REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 109 OF 2018

PATRICK MUTUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by J. WANGANGA RM

in MAUA SO No. 31 of 2017 delivered on 26/4/2018)

JUDGMENT

1. **Patrick Mutuma ("the appellant")** was charged with the offence of rape contrary to **section 3(1)(a)** as read with **section 3 of the Sexual Offences Act No. 3 of 2006**.

2. It was alleged in the charge sheet that on 17/4/2017 at [particulars withheld] Village, Nguyuyu Location Igembe Central district within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of **FW (the complainant**) without her consent.

3. He at the same time faced an alternative charge of committing an indecent act with an adult contrary to **section 11(a) of the Sexual Offences Act.** It was alleged that on the same day and place and time so stated, he intentionally touched the vagina of FW with his penis against her will.

4. The appellant denied the charges, confronted the accusations at a trial where the prosecution called five witnesses while the appellant gave unsworn statement and called no witness. In the end, he was found guilty, convicted on the main count of rape and sentenced to 10 years' imprisonment.

5. Aggrieved by that decision, the appellant has now appealed to this court against both the conviction and sentence. He has raised 5 grounds arguing that; the light used was not favourable for proper identification, and therefore a voice identification parade ought to have been conducted; that the report of the clinician did not prove the offence of rape; the pre-trial detention period was not taken into account contrary to section 333(2) of the CPC and lastly that the court erred in failing to consider his defence.

6. The appeal was ordered to be canvassed by way of written submissions which were then filed by both sides. In his submissions, the appellant faults the trial court for convicting him based on the inconsistent evidence of a single identifying witness (complainant). He contends that the prosecution did not prove its case to the required standard and that his defence was dismissed. He relied on **Kiilu & anor v R (2005) 1 KLR 174, Roria v R (1967) EA 583, Abdallah Bin Wendo & anor v R 20 EACA 168 and Festus Mukati Murwa v R (2013) eKLR** among others in support of his submissions. It is equally asserted that the trial court had not factored in his pre-trial detention in.

7. The prosecution submitted that it had proved beyond reasonable doubt all the ingredients of rape and the evidence adduced was sufficient. The cases of **R v Oyier (1985) KLR 353, Choge v R (1985) KLR 1 and Anjononi 7 others v R (1976-80)1 KLR 1566** were relied on to buttress those submissions.

8. This being a first appeal, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own independent findings and conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Daniel Njuguna Wairimu v R (2010) eKLR**

9. At trial, **PW1,** the complainant, in her evidence recalled being in her house on the material day. At 3.00 am, she was sleeping when she was alarmed by a spotlight. She then saw somebody in her bed who, called her 'mama' and told her not to fear. After telling her that he had been admiring her a lot and that he liked Kikuyu women, he put a bulb in her mouth to cover it, lit his bright torch, removed her panty, came

on top of her, folded her legs and raped her for an hour. She felt a lot of pain because she is quite old. Soon thereafter, he lit his torch again and gave her Ksh.50 before leaving. At 6.00 am, she went to inform her son, PW2 what had happened. Shocked, PW2 went to inform his neighbour, PW3. PW1 was able to describe to PW3 and her two daughters how the attacker looked like. She further told them that she was able to recognize him through his voice because he called her 'mama'. She affirmed that she knew the appellant prior to the incident because he was a very close neighbour. She went to the hospital then to the police station to report. The appellant was subsequently arrested after having been positively identified by PW1 in an identification parade.

10. During cross examination, she reiterated her testimony that it was the appellant who had raped her. She denied either knowing of any quarrel between the appellant and her son or fixing him.

11. **PW2 E K K,** son to **PW1**, testified that he felt a lot of pain when his mother came to tell him that, somebody had raped her. He went to PW3's place to inform her, what had happened. PW3 then accompanied PW1 to Thambiro dispensary, after which a report was made at Kanjo Police station. He knew the appellant prior to the incident because he worked for his neighbour, PW3's husband. During cross-examination, he stated that PW1 easily identified the appellant's voice because he lived nearby for long.

12. **PW3 W N,** was sleeping at about 5.00 am on the material day when, her daughters came to inform her that PW2 was looking for her. PW2, who was then crying, told her that his mother had been raped by somebody. She felt like falling down but her daughters encouraged her to be brave**.** She accompanied PW1 to the hospital. She later learnt that it was her employee, the appellant who had committed the offence. During cross examination, she stated that the reason why the identity of the appellant was not revealed was because, he would have been killed by people.

13. **PW4 Martin Kariuki,** a Senior Nursing Officer at Thambiro Health Centre, examined the complainant on the material day. Although her clothes were not blood stained and there were no laceration or bruises or spermatozoa noted, she was physically disturbed. She had increased discharge and increased epithelial cells which were a sign of friction or infection in the vagina. Based on the above revelation, he concluded that there was sexual activity that had taken place. He produced the P3 form for PW1 and treatment notes for both PW1 and the appellant.

14. **PW4 PC Weslay Murei** of Kanjo Police Station was the investigating officer. He testified that on 18/4/2017, a report was made by the complainant, that she had been raped the previous night while she was sleeping. She even recognized the rapist because he used to work nearby. After visiting the scene, they arrested the appellant.

15. In his defence, the appellant, **DW1** gave unsworn testimony. He vehemently denied committing the offence and maintained that he had been mistakenly identified as the perpetrator because he considered the complainant and a mother and could not imagine doing the act attributed to him.

Determination

16. In this determination the thread that knits the first four grounds of appeal is the question whether the prosecution discharged its onus of proof then the last question on whether the pre conviction period of incarceration was factored into the sentence. The ground on sentence is the clearer one and invites as the starting point.

17. It is a statutory dictate under section 333(2) of the Criminal Procedure Code that the sentencing court takes into account the period served before sentence in computing and reckoning the sentence. It is also evident from the sentence that no regard was given to any period served while he underwent trial. However, whether or not the appellant was in custody during trial must be a matter for the record of the court file. The file shows that the appellant was granted bond on the 21/4/2017 and a release order was issued on 22/06/2017. Accordingly, he was indeed in custody for two months. That period was due to reckoning in the sentence. To that extent, the sentence must be computed to take account of the period of detention. That however is a determination that will matter only if I uphold the conviction.

18. On the challenge against conviction, Section 3 of the Sexual Offences Act defines rape to mean, *the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.* It also includes a situation where the consent is obtained by force.

19. The ingredients of the offence of rape therefore, include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In ***R v Oyier (1985) KLR pg 353***, 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. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."**

20. The first issue for determination is whether, there was an intentional, unlawful and non-consensual penetration of the genital organ of PW1. What came from PW1's testimony was that the appellant had been preying on her for a while. She stated that, **"He then told me that he had been admiring me a lot and likes Kikuyu Women. He then put a bulb in my mouth and removed my inner wear. He came on top of me, folded my legs and raped me. I was unable to cream because he had put a bulb in my mouth. He stayed for an hour. I felt a lot of pain because I am old."**

21. PW4 construed the increased discharge and epithelial cells in PW1's vagina to mean that, there was friction or infection possibly caused

by sexual activity. That evidence when put together with that of PW1 that the appellant was with her for one hour and spoke to her makes it clear that there was sufficient evidence of penetration. Accordingly, the prosecution proved that, the appellant intentionally and unlawfully caused his genital organ to penetrate that of the complainant, without her consent. I may add that, whether or not there was consent becomes an issue only when the accused alleged consent. Here that was not the case.

22. The other ingredient is whether it was the appellant who had sexual intercourse with PW1. In her evidence, PW1 narrated the excruciating ordeal she had been subjected to by the appellant. It is pretty evident that PW1 was quite elderly and she had fully grown up children. In the mind of the trial court and this court the witness was honest and said the truth. The evidence was that the appellant and the complainant were not strangers to each other. It was thus practical that the complainant was able to recognize him by voice besides seeing his face with the aid of the torch the appellant held. She stated,

> **"I recognized him through his voice. He called me 'mama'. He is a very close neighbour. He is very well known to me even before. He had a torch and I was able to see his face. The torch was very bright. It lit his face enabling me to see him very well. He lit the torch again when he finished with me to see the Ksh.50 which he gave me before leaving."**

23. That evidence by PW1 undoubtedly passes the test of recognition as laid down by the Court of Appeal in ***Peter Musau Mwanzia v Republic [2008] eKLR***, where the court held:

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."**

24. I have no lingering doubt in my mind that based on the weight of the evidence led, the appellant was unmistakably recognized and identified as the perpetrator.

25. The upshot from the foregoing analysis is that the appeal on conviction is devoid of any merit and the same is hereby dismissed. However, the sentence is reviewed to the extent that the computation of the period to be served shall take into account the period between the 21/04/2017 and 22/06/2017 when the appellant was in custody before the release order was issued.

Dated, signed and delivered at Meru this 23rd day of July, 2021

Patrick J.O Otieno

Judge

In the presence

Mr. Wema for the state

Appellant in person

Patrick J.O Otieno

Judge