REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E029 OF 2020

HENRY MBUGUA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Mariakani by Hon N. C. Adalo (SRM) delivered on 14th November, 2019 in S. O. Case No. 20 of 2019)

CORAM: Hon. Justice Reuben Nyakundi

Appellant in person

Mr. Mwangi for the State

J U D G E M E N T

This is an appeal by **Henry Mbugua** against both conviction and sentence arising from the Judgment of **N. C. Adalo (SRM)** at Mariakani. Whereby he was found guilty of rape contrary to Section 3 (1) (a) (c) (3) of the Sexual Offences Act. The appellant thereafter was sentenced to ten (10) years imprisonment for that offence.

The litigation history

The charge was premised on the facts that on 14th February 2019, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **LA**, a female adult aged 23 years by use of force. The appellant denied the offence. In his unsworn statement before Court he denied to sexually committing an act of rape.

However from the record, it is clear that the Learned trial Magistrate disbelieved his defence and went for the strength of the prosecution case. The appellant nevertheless was aggrieved with the conviction and sentence, as can be seen from the following grounds:

(1). That the Learned trial Court Magistrate erred in Law and fact by failing to consider that the charge sheet was defective.

(2). That the Learned trial Court Magistrate erred in Law and fact failing to meet the test presented in Section 124 of the Evidence Act.

(3). That the Learned trial Court Magistrate erred in Law and fact by convicting I the appellant without considering that the evidence of (PW1) was wanting and highly questionable for it to sustain my conviction.

(4). That the Learned trial Court Magistrate erred in Law and fact by relying on corroboration of medical report.

(5). That the Learned trial Court Magistrate erred in Law and fact by failing to see that some crucial witnesses were not called to testify.

(6). That the Learned trial Court Magistrate erred in Law and fact by failing to consider that my case was not proven beyond reasonable doubt.

(7). That the Learned trial Court Magistrate erred in Law and fact by failing to find that I the appellant raised a plausible defense which ought not to have been dismissed.

On appeal, the appellant presented his case by way of written submissions. In reply the prosecution counsel **Mr. Mwangi**, also opposed the appeal on the strength of the evidence and Judgment of the trial Court. As regards the appellant, he attacked the complainant testimony **(PW1)** by contrasting it with the test in Section 124 of the Evidence Act on lack of corroboration. It was further the appellants submissions that the material particulars of the prosecution case on penetration tended to proof a made up case which evidence was never evaluated by the Learned trial Magistrate. He cited and placed reliance on the cases of **Mutonyi v R {1982} KLR 203; Jon Cardon Wagner v R {2011} eKLR.** In the appellant's submissions, the trial Court failed to address her relied to the medical evidence and the circumstances created therein by the complainant.

In regard to the scene, the appellant urged this Court to scrutinize the explanation given by the complainant on the surrounding circumstances which create a doubt on the rape incident. In all the appellant prayed for the conviction and sentence to be quashed.

Respondents submissions

Learned counsel for the respondent opposed the appeal. He submitted that contrary to submissions by the appellant, there were no fundamental issues to raise the defectiveness of the charge that is not curable under Section 328 of the Criminal Procedure Code. Counsel further submitted that the contradictions and inconsistencies referred to by the appellant were minor and thus do not go to the root of the burden of proof of beyond reasonable doubt.

Decision

Having considered the appeal, submissions from either side and carefully perused the record and the impugned Judgment. Being a first appeal, the Court is under a duty to the appellant to evaluate and reconsider the evidence afresh so as to draw its own conclusions on whether the Judgment can be upheld or set aside. **(See Okeno v R {1972} EA 32).** The evidence before the trial Court is to be tested within the bounds of the principles in **Woolmington v DPP {1935} AC 462 and Miller v Minister of Pensions {1942} 2 ALL ER.**

At that trial Court, the case sought to be addressed by the prosecution comprised of the following elements:

(1). The act of intentional and unlawful sexual intercourse by the appellant against the complainant.

(2). That the sexual act complained of was done without the complainant's consent.

(3). That positively identified as the perpetrator of the crime was none other than the appellant.

The prosecution to proof the above ingredients relied on the evidence of the complainant **LA**. She told the Court of the graphics surrounding the rape which occurred on 14.2.2019. It all happened within the precincts of **(PW2's)** and the appellant house. Apparently, the complainant happened to be a sister in law to the appellant. In her narration without her consent, the appellant undressed her on that night and forced his penis to penetrate her genitals. Given the gravity of the offence, **(PW2)** on receipt of the complaint reported the matter to the police. The complainant on recording the statement on the crime was referred to the hospital for a medical examination.

According to **(PW4) – Makina** of Samburu Health Center, the complainant **(PW1)** was duly examined to confirm the allegations of rape. The witness, then stated that on physical examination, the complainant was found to be eight (8) months pregnant. Further the vaginal examination showed lacerations on the vulva. Taking all the findings made from the medical examination, **(PW4)** opined that there was valuable evidence on penetration. She produced the P3 as an exhibit 2 in support of the prosecution case.

(PW5) – PC. Mwaka attached to Taru Police Station told the Court that on investigations done by visiting the scene and recording statements of witnesses there was a clear indication of a crime of rape having been committed. On his part, the appellant as earlier alluded to all these allegations, denied the offence. That it was a fabrication by the wife having accepted to cohabit with her with all her children.

In my Judgment, the contention by the appellant cannot succeed. In support of conviction, the prosecution presented before Court the aspect of intentional and unlawful act of sexual intercourse that happened on 14.2.2019 at his house. I note that **(PW2)** testified that the appellant raped the complainant while she was out of the homestead.

According to the medical examination report, the complainant was found to have sustained lacerations to the vulva. That inflammations around the private parts according to **(PW4)** was a positive indication of penetrative sex. Although, it is not necessary to prove penetration through a medical report, in the instant case, that corroborative evidence went further to support **(PW1)** testimony that an offence of that nature had been committed.

I therefore find probative weight in the evidence of **(PW1)** as corroborated by medical evidence of **(PW4)** on the issue of penetration. In this regard, the Court cannot also ignore the investigating officer though not an eye witness, ascertained the evidential value of the witnesses in proving the case against the appellant. In considering the case, I am of the conceded view that circumstantial evidence was so compelling to implicate the appellant of the offence beyond reasonable doubt. The inference drawn by the trial Court was consistent with all proven facts which excluded every other reasonable inference on the non commission of the offence.

The fact that the appellant was alone with the complainant. He executed the offence before the wife could return to the house is a behavior not rebutted in his defence. The consent in this incident was obtained through force, threat or intimidation by the appellant. I cannot conclude this Judgment without pointing out that the evidence on recognition of the appellant was watertight. The Court's duty as set out in **Roria v R {1967} EA 583; Abdalla Bin Wendo v R {1953} 20 EACA and Anjononi v R {1976} 80 1 KLR 1566** is such that there was no error or mistake as to the perpetrator of the crime.

I therefore find that the trial Court directed its mind to these issues on penetration without the consent of the complainant that the prosecution on the facts discharged the burden and standard of proof of beyond reasonable doubt for the offence charged. There are no contradictions or inconsistencies that would affect the findings made by the trial Court. In my view, the conviction entered against the appellant be and is hereby affirmed by this Court.

On sentence the words by the **Constitutional Court of South Africa in Jabulane Alpheus Tshabalala v The State & Commission for Gender Equality Center for Applied Legal Studies** forms the test of significance in sentencing of rape offenders the Court observed:

> ***"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."***

With regard to sentence, we say that the appellant's case is one of the worst that can be envisaged. He got away with a light sentence.

His appeal against the sentence fails too.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE