REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 59 OF 2020

GASPER KAGIRI NJAMBI.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the Judgment of the Chief Magistrate's Court

at Thika, V. Kachuodho, SRM in Sexual Offences Case No. 4156 of 2014

dated 17th July, 2019)

JUDGMENT

1. ***GASPER KAGIRI NJUMBI*** was convicted of the offence of rape contrary to **Section 3(1)(a)(b)(3)** of the **Sexual Offences Act, No. 3 of 2006** and was sentenced to 10 years imprisonment. The appellant being aggrieved by that conviction and sentence filed this appeal.

2. The duty of this Court, as the first appellate court was discussed in the case ***KIILU & ANOTHER VS. REPUBLIC IKLR 174*** thus:-

> ***"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.***

3. MWK at the time the offence was committed was 96 years old. She lived alone in her mud house. On 2nd November, 2014 at night, she was in her bed. She had not locked the door because she was sickly. Her bed was next to the door. She heard the door opened and also heard footsteps. MWK stated that the person who entered her house raped her. She screamed and people came to her rescue. That the person who raped her was apprehended. She was taken to hospital and was issued with P3 form and Post Rape Care Form.

4. ***Jared Nyakundi*** narrated how on the day in question at around 8 pm he was at his house. His neighbour went to his house and told him that someone was strangling *"shosho"* (grandmother) who was screaming loudly. Jared and his neighbour went to grandmother's house. On arriving at that house, they strategically stood, one at the window and Jared stood at the door. They locked the door from outside. A man emerged from grandmother's house through the window manned by his neighbour. This is what Jared stated in evidence:-

> ***"Fridah (Jared's neighbour) from the window of*** *shosho* ***saw a man trying to come out of*** *shosho's* ***house through the window…***
>
> ***I left the door and went to the window where Fridah had called us. I found the man trying to come out of*** *shosho's* ***house through the window."***

5. Jared and those with him pulled that man out through the window. On being cross-examined, Jared confirmed that on arriving at MWK's house, he heard MWK crying for help. The door to MWK's house was not locked. Fridah, who was with him locked the door from the outside. He and Fridah stood outside the door and the window. Jared confirmed that the person they took to the police station was the one they pulled out, through the window of MWK's house. Jared confirmed that MWK informed them that the man they pulled out of the window had raped her. Jared was clear that the person they pulled out of the window of MWK's house was the one whom they handed over

at the police station.

6. The medical officer at Thika level 5 hospital confirmed that MWK was taken to that hospital complaining of rape. Although the doctor examination did not find MWK had injuries to her genital organ, he stated that that was not determinant of no sexual assault. The examination did find MWK had pulse cells.

7. Appellant, in this appeal relied on his grounds of appeal. He did not make any submissions in support of those grounds.

8. On the first ground, the appellant alleges that his rights under **Article 50(2)(c)(j**) of the Constitution were violated.

9. **Article 50(2)(c)** of the Constitution requires an accused person to be afforded adequate time and facilities to prepare a defence.

10. Since appellant did not support his grounds with submissions, I am at a loss to know how this provision of the Constitution was violated with regard to the appellant. When the trial court ruled that appellant had a case to answer and required him to elect how he would defend himself, appellant elected to give unsworn evidence. His defence hearing was fixed for 6th February, 2019 and on that day appellant stated:-

> ***"I am ready for defence hearing."***

11. I can find no basis for appellant's allegation that **Article 50(2)(c)** of the Constitution was violated in the light of appellant not having complained of such violation during the trial.

12. Similarly, there is no evidence that **Article 50(2)(j)** of the Constitution was violated since appellant did not complain of not being provided with prosecution's witnesses' statements.

13. On the second ground of appeal, appellant complained that the trial court failed to determine there was penile penetration.

14. The definition of penetration, under the Sexual Offences Act was considered in the case ***IRENE ATIENO OCHIENG V. REPUBLIC (2017) eKLR*** thus:-

> ***"Section 2 of the Sexual Offences Act defines penetration as:***
>
> ***'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'***
>
> ***This position was fortified in 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 added).***
>
> ***Later the Court of Appeal, then differently constituted, in the case of ERICK ONYANGO ONDENG V. REPUBLIC (2014) eKLR held as such on the aspect of penetration:-***
>
> ***"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.'"***

15. MWK a 96 years old lady testified that appellant raped her and consequently she screamed which attracted her neighbours who assisted her in apprehending the appellant. That evidence as provided under the proviso of **Section 124** of the Evidence Act was sufficient to convict appellant. The proviso of **Section 124** of the Evidence Act provides:-

> ***"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.***

16. With that proviso in mind and considering the evidence adduced by prosecution, I do reject the ground that penetration was not proved. I uphold the finding of the trial court that the presence of pulse cells coupled with MWK's evidence proved sexual assault.

17. Appellant was arrested while trying to get out of MWK's house, through the window and the neighbour, Jared, who responded to MWK's screams was emphatic that on apprehending appellant, they took him to the police station. Appellant therefore erred to submit that he was not properly identified.

18. **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.***

19. Appellant on ground 4 of his grounds of appeal stated that essential prosecution's witnesses were not called to testify. I will call to remembrance of the jurisprudence on number of witnesses in prosecution's case as discussed in the case ***RICHARD MUNENE V. REPUBLIC (2018).***

> ***"We repeat what, in our view is elementary principle of criminal law that, although the prosecution must avail all witness necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses. See Section 143 of Evidence Act and BUKENYA & OTHERS V UGANDA*** *[1972] EA 549****."***

20. Since appellant did not make submissions in support of his grounds of appeal, it is difficult to know which witnesses he referred as having not been called by prosecutions. Perhaps he meant the other arresting witnesses but I would respond by saying that those witnesses would have testified by repeating what Jared stated. Their absence did not adversely affect the prosecution's case.

21. It follows from my above discussion that appellant's appeal against conviction does fail. Similarly, I find no reason to interfere with the trial court's sentence. No doubt the offence against MWK who at her age of 96 years was traumatising. MWK stated that she broke her rib during appellant's sexual assault and had thereafter to use a walking stick to aid her walking. The 10 years imprisonment meted out to appellant was commensurate to the offence committed.

22. Appellant was held in custody throughout his trial and the tail court should have deemed his sentence to have commenced from the period he was held in custody as provided under **Section 333(2)** of the Criminal Procedure Code. That Section provides:-

> ***"Subject to the provisions of*** *Section 38* ***of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

23. To the above extent, this Court shall interfere with appellant's sentence.

DISPOSITION

24. The judgment of this Court is as follows:-

(a) Appellant's appeal against conviction is rejected.

(b) Appeal against sentence is rejected except that the 10 years imprisonment of ***GASPER KAGIRI NJUMBI*** shall commence from 4th November, 2014.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 20TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant: ……Present

Respondent: ……...…Ms. Kathambi

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE