REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 66 OF 2019

DAVID KIMANI KIMAITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Senior Resident Magistrate at Gatundu, ***C.N. Mugo (Mr.)*** *in Sexual Offence No. 20 of 2018 delivered on 14th August, 2019)*

JUDGMENT

1. ***DAVID KIMANI KIMATA,*** the appellant herein, was convicted before the chief Magistrate's Court Gatundu of the offence of rape contrary to Section 3 (1)(a)(c)(3) of the **Sexual Offences Act** No. 3 of 2006. He was sentenced to imprisonment for 10 years. He has filed this appeal against that conviction and sentence. This Court as the first appellate court is expected to submit the evidence of the trial court as a whole, to a fresh exhaustive examination and make its own decision on that evidence. This Court is also expected to weigh conflicting evidence of the trial and draw its own conclusion. In entertaining this appeal, this Court should make allowance of the fact that it did not hear or see the witnesses who testified at the trial: See ***OKENO V. REPUBLIC*** ***(1972) E.A. 32.***

2. The prosecution called a total of 5 witnesses.

3. The prosecution's case was that MWM, a 35 year old lady was in a farm at Karatu area. It was a farm owned by the Assistant Chief's mother. She was alone. She was raped by the appellant while there. She stated:-

> ***"I recall 18/7/18, it was on a Wednesday the accused*** *(now appellant)* ***found me at the farm where I was and he raped me. He put me on the ground and inserted his penis to my vagina. I had not consented to the act. The accused was alone during the rape."***

4. MWM went and reported the matter to the Assistant Chief and it was then the appellant fled. Later MWM reported the rape to her mother. MWM lived with her parents.

5. The mother reported the matter to the police. MWM was taken to Karatu hospital and was later referred to Gatundu Level 5 hospital.

6. MWM at first, in her testimony in chief stated that the appellant, whom she knew because he was a neighbour approached her in the farm in company of someone called Gitau but later on, on being cross-examined, she said that it was Chege and not Gitau and that the said Chege tried to dissuade appellant to leave MWM alone but the appellant declined the advice. That the said Chege then left the scene.

7. Evidence was also given by a Clinical Officer of Karatu Level 4 hospital who testified on behalf of his colleague, who was not available to testify because she had gone to undertake further studies.

8. Similarly, other evidence was adduced by a doctor from Gatundu Level 5 hospital, who also gave evidence on behalf of her colleague who was away doing Masters Degree at University of Nairobi.

9. Both medical examinations at Karatu and Gatundu hospital, showed that MWM had a history of sexual activity. MWM's clothing was noted to be dirty with soil. On examination, it was found that MWM's genital was normal, no bruises, hymen was broken and there was semen. The medical report of Karatu hospital noted that MWM was mentally challenged. There was semen in MWM's vaginal and she was given emergency contraceptive and post-exposure prophylaxis (PEP).

10. Treatment notes, post rape care form and P3 Form were exhibited before the court.

11. On the prosecution closing its case and the appellant being put to election as per Section 211 of the Criminal Procedure Code (CPC) he elected to remain quiet. Section 211(1) of CPC provides:-

> ***"211(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)."***

The appellant did not offer a defence, nor did he call any witnesses. The trial court, as stated before, proceeded to convict the appellant as charged.

12. The appellant has presented 10 grounds of appeal.

13. On grounds 1,2,3 and 4, appellant argued that the prosecution failed to prove the case on required criminal standard and that the trial court shifted the burden of proof to the appellant.

14. I have considered this ground. Nothing could be further from the truth. The criminal standard of proof is as discussed in the case of ***STEPHEN NGULI MULI VS. REPUBLIC (2014) eKLR:-***

> ***"The standard of proof required is*** *"proof beyond reasonable doubt."* ***In reference to this Lord Denning in*** *MILLER V MINISTRY OF PENSION [1947] 2 ALL ER 372* ***stated: -***
>
> > **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.""**

15. The fact that the prosecution met the required standard of proof was appreciated by the learned trial magistrate in the considered judgment of 14th August, 2019 where it was stated:-

> ***"What was clear to the court was the complainant had been raped and the accused was the perpetrator. Indeed the evidence as presented by the prosecution was watertight and in my mind there is no reasonable doubt on the guilt of the accused."***

16. Consequently, I reject grounds 1,2,3, and 4 of the appellant's appeal. I might add that there was no legal requirement for the doctor to state whether MWM's hymen was broken when MWM was examined or on a prior occasion. It mattered not. For the offence to be proved, there must be penetration, lack of consent or if there was consent, it was obtained by force, or threat or intimidation. In this case, I am satisfied that there was no consent. MWM said as much.

17. Under grounds 5 and 7 appellant argued that the trial court failed to determine that the prosecution's case had contradictions and inconsistencies.

18. Appellant through his written submissions stated that there was contradiction in the evidence of MWM and her mother in that MWM said she reported the rape first to assistant chief then to her mother and that to the contrary that her mother in evidence stated that MWM report the matter to her first then proceeded to the assistant Chief.

19. The appellant erred to have made the above submissions. The prosecution's evidence on how MWM reported the offence is very clear and un-contradictory. MWM stated that she was in Assistant Chief's mother's farm when she was raped by the appellant. MWM went and reported the matter to the Assistant Chief. She followed this by saying that she reported the matter to her mother who took her for treatment at Karatu hospital. Her mother confirmed that evidence that MWM found her at home and informed her of the rape. The mother took her to police station and was advised to take her to hospital, which she did.

20. There is no contradiction in that evidence.

21. On the same grounds appellant submitted that since no specimen of his semen was taken it could not be established who committed the offence.

22. My simple answer is that it is not mandatory that to prove sexual offence there must be medical examination done to the accused. Section 36(1) of the sexual Offences act provides the court may direct samples be taken of an accused person, but hat provision is not mandatory nor is it required for a conviction to take place. The Court of Appeal had occasion to consider that section in the case of ***GEORGE KIOJI VS. RPEUBLC Criminal Appeal No. 270 of 2012*** where the Court expressed itself as follows on proof of commission of a sexual offence:-

"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 be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused person. In deed 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 reason for that belief,"

23. Appellant argued that the person identified by MWM, as Chege who tried to persuade the appellant to leave MWM alone, having not been called as witnesses that prosecution's case must fail.

24. Section 143 of the Evidence Act provides as follows:-

"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

25. The appellant needs to be reminded that the evidence of MWM, which was corroborated by the medical evidence needed no further corroboration. Proviso of section 124 of the Evidence Act provides that if the court is satisfied that a victim of sexual offence is truthful, such evidence does not need corroboration. This is what the proviso states:

"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."

26. In this case, the trial court was satisfied in the truthfulness of MWM. This is what court stated:-

"It should be noted that the accused was not a stranger, he was the complainant's (MWM's) neighbour and as such well known to her. Further, the rape happened in broad day light when visibility was optimal and this would rule out a case of mistaken identity. Although the complainant had some mental impairment, she was quite lucid even in her testimony before the court and maintained that it was the accused person who had raped her."

27. The courts have often held that there is no particular number of witnesses required to prove a fact. This was once again stated by the court of Appeal in the case of ***RICHARD MUNENE VS. REPUBLIC (2018) eKLR*** thus:-

"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."

28. For the above reason, the submissions of the appellant are rejected.

29. The appellant further faulted the trial court for having received medical evidence from doctors who had not examined MWM and had not prepared the reports presented in court.

30. To this argument, I simply rely on the Court of Appeal decision of ***JOSEPH MAHENDE VS. REPUBLIC (2019) eKLR*** thus:-

***"Our interpretation of* section 33 (d) *of the Evidence Act as read with* section 77(1) & (2) *of the Evidence Act, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under* Section 48 *of the* Evidence Act. However*, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under* Section 33 (d) *of the* Evidence Act and which *evidence by dint of* Section 77 (1) & (2) *of the* Evidence Act*, is admissible and presumed as genuine and authentic*.

In JOSEPH BAKEI KASWILI -VS- REPUBLIC **[2017] eKLR,** *the Court confronted with a situation where a victim had been attended to by 3 different medical practitioners but only one appeared at the trial, held inter alia as follows:-*

"Section 33 of the Evidence Act Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable. Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."

In ANGELA -VS- REPUBLIC **[2001] eKLR** *the Court added the following:*

"A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the Evidence Act. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h)

may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:-

> **"Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases..."”**

31. Although that portion of that case relied on is long winded it clearly explains the jurisprudence of section 33(d) and 77(1) & (2) of the Evidence Act. The trial court cannot be faulted for having permitted those doctors who testified on behalf of their colleague to testify.

32. The other submissions made in respect to the grounds set out above is in relation to the mental faculties of MWM. At the trial MWM and her mother did not talk of MWM's mental impairment. It was the investigating officer and the clinical officer of Karatu hospital who mentioned it in their testimony. Both stated that MWM was mentally challenged.

33. Appellant has argued that because MWM was mentally challenged the appellant ought to have been charged under section 146 of the Penal Code which provided:-

> ***"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."***

34. Appellant's argument is that because he was charged under the wrong section his appeal on conviction should succeed.

35. I wish to reiterate that the trial court was impressed by the testimony of MWM. It is clear that the trial court found it difficult to accept that MWM was mentally challenged as stated by prosecution witnesses. But the more important issue is can what was mentioned as mental challenge be equated with the words used in section 146 above,that is, idiot or imbecile. Those two words are not defined in the Penal Code. The Black's Law Dictionary Tenth Edition make the following definition:-

> *"Idiot:* ***A person afflicted with profound mental retardation.***
>
> *Imbecile:* ***A person afflicted with severe mental retardation."***

36. It will be seen that one who is an idiot or imbecile has severe retardation. The trial court received the evidence of MWM and did not note such severe retardation. It follows that there was no error in charging the appellant with rape contrary to section 3(1)(a)(b) as read with sub-section 3(3) of the Sexual Offences.

37.It follows that there is no merit in the appeal against conviction of the appellant. Appeal against conviction is dismissed.

38. On sentence Section 3(3) of the Sexual Offences Act provides that on conviction, as the appellant was convicted here, the sentence *"shall be not less than ten years but which may be enhanced to imprisonment for life."*

39. In view of the Supreme Court decision of ***FRANCIS KARIOUKO MURUATETU & ANOTHER VS. REPUBLIC*** **(*2017) eKLR,*** where the said court stated that mandatory sentence was unconstitutional. I am of the view that appellant sentence of ten years can be interfered with. In interfering with that sentence, I am guided by the fact that appellant refused the persuasion Of ***Chege*** who asked him to leave MWM alone and that MWM was traumatised by the unlawful act of the appellant. Bearing that in mind, I set aside the trial court sentence and I do hereby sentence the appellant to 7 years imprisonment. That sentence shall commence from the date he was sentenced by the trial court.

40. Orders accordingly.

JUDGMENT DATED and DELIVERED at KIAMBU this 22nd day of April 2021.

MARY KASANGO

JUDGE

Coram:

C/A

Appellant: …….

For the Appellant: …….

For the Respondent: ……..

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE