REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO.86 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. M. Kesse - SRM

delivered on 25th July 2019 in Kitale CMC CR. Case No. (S.O) No.136 of 2018)

PETER WANJALA WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, **PETER WANJALA WANYONYI**, was charged with the offence of **rape** contrary to **Section 3(1) (a) (b)** as read with **Section 3(3)** of the **Sexual Offences Act.** The particulars of the offence were that on diverse dates in the month of March 2018 and 4th August 2018, at [particulars withheld] Farm, within Trans Nzoia County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of C.W without her consent. In the alternative, the Appellant was charged with **committing an indecent act with an adult** contrary to **Section 11**(1) of the **Sexual Offences Act.** The particulars of the offence being that on diverse dates in the month of March 2018 and 4th August 2018, at [particulars withheld] Farm, within Trans Nzoia County, the Appellant intentionally and unlawfully caused contact between his genital organ namely penis and the genital organ of the complainant namely vagina.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged. He was sentenced to serve five (5) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the medical evidence adduced was insufficient and did not establish penetration. He faulted the trial magistrate for failing to hold that the failure to conduct a DNA test was adverse to the prosecution's case. He was also aggrieved that there was no documentary evidence produced in court to prove the complainant's mental state. He was also aggrieved that crucial prosecution witnesses were not called to testify in the case. He was aggrieved that his constitutional rights to a fair trial were violated by the trial court. He was aggrieved that the trial court disregarded credible and truthful evidence adduced on his behalf. In the premises therefore, the Appellant urged the court to allow the Appeal, quash the conviction and set aside the sentence that was imposed on him.

Mr. Omooria for the State opposed the Appeal. He filed written submissions in opposition thereof. He made submissions to the effect that the prosecution had established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. He set out the brief elements required in a charge of rape as penetration, lack of consent/rape and identity of the perpetrator.

On the element of penetration, he asserted that the law does not envisage absolute penetration into the genitals nor the release of spermatozoa or semen of the male organ for the act of penetration to be complete. In that regard he cited the case of **Daniel Wambugu Maina vs. Republic [2018] eKLR.**

He submitted that it was the complainant's testimony that the Appellant had asked her to bend and touch the wall. He then inserted his "mkia" into her vagina and she felt pain. The Appellant repeated that act on several occasions. She later fell pregnant. At the time of the trial, she was expecting to deliver a baby.

The Learned Prosecutor further stated that PW6, the clinical officer, examined the complainant and established that she was pregnant. Her hymen was torn and old looking. He concluded that the complainant was raped. He produced the P3 form as prosecution exhibit No. 1 and treatment notes as prosecution exhibit No. 2. He submitted further that PW1 had placed the Appellant at the scene of crime and as the person who committed the offence which facts were never challenged by the Appellant on cross examination.

He cited the case of **BASSITA HUSSEIN vs. UGANDA SUPREME COURT CRIMINAL APPEAL NO 35 of 1995** where the court held that an act of sexual intercourse or penetration may be proved by direct or circumstantial evidence and usually the sexual intercourse is proved by the victim's evidence and collaborated by medical or other evidence.

It was urged that no persuasive evidence on the part of the Appellant was adduced as to make this court to interfere with the findings on this ingredient of penetration.

On the element of consent, Learned Prosecutor submitted that PW6, a clinical officer, testified that upon examination, he observed that the complainant was mentally challenged. This was further confirmed by PW1 and PW2, the complainant's parents who testified that the complainant was mentally challenged. The trial court also had an opportunity to assess the complainant and was satisfied that she was mentally challenged. It was further submitted that **Section 43(4) (e)** of the **Sexual Offences Act** lists a person who is mentally impaired as a person incapable of giving consent to a sexual act.

In that regard, the Learned Prosecutor maintained that the complainant was mentally challenged and lacked capacity to consent to a sexual act by dint of **section 43(4) (e)** of the **Sexual Offences Act.**

On the element of identity, it was submitted that the complainant testified on cross examination that she knew the Appellant as Peter and was able to point him in court. She further stated that the Appellant had raped her severally and made her pregnant. The complainant also saw the Appellant severally visit her home. She knew him well. Learned Prosecutor termed this as evidence as proof of positive identification. He cited the case of **RORIA V. REPUBLIC 1967. E.A 583** urging the court to find that circumstances were favourable to enable the complainant identify the Appellant.

On the ground that the trial court rejected the Appellant's defence, the Learned Prosecutor was of the view that the Appellant made an unsworn defence which lacked weight and in the estimation of the probative value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative.

He averred that since the Appellant made an unsworn defence, this lacked weight and was not persuasive and thus the prosecution's case remained cogent and unshaken. In so submitting, he cited the case of **MAY vs. THE REPUBLIC [1981] KLR, 129.**

On the ground that the prosecution's evidence was riddled with inconsistencies and discrepancies, it was submitted that the Appellant's conviction was sound as all the ingredients of the offence were proved. The court was invited to address itself to the case of **Twehangane Alfred V. Uganda Criminal Appeal No. 139 of 2001** where the court noted that it is not every contradiction in evidence that warrants rejection of the prosecutor's evidence. The court should ignore minor contradictions unless the court is of the view that it points to a deliberate untruthfulness or if it affects the main substance of the prosecution case.

The facts of the case according to the prosecution are as follows: PW1, Judy Wangale, the complainant's mother stated that the complainant herein was twenty-one years of age at the time she testified in court. The complainant did not attend school as she was mentally challenged. She stated that on a date in March 2018, at 3.00 p.m. she went home and found several people gathered in her homestead. A few minutes later, the complainant fell ill while at Mama Pesh's house. She was taken to hospital where she was found to be pregnant. When the examining doctor asked who was responsible for the pregnancy, she stated that it was Peter Wanjala Wanyonyi and that he had raped her.

PW2, RW, who was the complainant's father, stated that PW1 was his wife and the complainant was their daughter. He stated that the complainant is physically weak, has fainting bouts, suffers memory loss and has been mentally challenged since birth. PW2 stated that sometimes in March 2018, he was summoned to Big Tree where he met the Appellant who had been arrested for raping the complainant. The Appellant confessed and sought forgiveness from him. He declined that request for forgiveness for raping his daughter. The complainant informed him that she had been impregnated by the Appellant.

PW3, GC, was a neighbour of the complainant's family. She told the court that she had taken the complainant into her home and was living with her when the complainant fell ill. She took the complainant to Big Tree Dispensary where the doctor examined her and informed PW3 that the complainant was pregnant. Upon inquiries being made by the doctor, the complainant told the doctor that she had been raped by Baba I. She then called the complainant's mother and informed her of what had transpired. The Appellant was later arrested. He admitted to having had an affair with the complainant. He accepted responsibility.

PW4, Benson Natembeya, a *Nyumba Kumi* chairman told the court that on 10th August 2018 he was informed by PW3 that the Appellant had impregnated the complainant. He approached the Appellant and inquired from him if the allegations were true. They attended a meeting with the Appellant and the complainant. The complainant stated that it was the Appellant who had impregnated her. At that time, the Appellant had admitted to have had an affair with the complainant which had gone on for a long time. The Appellant was arrested and handed over to the police at Big Tree.

PW5, the complainant, testified that she was twenty-one years old. She attended school up to standard eight. She stated that she resides at Big Tree with her parents. She helps them with domestic chores. She also knew PW3 as their neighbour. She used to stay with her sometimes. She testified that Peter Wanjala used to reside next door to them. He was also known as Baba I. He raped her severally in his house. He also took her to the dogs' house at a neighbour's house and also raped her there. On one occasion, he raped her when she was sent to the shop by her mother. He chased after her and when she was about to get home, he caught up with her and raped her. He chased her until her chest started aching. She then started falling ill and fainted frequently. One day, some people witnessed him raping her. She did not want to engage in sexual intercourse. He forced her. After a while, she fell pregnant. PW3 sent her to hospital. The doctor confirmed that she was pregnant. Every time Peter used to ask her to bend and touch the wall. He inserted his "mkia" into her vagina and every time he did it, she would feel pain. She did not tell anyone. She once told the mother and the mother scolded her. The Appellant repeatedly raped her until she fell pregnant. Her parents observed that her body was changing. She also told PW3 that the Appellant was responsible for her pregnancy. She identified the Appellant in the dock and confirmed that he was the one that raped her. She recorded her statement and was later taken to hospital for the second time.

PW6, Joel Toroitich Kiptoo, a clinical officer, at Kitale County Referral hospital produced a P3 form in respect of the complainant. He testified that she gave a history of having been raped by someone known to her on diverse dates between March 2018 and August 2018. He noted that she was mentally challenged. On examination, she had taken a bath and changed her clothes. She had a mass in the abdomen. She had no tears or bruises on vaginal examination. The hymen was torn and old looking. She had a whitish discharge on her private parts. On laboratory examination, Syphilis, HIV and Hepatitis tests returned negative. On urinalysis, the complainant was found to be pregnant and had bacterial cells in her urine. There were white blood cells seen.

PW7, Joel Kipkirui, the investigating officer, testified that he was stationed at Big Tree Patrol Base. He was at work when the Appellant was brought in by members of the public. He booked the report and continued with the investigations. The victim was twenty-one years; she was pregnant. The complainant was mentally challenged. He was informed that the victim was living with PW3 who stated that she had suspected the complainant to be pregnant. On cross examination, he stated that the complainant stated that the Appellant had started seeing her in March after his wife left him. After concluding investigations, he charged the Appellant with the current offence.

When the Appellant was put on his defence, he denied the allegations that he had sexually assaulted the cfomplainant. He stated that on 10 th August 2018, he had returned home from work in the evening and went to a neighbour's house because he needed a copy of an agreement. On reaching there, he saw his neighbours one of whom was his sister-in-law. She indicated that she wanted to talk to him. He stepped out and the other went to the house. Shortly after, the other one came out. They asked him about work. Twenty metres away were five other women one of whom was the lady that sold the land to him. All the other ladies were known to him. His neighbor exclaimed "so it was my neighbour". The four ladies stated that they wished that he spoken to them. They suggested that they go to PW1's house. The one who spoke first intimated that he would face the fire. He was assaulted and requested to give the money that he had in his possession.

His neigbour came together with a village elder and a *Nyumba Kumi* chair. He was robbed off his money and sugar that he had in his possession. When they left that home, he was taken to the police station. He was not taken to Hospital. He stated that he was been framed over a piece of land which he had failed to sell to a former friend of his wife whom he had separated from.

He explained that Judith Wanjala (PW1) had sold land to him and he had not cleared the balance of the purchase consideration for a long time. The first person who intended to buy the land was Gladys (PW3). He did not allow her to purchase the land but instead sold it to someone else. She became bitter that he sold the land to someone else with good money and paid off the debt of Kshs. 18,000. That's when the grudge developed. Later on his wife fled with the purchase consideration. The Appellant insisted that he had been framed because he had issues with the previous land owner.

DW2, Evelyn Wanani, a village elder, stated that she was not aware that the Appellant had been charged with rape. She was unsure whether the Appellant had committed the offence.

This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court afresh. The Court of Appeal in Gabriel **Kamau Njoroge –vs- Republic [1982 – 88] 1 KAR 1134** stated this on the duty of the 1st Appellate court;

> **"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."**

In the present appeal, the issue for determination is whether the prosecution established the offence of **rape** contrary to **Section 3(1) as** read with **Section 3(3)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence in this appeal in light of the submissions made on this appeal. **Section 3(1)** of the **Sexual Offences Act** states that a person commits the offence of rape if;

> **"He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;**
>
> **a) The other person does not consent to the penetration; or**
>
> **b) The consent is obtained by force or by means of threats or intimidation of any kind."**

The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act. On the element of penetration, the complainant testified that on several occasions the Appellant had raped her. **Every time he used to ask her to bend and touch the wall. He inserted his "mkia" into her "urinating thing" and every time he did it, she felt pain. She did not tell anyone on what had transpired. She once told her mother. The mother however scolded her. PW6 the Clinical Officer who examined the complainant noted that the complainant gave a history of having been raped by someone known to her on diverse dates between March 2018 and August 2018. He also observed that the complainant was mentally challenged. On vaginal examination, she had no tears or bruises but the hymen was torn and old looking. A urinalysis confirmed that the complainant was pregnant.**

With respect to the evidence of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in **Martin Nyongesa Wanyonyi vs. Republic Criminal Appeal No. 661 of 2010, (Eldoret),** citing **Kassim Ali vs Republic Criminal Appeal No. 84 of 2005** (Mombasa) where the court stated that:

> **"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."**

In the present appeal, penetration was proved by the complainant's evidence which was corroborated by that of PW6. The Appellant did not challenge this evidence and this court finds that penetration was proved to the required standard of proof beyond reasonable doubt.

It's the complainant's case that she did not consent to the sexual acts. **According to the Proviso to Section 42 of the Sexual Offences Act, *"a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice."*** In **Republic v. Oyier [1985] eKLR**, the Court of Appeal held as follows:-

"The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist."

In the instant case, **PW1 and PW2 testified that the complainant was their daughter. She was mentally challenged. PW3, the Clinical Officer who examined her, observed that she was mentally challenged.** The trial magistrate saw the complainant and was satisfied that she was mentally challenged. She conducted a *voire dire* to satisfy herself as to the intelligence of the complainant. She was able to give a coherent testimony and answer questions put to her on cross-examination.

The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case. **(See Charles Ndirangu Kibue v Republic [2016] eKLR)**

This court has carefully considered the evidence tendered by the prosecution and particularly the complainant and the defense raised by the Appellant. This court reaches the verdict that indeed the prosecution established that the sexual intercourse was not consensual. The complainant had no mental capacity to give free consent. It is also not disputed that that the complainant had a degree of mental retardation. This court finds that the trial magistrate arrived at the correct finding. The conviction was proper and was supported by the law and evidence.

As regards the identity of the perpetrator, this was not in dispute. He was a person well-known to the complainant. The complainant's evidence was that of recognition. It is a well settled principle in criminal law that recognition is a better form of identification than identification of a total stranger. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault. The Appellant was known to the complainant prior to the sexual assault. She knew where he resided. They were neigbours at home. This court therefore holds that the prosecution established to the required standard of proof that it was the Appellant who sexually assaulted the complainant.

In light of the foregoing, the appeal lodged by the Appellant lacks merit and is hereby dismissed. The custodial sentence meted on the Appellant is legal. Since there is no reason to disturb both the conviction and sentence, the decision of the trial court is hereby affirmed and the appeal is dismissed accordingly.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L. KIMARU

JUDGE