



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 2 OF 2019

MICHAEL MASINDE WAMALWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon J. King'ori

(C.M) in Bungoma Law Courts S.O Case No. 64/2017 delivered on 28/12/2018)

JUDGMENT

1. The Appellant herein was arraigned in the subordinate court to answer charges of Rape contrary to **section 3(1)** as read with **section 3(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on 6th September, 2017 in Bumula Sub County within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the Vagina of LNB without her consent.
2. The Appellant faced an alternative charge of committing an indecent act with an adult contrary to **section 11(a)** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that on 6th September, 2017 at around 2300 hours in Bumula Sub County within Bungoma county he intentionally and unlawfully caused his penis to come into contact with the Vagina of LNB without her consent.
3. In Count II, he was charged with committing an indecent act with an adult contrary to **section 11(A)** of the **Sexual Offences Act No. 3 of 2006**. Particulars being that on 6th September, 2017 at around 2300 hours in Bumula Sub County within Bungoma County he unlawfully touched the breasts, buttocks and thighs of JNB without her consent.
4. In count III, he was charged with assault occasioning actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars being that on 6th September, 2017 at around 2300 Hrs in Bumula Sub-County within Bungoma County he intentionally and unlawfully assaulted JNB occasioning her actual bodily harm.
5. In count IV, he was charged with burglary contrary to **Section 304(2)** of the **Penal Code**. The particulars were that on the night of 6th September, 2017 at around 2300 hrs in Bumula Sub County within Bungoma county he broke and entered a dwelling house of JNB with intent to commit a felony namely rape therein.
6. He faced an alternative charge of entering a dwelling house with intent to commit a felony contrary to **section 305(1)** of the **Penal Code**. Particulars being that on 6th September, 2017 at around 2300 hrs.in Bumula Sub County within Bungoma county entered in the dwelling house of JNB with intent to commit a felony namely rape therein.
7. A summary of the prosecution case was as set out below. PW1 LNB stated that on 6/9/2017 at around 11.00 pm while asleep in her house, she was awakened by her co-wife crying out for help. She went out to check and found her co-wife on the ground completely naked. When the assailant who was assaulting her co-wife saw PW1 approach, he ran behind the house. As PW1 walked back to her house, the assailant emerged and grabbed her and dragged her to a nearby sugar plantation approximately 100 metres away where he raped her. He threatened to slaughter her if she made any noise. She said that she identified the assailant by his face since there was bright moon light and that the assailant is her clansman.
8. PW6 William Khaemba, a village elder received a call from PW5 Robert Wamalwa and was informed that PW1 and PW2 had been sexually assaulted. He found the complainants at their home and they told him that they had been assaulted by the Appellant. He participated in tracing and arresting the Appellant at Mayanja. The Appellant was escorted to Bungoma Police Station and was subsequently charged.
9. At the close of the Prosecution case, the Appellant was put on his defence, whereupon he gave a sworn statement to the effect that he was arrested on his way back from delivering money to his mother-in-law for the treatment of his wife. That he was not informed the reason for his arrest.

10. Upon conclusion of the trial, the Appellant was convicted and sentenced to serve 40 years' imprisonment on the first count, 10 years' imprisonment on the second count, 3 years' imprisonment on the third count and 4 years' imprisonment on the fourth count.

11. Aggrieved, the Appellant preferred this appeal on the following grounds; -

1. That he pleaded not guilty to the charges.
2. That the prosecution case was full of material inconsistencies and lacked probative value to justify a conviction.
3. That the sentences in counts 1 and 2 were unconstitutional.
4. That there was no compliance with the provisions of Section 36(1) of the Sexual Offences Act as no scientific test was conducted on both parties to ascertain whether or not the appellant committed the offence.
5. That the trial court's decision was made without proper jurisdiction and was not warranted by evidence on record.
6. That it was wrong principle to base a conviction on the weakness of the appellant's defence without considering the strength of the prosecution's case to warrant a conviction.
7. That the trial court misdirected itself in law and fact by failing to issue an order on the concurrence or consecutive in term in respect of the sentence in the four counts.
8. That the sentence is manifestly harsh and excessive in the circumstance of the evidence and thus made in bad spirit and simply unconstitutional.

12. The Prosecution opposed the appeal in its entirety on the grounds that:

1. Each of the sentences meted on each of the counts was proper and in accordance with the law owing to the circumstances of the case. The sentence imposed by the trial court with respect to Counts I and II was proper and within the law. That the complainants' in the cases were different thereby not falling under the same offence. She urged that section 3(1) as read with section 3(3) of the Sexual Offences Act is clear that a person is liable upon conviction to imprisonment of a term not less than 10 years which can be enhanced to life imprisonment. Further that in Count II the Appellant was charged with indecent act with an adult contrary to section 11(A) of the Sexual Offences Act.
2. At no point during the trial did the court direct that an appropriate sample be taken for analysis including DNA and thereby there was nothing for the prosecution to comply with. That in any case, the Appellant was arrested one day after the incident thereby there was no point for samples to be taken for forensic analysis considering that the Appellant was properly identified.
3. The trial court decision was made with consideration of the evidence on record and that the trial court analyzed both the Appellant's case and the Prosecution to arrive at its finding. That in his defence, the Appellant only gave evidence of how he was arrested but failed to give evidence on what happened on the date of the offence. That he did not also call his sister who stays with him as a witness when she could have probably shed light on where he was when the incident occurred.

13. Directions were taken for the disposal of the appeal by way of written submissions. Both parties filed submissions which have been duly considered.

14. This being a first appeal, the duty of the court is as was held by the Court of Appeal in **David Njuguna Wairimu vs. Republic [2010] eKLR** that:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

15. I have therefore analyzed and reevaluated the evidence in this case to establish whether it was sufficient to sustain the convictions on all or any of the charges which the Appellant faced at the trial.

16. I first examined the evidence on identification. PW1 and PW2 were the identifying witnesses. PW1 stated that she was able to identify her assailant by his face since there was bright moonlight. Further that she also recognized his voice because he is a fellow clansman. PW2 on her part identified the assailant by the light of the lamp that she lit and placed on the table in her house before the Appellant entered. She said she recognized him because she had known him from his childhood.

17. In her first report to PW3, narrating the events of the night, PW2 identified Wamalwa as the person who had intended to rape her before she was rescued by her co-wife. Further that Wamalwa raped her co-wife some 100 meters from her home. PW3 too knew the Appellant as a person from his area. The evidence of the two complainants (PW1 & PW2) clearly shows that they were able to see and identify the Appellant using bright moonlight and lamp light respectively. The bright moonlight and the lit lamp provided favourable conditions for identification of the perpetrator.

18. The evidence of identification of the Appellant by the two complainants was fortified by the fact that it was by recognition. The Appellant was a person known to both complainants before the ill-fated night. PW1 recognised him by his voice and as her clansman. PW2 recognised him because she had known him from childhood. She even shouted his name out loud during the assault against her. The trial magistrate reached the determination that indeed the complainants had identified the Appellant as the perpetrator of the offences with which he was charged.

19. It is therefore noteworthy that the complainants' identification of the Appellant was not that of strangers identifying another stranger, but rather of people familiar with the Appellant recognizing him. This was a case of recognition rather than mere identification. The dicta in the case of **Anjononi vs. Republic [1980] KLR 54 at P.60** applies. The Court of Appeal held thus:

“Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other.”

20. Evidence of recognition is generally more reliable than identification of a stranger, but I am alive to the fact that mistakes may sometimes be made by witnesses. In **Wamunga vs. Republic [1989] KLR 424**, the Court of Appeal held as follows:

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

21. I am therefore satisfied that although it was at night, this court has no doubt in its mind that the complainants indeed recognized their assailant. He took quite some time with them dragging PW1 out of her house to wrestle her to the ground and strip her naked. Thereafter, he dragged PW2 for what the witnesses said was about 100 meters before he subdued and raped her.

22. Having the above legal principles in mind, I am of the considered view that the evidence of identification against the Appellant was corroborative, cogent and reliable. It was also not in dispute that the two witnesses and the Appellant were known to each other prior to the night of infamy. I therefore hold, as did the trial court, that the appellant was positively identified.

23. The offence faced by the Appellant in the subordinate court in the first count was that of rape contrary to **section 3(1)** as read with **section 3(3)** of the **Sexual Offences Act**. The section reads:

3(1) A person commits the offence termed rape if –

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**
- (b) ...**
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.**

3(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

24. The essential ingredients of the offence of rape were restated in **John Cheruiyot Chepchilat vs. Republic [2021] eKLR** where the Court held that for the offence of rape to be established, the following elements must be demonstrated:

- i. The intentional and unlawful penetration of the genital organ of a person by another.**
- ii. The absence of consent.**
- iii. Where consent is obtained by force or by means of threat or by intimidation of any kind.**

25. On the elements of rape that the prosecution required to prove, the first was whether there was intentional and unlawful penetration. **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.”*

26. In the case of **Mark Oiruri Mose vs. Republic [2013] eKLR** 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.”

27. In her testimony, PW1 narrated how the Appellant attacked her, dragged her for some distance and raped her. She gave evidence of penetration, which the medical evidence confirmed. Specifically, the medical evidence tendered by PW7 Daniel Sitati, a clinical officer based at Bumula Sub County Hospital. He testified that he examined PW1 on 7th September, 2017 when she presented with a history of having been raped. He gave the indicators thereto to be bloody, wet whitish discharge, lacerations on the labia minora, swelling on the labia

majora and bloody urine sample indicating injury. Epithelial cells were present indicating infection. He concluded that the patient had been raped and filled the P3 form in that regard. The evidence of PW7 confirmed that PW1 had been raped. Accordingly, I am in agreement with the findings of the trial magistrate that there was penetration.

28. The second element for consideration on the offence of rape is whether there was consent. Under **Section 42** of the **Sexual Offences Act**, consent is obtained if the person agrees by choice, and has the freedom and capacity to make that choice. The evidence of PW1 was very clear that the sexual intercourse was not consensual. She described the ordeal. The Appellant grabbed her and dragged her to a sugar plantation when she came to the rescue of her co-wife who was screaming for help. He threatened to slaughter her if she did not stop making noise and then he forcefully had sexual intercourse with her.

29. Upon careful review of the evidence on record, I am satisfied that there was no consent on the part of PW1 to the act committed against her. The fact that the Appellant dragged PW1 to the sugar plantation and threatened her with a panga is enough evidence that consent was not granted. The investigating officer testified that the scene was disturbed denoting a struggle, and the medical evidence also corroborated the witness' account.

30. In sum, I am satisfied that the offence of rape contrary to **section 3(1)** as read with **section 3(3)** of the **Sexual Offences Act** was proved to the required standard.

31. In Count II, the Appellant was charged with the offence of committing an indecent act with an adult contrary to **section 11A** of the **Sexual Offences Act**. The said section provides as follows:

“Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.”

32. **Section 2** of the **Sexual Offences Act** defines an indecent act to mean *“any unlawful intentional act which causes (a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person; (b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration”*.

33. PW2's testimony was that the Appellant dragged her out of her house. He pushed her to the ground, pulled off her petticoat leaving her with the underwear and touched her breasts and thighs. PW1 confirmed that when she came to her rescue. She found PW2 naked. PW4 arrived at the scene to find PW2 in a petticoat and covered in mud. The Court finds that sufficient evidence was availed to prove that the Appellant committed the offence of indecent assault against PW2. The witness account was cogent and not shaken even on cross-examination.

34. In Count III, the Appellant was convicted for the offence of assault occasioning actual bodily harm contrary to **section 251** of the **Penal Code**. I have analyzed the evidence and find that the medical evidence given by PW7 was consistent with witness testimonies. As can be seen from the treatment notes and the P3 form produced as prosecution exhibits 7 and 6 respectively, PW7 noted the following injuries: bruises on the face, tender swelling on the jaw and left face and tenderness on left side of the chest. There was bleeding from the upper teeth. PW7 assessed the injuries as actual bodily harm.

35. PW2 testified that the Appellant pulled her outside, stepped on her neck and squeezed it. He then pulled off her petticoat, touched her breasts and thighs, and beat her when she screamed and held a knife against her. In her testimony, PW1 stated that when she came out of her house in answer to the distress call from PW2, she found PW2 lying on the ground and the Appellant stamping on her. PW3 also recounted that when he arrived at the scene, he saw that PW2 had a swollen face and her clothes were muddy and torn.

36. Actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (*mens rea*) and the assault must have taken place (*actus reus*). (See - **Alex Kinyua Murakaru v Republic [2015] eKLR**).

37. I have reevaluated the evidence on record and find that it is sufficient to support the conviction of the Appellant for the offence charged. The Appellant did not debunk the evidence of PW1, PW2 and PW7 during cross examination and I find that the trial court arrived at the correct conclusion which I hereby uphold.

38. In Count IV, the Appellant was charged with burglary contrary to **section 304(2)** of the **Penal Code** with an alternative charge of entering a dwelling house with the intent to commit a felony contrary to **section 305(1)** of the **Penal Code**. The evidence of PW2 was that she was awakened from sleep by the sound of her door being pushed in from outside whereupon she lit a lamp and went into the sitting room. It was at this moment that the Appellant entered the house holding a steel rod which he had used to break the door and gain entry into the house. The steel rod was produced as prosecution exhibit 4.

39. PW9 the Investigating Officer who visited the scene took pictures of the damaged door while PW8 developed the film into a photograph. The print photographs showed a hole in a door leading into PW2's house. That the hole was used by the suspect to gain entry into the house of PW2.

40. **Section 305(1)** of the **Penal Code** provides *inter alia* that any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit a felony therein is guilty of a felony. There is no doubt therefore that the alternative charge to count IV was proved to the required standard.

41. This was a criminal trial and the burden of proof lay squarely upon the prosecution to prove the charges laid against the Appellant beyond reasonable doubt. From the foregoing analysis, I am satisfied that the trial magistrate arrived at the correct conclusion based on the evidence

before the court. In my considered view, the evidence adduced by the Prosecution against the Appellant was overwhelming and was not shaken at any point in the cross-examination. In his defence, the Appellant only spoke of the day of his arrest and did not say anything about the day in question.

42. On sentencing, the Appellant contends that he should not have been sentenced on both count I and II which fall under the same offence. The record however indicates that the offences in Count I and II relate to different complainants. In count I, the charge is rape contrary to **section 3(1)** as read with **section 3(3)** of the **Sexual Offences Act** and the complainant is LNB, while in count II, the offence is committing an indecent act contrary to **section 11(A)** of the **Sexual Offences Act** and the complainant is JNB. The offences, although committed in the same night, were different, and were committed against different complainants.

43. On the appropriateness of the sentences, under **section 3(3)** of the **Sexual Offences Act**, the offence of rape is punishable by a minimum sentence of imprisonment for ten (10) years. A term of imprisonment not exceeding five (5) years or a fine not exceeding Kshs 50,000/= or both are provided for count II under **section 11A** of the **Sexual Offences Act**. Upon conviction on the third count, the Appellant was liable to imprisonment for a term of five (5) years' as prescribed under **section 251** of the **Penal Code**, and a term of ten (10) years' imprisonment for the fourth count as prescribed under **section 304(2)** of the **Penal Code**.

44. As raised in the grounds of appeal, indeed the trial court did not specify whether the sentences imposed were to run consecutively or concurrently. In **John Waweru Njoka vs. Republic [2001] eKLR**, the Court of Appeal (Chunga CJ, Omolo & O'Kubasu JJ.A.) held:

“The question which arises, in the circumstances, is whether, on conviction, the sentences both limbs of the offence should be concurrent or consecutive.

In law it lies in the discretion of the Court to order whether sentences should run concurrently or consecutively. Nevertheless, it is an established principle of law that where the offences are committed in one transaction, the sentences ought to run concurrently even when laid in separate counts.

In the present case, the magistrate entered conviction on both limbs of the charge for breaking as well as for stealing. From the evidence on record these two offences were committed in one transaction. That being so, we are satisfied that the magistrate ought not to have ordered the sentences on the two limbs of the charge to run consecutively.”

45. The offences committed against PW2 including breaking and entering her house, assaulting her to cause bodily harm and then indecently assaulting her were aimed at subduing her so that the Appellant could rape her. The three offences were therefore committed in a series of the same transaction and the sentences ought to have been ordered, as I hereby do, to run concurrently from the date of conviction.

46. This court takes note of the sentences imposed as stated earlier vis-à-vis the penalties provided by statute. The court also notes the mitigation that the Appellant gave. The mandatory minimum sentence for the offence of rape under **section 3(3)** of the **Sexual Offences Act** is not less than ten (10) years which may be enhanced to life imprisonment.

47. The upshot of the foregoing analysis is that the appeal is found to be lacking in merit and is dismissed. However, this Court will only interfere with the sentence imposed upon the Appellant and order that:

The Appellant shall serve twenty (20) years' imprisonment in count I, five (5) years' imprisonment in count II, three (3) years' imprisonment in count III and four (4) years' imprisonment in count IV.

The sentences in counts II, III and IV shall run concurrently. The Appellant shall however serve the sentence of twenty (20) years' imprisonment in count I first and the concurrent terms in count II, III and IV shall run consecutive to the sentence in count I from the date of conviction.

Orders accordingly.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF OCTOBER, 2021.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Appellant in Person.

In the presence of.....State Counsel.