognition" witnesses who had prior knowledge of the accused enabling them to recognize the accused at the time of the alleged crime. Indeed, a witness who has acquired sufficient knowledge of an accused when a crime is committed over a long period of time may be considered a recognition witness.

42. It also suffices to note that, the complainant stated in her evidence that, she met the appellant at South B. The appellant in his testimony in court stated that, he works as a hawker at South B. He was indeed arrested at South B.

43. Furthermore, the appellant has not rebutted her evidence. In his defence, he dwelt squarely on the events of the day he was arrested. He is mute on the events of date of the alleged incidents or occurrence of the offences.

44. In my considered opinion, as aforesaid, offence was committed in the broad daytime and the complainant spent adequate time with the appellant to positively identify him.

45. Further the appellant argues that, the arresting officer should have been called to testify, I concur that, the witness should have been called. However, the absence of the witness does not render a fatal blow on the prosecution case. In the case of; *Chila vs The Republic* [1967] EA 722 the court observed as follows: -

> *"The law of East Africa on corroboration in sexual cases is as follows. The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."*

46. In the instant matter, the complainant was not known to the appellant before the incident. I warm myself that, I did not have the benefit of her demeanor, but taking into account the circumstances of this case and the fact that no evidence of malice is available, I find the complainant's evidence reliable. It is noteworthy that, sexual assault by its nature is dehumanizing, degrading and embarrassing and one would not take pride in fabricating the same for no reasons and more so against a total stranger.

47. Thus based on the aforesaid I find that, the appellant was positively identified as having been involved in the commission of the offence, however, I find that, the prosecution failed to prove theft of the sum of; Kshs 950.00 indicated in count one of robbery with violence contrary to section 2976 (2) of the penal code. The conviction of the appellant thereon is unsafe and I accordingly quash it and set aside the sentence of twenty (20) years imposed in respect thereof.

48. However, I find and hold there is sufficient evidence to sustain the conviction on the charge of rape and I confirm it. As regards the sentence of ten (10) years imposed upon the appellant, I find that, it is lawful and legal. There is no evidence that, the trial court considered irrelevant factors in meting it out and therefore there is no reason to warrant interference with it and I decline to set it aside. I however, order that, the sentence will run from the date of arrest being 31st January, 2017.

49. It is ordered, and appellant is notified of right of appeal within 14 days.

50. Finally, with utmost due respect to all the players who participated in the trial in the lower court, and as a matter of observation, when one takes into account the manner in which the case herein was conducted, it creates the impression that, it was handled extremely "casually." No explanation is offered to why the arresting officer was not called and the court did not intervene to inquire. The Investigating Officer's evidence is rather scanty. The analysis of evidence in judgment especially on count 2 is quite brief and/or undetailed. I will leave it at that.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 29TH DAY OF APRIL 2021.

GRACE L. NZIOKA

JUDGE

In the presence of

Applicant in person

Akunja for the Respondent/State

Edwin – Court Assistant