REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 118 OF 2019

JOHN MUTAVA MWEKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. E. M. Muiru (PM) in Kilungu

Principal Magistrate's Court Sexual Offence No. 21 of 2019 delivered on 17th July, 2019).

JUDGMENT

1. **John Mutava Mweku** the Appellant was charged with the offence of Rape contrary to section 3(1) as read with section 3(3) of the Sexual Offences Act. The particulars were that the Appellant on diverse dates between November and December 2018 at [particulars withheld] location, Kitaingo sub-county within Makueni county intentionally and unlawfully committed an indecent act which caused penetration by inserting his genital organ to the genital organ of **MKK** without her consent.

2. He also faced an alternative count of committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2007(2006). The particulars are that on diverse dates between November and December 2018 at [particulars withheld] location in Kitaingo sub-Location within Makueni county, intentionally and unlawfully committed an indecent act with **MKK** by touching her genital organs.

3. After a full trial he was found guilty, convicted and sentenced to ten (10) years imprisonment on the main count.

4. Being aggrieved he filed this appeal citing the following grounds;

> ***i) That*** *the Trial Magistrate erred in law and fact in holding that the salient ingredients of the charge of rape had been proved beyond any reasonable doubt and hence convicted the Appellant.*
>
> ***ii) That*** *trial Magistrate erred in law and fact in holding that the charges had been proved beyond any reasonable doubt to warrant conviction of the Appellant.*
>
> ***iii) That*** *learned trial Magistrate erred in law and fact in convicting the Appellant against the weight of the evidence on record which evidence was contradictory and inconsistent and of a complainant of not normal mental capacity.*

iv) That *learned trial Magistrate erred in law and fact in making findings that were not based on evidence but premised on his own speculation and conjecture.*

v) That *the learned Trial Magistrate erred in law and fact in failing to find that the complainant was mentally retarded and her evidence was contradicting and not sure who was the assailant.*

vi) That *the learned trial Magistrate erred in law and fact by not taking into consideration the evidence of PW6 confirming that the accused person was not presented to them for examination of his evidence.*

vii) That *the learned trial Magistrate erred in law and fact in relying on hearsay evidence and which were not produced by the complainant.*

5. A summary of the case before the trial court is that on the material day Pw1 (MMK) went to the Appellant's home during the day to fetch water. She had known him through church. While at his home, the Appellant had sex with her. When through he told her to go home. She did not tell anyone as he had told her not to say. She however later informed Mrs. [particulars withheld] the teacher. She also stated that she had had sex with the Appellant six (6) times before this incident and she never told anyone. She was taken to hospital. She conceived as a result of this incident. She said she was born in the year 2000.

6. In cross examination she explained that the Appellant used to get her from her grandmother's house. She was however not clear on the dates.

7. **PW2 CM** was Pw1's head teacher. She testified that on 14th February 2019 she learnt of PW1's pregnancy through her aunt and mother. She informed the assistant chief and later reported at Wote AP post. She recorded her statement at Kilome police station. She said Pw1 told her the Appellant Mutava Mweku was responsible for the pregnancy.

8. **PW3 JMK** is Pw1's mother. She testified that she had noticed changes in Pw1 when she came for half term in February 2019. It was later confirmed at the hospital that she was four (4) months pregnant. She told her that the person responsible was Mutava.

9. **PW4 RN** an aunt to Pw1 confirmed noticing changes in Pw1. She informed Pw3 and the girl was taken to hospital. She informed her that the person responsible for the pregnancy was Mutava. She called Pw2 and later reported to the police.

10. **PW5 P.C. Mollet Achieng** received Pw1's report on 18th March 2019. She explained to her that she had been raped by Mutava who worked for a neighbour and she was now pregnant. The witness stated that Pw1 could not explain some questions well. She sent Pw1 to hospital and a P3 form was filled. She then charged the Appellant who had been mentioned by Pw1. She also took Pw1 for psychiatric evaluation and availed the report to court.

11. **PW6 Hammington Mwamba Masoo** a clinical officer examined Pw1 on 18th March 2019. He noted that she was not of normal mental capacity. The tests confirmed Pw1 was 15 weeks pregnant.

He produced the outpatient card (EXB 1); P3 Form (EXB 2); Lab report (EXB 3); letter and sound scan (EXB 4); immunization card (EXB 5).

12. When placed on his defence the Appellant gave a sworn statement of defence and called four (4) witnesses. He denied the charges saying he is a herds boy aged 52 years, and married with five (5) children. He said he was a Christian and a leader and could not do such a thing. He said this whole saga started in church where Pw1's family goes.

13. He said his wife was the first to be accused of being a witch in February 2019. The same was investigated and found to be false. On 18th March 2019 he was arrested for unknown reasons. He later

learnt he was accused of impregnating Pw1. The charges read to him were different. On 23rd March 2019 PW1's family incited young men who destroyed his home and later the fodder for his employer's animals, was also destroyed.

14. **Dw2 GM** his brother, **Dw3 EN** his relative and **Dw4 BM** his brother all testified on the Appellant's good character. **Dw5 JM** another brother echoed what the rest of the defence witnesses had stated. He told the court of the witch craft allegations and the present case.

15. Both parties agreed to dispose of the appeal by written submission which they did.

16. Mr. Morara for the Appellant submitted that there was contradiction by the witnesses on the date of incident in view of the date stated in the charge sheet. He argued that Pw1 only went to hospital when she was 15 weeks pregnant, hence the need for a DNA test to be conducted which was never the case. It is his submission that the DNA test was necessary to establish the paternity of the child since it was claimed that the pregnancy was as a result of the rape.

17. Counsel submitted that Pw5 and Pw6 had confirmed that Pw1 was aged 18 years and was not of normal mental capacity. He however claimed that at the time of plea taking this had never been mentioned and the required documents were not produced. It is his submission that the trial court did not comply with Section 169 Criminal Procedure Code while writing her judgment. He points out that the learned trial Magistrate did not set out the points for determination and the reasons for the findings on each point. Further that the judgment contains assumptions and conclusions not borne by the evidence.

18. Lastly counsel filed a long list of authorities numbering seven (7). He however does not make mention of any of them anywhere in his submissions. It is therefore not clear to which points they apply.

19. In opposing the appeal Mrs. Owenga counsel for the Respondent summarized the evidence of the prosecution and the defence. She submitted that contrary to the Appellant's submissions the trial court convicted the Appellant based on the entire evidence and not just the evidence of Pw1. That there was no evidence from the defence to demonstrate that Pw1 was so mentally challenged that she could not give a cogent evidence.

20. She submitted that there were no contradictions in the evidence as alleged by the Appellant. She said the anomalies in the dates can only be attributed to typing errors. To her all the required elements in an offence of rape were proved i.e. Pw1 was aged 18 years and above, there was sexual intercourse and Pw1 did not consent to it. Medical documents were produced to support the oral evidence.

21. Lastly she submitted that the allegation that the prosecution's evidence was a framed up story can't hold since it was clear that the Appellant was well known to the family of PW1 as a worker in the neighboring home. That his allegations on conflict in the church did not hold water as he failed to call his wife as a witness to support him.

22. On sentence, she contended that the sentence of ten (10) years imprisonment was reasonable considering the Appellant's advanced age and that of Pw1.

23. The duty of the first appellate court is to re-evaluate and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions.

See **Okeno –Vs- Republic [1972] EA 32**. In **Kiilu & Anor –Vs- Republic [2005] 1 KLR 174**, the Court of Appeal stated thus;

> ***(1) 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.***
>
> ***(2) 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; it must make its own findings and draw its own 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.

The same was reiterated in the case of **David Njuguna Wairimu – Vs – Republic [2010] eKLR.**

24. Upon a careful reconsideration and evaluation of the evidence on record and taking into account all the submissions made by both the Appellant and Respondent and further upon careful consideration of the law, the following issues arise for determination: -

(i) Whether Pw1 was an adult.

(ii) Whether there was penetration of Pw1's genital organ by a male organ.

(iii) Whether the trial court erred in law in failing to order for a DNA test to establish paternity of the child Pw1 was carrying.

(iv) Whether Pw1 was mentally incapacitated.

(v) Whether in the final analysis the prosecution proved the case against the Appellant beyond reasonable doubt.

(vi) Whether the sentence meted out on the Appellant was excessive and unconstitutional.

Issue (i) - Whether PW1 was an adult

25. Pw1 (MMK) told the court in her evidence on 6th May 2019 that she was born in the year 2000 and was 18 years old. She did not however indicate the month of birth. Her mother Pw3 also stated that she was 18 years of age. The treatment notes (EXB 1) and the P3 form (EXB 2) also show that Pw1 was aged 18 years. The child health card (EXB 5) shows she was actually born on 30th December 1999.

26. All this evidence clearly confirms that Pw1 was above 18 years of age at the time of the alleged offence. My finding is that age was established and she was an adult.

Issue (ii) – Whether there was penetration of Pw1's genital organ by a male organ.

27. There is clear evidence that at the time the report was made to the police on 18th March 2019, Pw1 had been confirmed to be heavy with child. **Pw2 CM** who was Pw1's head teacher received a report of this condition on 14th February 2019. Her mother (Pw3) and aunt (Pw4) claim to have noticed this condition in February 2019.

28. **PW6 Hammington Wamba Masoo** the clinical officer who examined her said he did a pregnancy test and ultra sound on Pw1. The tests confirmed she was 15 weeks pregnant. My finding is that Pw1 was sexually penetrated by a male organ as a result of which she conceived.

Issue (iii) - Whether the trial court erred in law in failing to order for a DNA test to establish paternity of the child Pw1 was carrying.

29. Section 36 of the Sexual Offences Act provides that;

"(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing,

including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

30. In **Evans Wamalwa Simiyu –Vs- Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view;

"……..section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. Our view in the case of the Appellant DNA testing was not necessary. This is because the minor Complainant identified the Appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the Complainant that it was the Appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the Complainant and confirmed that vaginal swab was taken from her had spermatozoa…."

31. Earlier in the case of **Kassim Ali –Vs- Republic Cr. Appeal No. 84 of 2005 (MSA)** the Court of Appeal stated;

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

32. Later in the case of **AML –Vs- Republic [2012] eKLR** the Court of Appeal expressed the view that;

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

33. The Appellant submitted so much on the issue of the DNA test saying how failure to do it was fatal to the prosecution case. It is true that the prosecution case is that Pw1's pregnancy was as a result of the alleged rape. Pw1 in cross examination by the Appellant at page 7 of the Record of Appeal at lines 17-18 states;

"I am pregnant and you impregnated me. At Matungu hospital they can confirm it is yours."

34. Upon this revelation by Pw1 if indeed the Appellant was keen on confirming paternity this is the point at which he could have insisted on a DNA test being undertaken. The court may rely on any other evidence adduced to determine a case of defilement or rape though a DNA report if available would form part of that evidence.

35. It is nowhere indicated in the record that the Appellant requested for any DNA test to be carried out and it was declined. Based on this finding and the views expressed by the Court of Appeal in the above cases, I find that a DNA test is not mandatory if there is other evidence to be relied on. I will conclusively address the issue at issue no. (v).

Issue No. (iv) - Whether Pw1 was mentally incapacitated.

36. In her Judgment the learned trial Magistrate made this finding at page 8 lines 7-9.

"Hence in view of the Complainant's mental incapacity, she is incapable to give sexual consent in accordance to section 43(4)(e) of the Sexual Offences Act."

This she did after setting out sections 42 and 43 of the Sexual Offences Act to show that Pw1 was incapacitated. It has also been stated that a psychiatric report was filed in court by the prosecution. I have perused the record to confirm exactly what happened.

37. The record shows that when the matter came for plea taking and after the plea was taken the

prosecuting counsel addressed the court at page 2 in Record of Appeal lines 10-18 as follows:

> ***Prosecutor:*** *We apply to make an application. I and investigation officer have today spoken to complainant MM and on that basis we pray for an order to have complainant subjected to a psychiatric review to enable our further dealing*.
>
> ***Court***: *Prosecution sentiments noted. Complainant is hereby referred for psychiatric evaluation at Mathari Teaching and Referral Hospital Nairobi.*

38. On 9th April 2019 this is what transpired; page 3-4 Record of Appeal.

> *Before Hon. E. Muiru – S.R.M*
>
> *Court assistant – Gladys*
>
> *State – Wangia*
>
> *Accused – Present.*
>
> ***Prosecutor:*** *The psychiatric report is ready.*
>
> ***Court:*** *I do note the psychiatric report by Dr. Ngugi Gotere of Mathari Hospital dated 8/4/2019.*

39. It can be clearly seen that the Appellant was never informed of what was happening in respect to the psychiatric examination of PW1 and even the result. When the said report was availed on 9th April 2019, the same was not shown to the Appellant and he was not told anything about it.

40. The court in its wisdom decided to conduct a *voire dire* examination to satisfy itself of the suitability of Pw1 as a witness. After the examination she made the following observation at page 6, lines 7-9.

> ***Court:*** *I find the complainant understands the meaning of telling the truth. To give a sworn testimony.*

Pw1 went ahead and testified and was cross examined. It is nowhere indicated that the witness had any difficulty in understanding and/or answering questions in court.

41. The doctor's report shows that Pw1 was of low intelligence and was slow. Despite his finding that the girl was moderately retarded and could not testify she disapproved him by testifying so well in court. Infact if the court and prosecution had agreed with the doctor's finding they would have amended the charge to include Section 43(4)(e) Sexual Offences Act.

42. The charge remained as Rape contrary to section 3(1) as read with Section 3(3) of the Sexual Offences Act, and that remains the position. I find that Pw1's condition if any did not amount to mental incapacitation. She was capable of giving consent.

Issue No. (v) - Whether in the final analysis the prosecution proved the case against the Appellant beyond reasonable doubt.

43. Having dealt with the above 4 issues the major issue is whether the Appellant had sexual intercourse with Pw1 and if so whether it was with her consent. The evidence shows that the Appellant and Pw1's family were well known to each other. The Appellant worked as a herdsman for a neighbour to Pw3. Pw1 informed Pw2 – Pw5 that the Appellant was responsible for her pregnancy.

44. The Appellant denied this and sated that he was framed because of matters in the church where his family and that of Pw1 worshiped. This issue of conflict in church and his wife being called a witch never arose in cross examination of the witnesses. **Dw2 George Muthoka, Dw3 Elkana Nzomo, Dw4**

Bernard Mutavi who are brothers and a relative of the Appellant did not say anything in support of the allegations raised by the Appellant. They were all saying how he is a devoted and upright Christian.

45. It is only his brother **DW5 Jackson Mutua** who mentioned something about allegations of witchcraft against the Appellant and his wife. The Appellant also stated that after he had been charged, PW1's family incited young men who destroyed his home and later destroyed his employer's fodder.

46. Indeed these amounted to criminal activities and the matters should have been reported and evidence availed in court. There was none.

47. Be it as it may, the prosecution remains with the burden of proving its case beyond reasonable doubt. It is Pw1's evidence that this incident occurred in the Appellant's house when she had gone to fetch water from his home. She further said that they had had sex about six (6) times and she never disclosed it to anyone.

48. In cross examination she said the Appellant would come for her once she arrived from school. He would then take her to his home and rape her. That he would take her from her grandmother's place. Following this evidence by Pw1 a number of questions come to mind.

(i) With whom was Pw1 staying at the time? Parents or grandmother?

(ii) Which is this home from where the Appellant was allegedly picking her?

(iii) Was the Appellant staying alone or with his family, or at the employer's home?

(iv) Who is it that ever saw Pw1 with the Appellant?

49. Am asking all these questions because there are no answers to them from the evidence of Pw1-Pw4. Besides Pw1's word it is clear there is no other evidence connecting the Appellant to this offence. As a result of the continued sexual intercourse Pw1 conceived. I do find that in the midst of the shaky evidence on the identification of the rapist, the DNA examination would have unfolded the mystery.

50. Pw1 explained that they had indulged in sex with whoever it was about six (6) times before the last one. Why was she never speaking out or even confiding in someone about it if it was forced on her? Infact this matter only came to light after it was discovered she was 15 weeks pregnant. She was not even mentioning the issue of the pregnancy to anyone. Would one confidently say Pw1 was not capable of giving consent and did not or that matter give consent?

51. I am aware that the provisions to section 124 Evidence Act provide that the court can convict on the sole evidence of the victim of a sexual offence. My understanding is that the victim's evidence must be sound and unshaken to found a conviction. As I stated above Pw1 testified so well in court. She is an adult. She had indulged sexually with whoever it was over six (6) times. She said she would be picked from her grandmother's house.

52. Nobody forced or threatened her into sleeping with the man. She was capable of giving consent which she did hence the silence. My finding is that the prosecution failed to prove the absence of consent in this matter. The case was therefore not proved to the required standard.

53. The upshot is that **the appeal is allowed, the Conviction quashed and Sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 30th day of January 2020, in open court at Makueni.

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H. I. Ong’udi

Judge