REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.195 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.2037 of 2011 by: Hon. J. Wanjala – C.M.)

ARON KAMWERE MBOGUA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Hon. J. Wanjala, C.M. delivered on 18/10/2017.

The appellant, Aron Kamwere Mbugua 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 facts are that on 2/10/2011 in Nyandarua District, intentionally and unlawfully caused his penis to penetrate the vagina of EGN without her consent.

In the alternative, the appellant faced a charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act.

Upon conviction, the appellant was sentenced to serve 10 years imprisonment. No finding was made on the alternative charge.

The appellant is dissatisfied with the whole judgment. He preferred the appeal dated 30/5/2019 based on the grounds found in the petition of appeal. The same can be summed up into three broad grounds as follows:

1. *That the prosecution failed to prove its case to the required standards of beyond reasonable doubt;*

2. *That the assailant was not properly identified;*

3. *That the sentence is excessive;*

4. *That the court failed to consider the six years delay in the hearing of the matter.*

The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.

Mr. Muchangi counsel for the appellant also filed submissions to which Ms. Rugut, prosecution counsel responded.

This is a first appeal and therefore it is the duty of this court to re-examine all the evidence that was tendered before the trial court afresh, analyze it and come up with its own determination. Of course, the court has to consider the fact that this court neither saw nor heard the witnesses testify and the trial court was better placed to weigh the demeanor of the witnesses. This court is guided by the decision of *Okeno v Republic [1973] EA 32*.

Before the trial court, the prosecution called a total of three witnesses. PW1 EGN, then a student at [Particulars Withheld] University Nakuru and aged 24 years, was returning home on 2/10/2012 about 6.30 p.m. Ol Jororok using a public service vehicle going to Museveni. When the vehicle stopped at Kasuka, the appellant and other passengers entered the vehicle. PW1 knew the appellant by name of Haron, a person from her neighbourhod. Both of them alighted at Museveni and after a brief walk, the appellant caught up with her and they walked

together till the road that goes to her home and he offered and insisted on escorting her. When they reached a bushy path, the appellant held her by the shoulder, pushed her down, held her mouth. He managed to overpower her, removed her under pants and penetrated her vagina with his penis; that he also took her phone and put it off but later returned it. After that, he offered her Kshs.200/= which she refused. Next day, she was treated at Ol Kalou District Hospital and reported to the police on 5/10/2012. PW1 denied that she ever consented to the sex or that she was paid money.

The complainant was examined by Peter Nginyo on 3/10/2011 who found that her interior genitalia were painful, hymen was broken, perforated and old. The vaginal swab did not have any spermatozoa and she had bathed twice. His evidence was that the pain on the anterior genitalia was evidence of attempted penetration.

PW3 PC Augustine Ombui charged the appellant on 15/10/2015 after a report of rape was made by the complainant on 5/10/2011 and he was arrested.

When called upon to defend himself, the appellant stated that four police officers approached him at his place of work on 2/10/2011 and took him to police station where it was alleged that he had raped somebody. He said that he did not rape PW1 but she was his friend and that there was something they had agreed upon but he did not fulfill it and that its why she had him arrested.

Mr. Muchangi, the appellant's counsel submitted that the appellant was not positively identified because the incident occurred about 8.00 p.m. and it was dark and the complainant did not explain how she was able to see the assailant. He relied on the decision of *Maitanyi v Republic Cr.A.6/1986* where the court held that the court has to take the greatest care when relying in evidence of a single identifying witness under unfavourable conditions.

He also relied on the decision of *Christopher Kamau Mugo v Republic [2006] eKLR* where the court held that evidence of dock identification should not be accepted unless the victim gives a description of the assailant identified the person on parade held.

It was also the appellant's submissions that the appellant was arraigned in court on 17/10/2011 and it took 6 years to determine his case which was a violation of his rights; that he came to court over 50 times but the case was adjourned at the instance of the prosecution for failure of the prosecution witness to attend or lack of the police file. Counsel supported his argument with the decision of *Charo Karisa v Republic [2016] eKLR* where the Court of Appeal observed that a trial must be conducted within a reasonable time and that 6 years was therefore unreasonable.

Counsel further submitted on discrepancies in the prosecution case; that though the complainant did not state the time of attack, the court found it to be about 8.00 p.m. which was conjecture, that the alleged struggle between the complainant and appellant was not corroborated by any evidence; that there was no evidence of penetration but attempt as found by the doctor.

In opposing the appeal, Ms. Rugut, urged that the complainant identified the appellant even by name of Haron as he hails from her neighbourhood; that they talked as they walked home.

As to the delay in determining the case, counsel submitted that though there was a delay, it was attributed to different reasons including transfers of magistrates or the court not sitting.

As regards the issue of penetration, counsel submitted that PW1's testimony was corroborated by the doctor's evidence and the fact that the appellant even admitted to having had intercourse with PW1 but claimed to have been his friend.

I have considered the grounds of appeal and the submissions by counsel. As happens in most Sexual Offences, the complainant was alone at the time of the alleged attack. PW1's testimony is that the appellant was known to her as Haron. They hail from the same neighbourhood. PW1 saw the appellant board the vehicle in which she was at Kasuku at about 6.30 p.m. PW1 admitted that by the time she alighted from the Matatu, it was dark but they talked as they walked home. I have no doubt that PW1 identified the appellant. In fact, in the cross-examination of PW1 and defence, the appellant did not deny that he was with the complainant on that night. His defence was that she was his girlfriend. This allegation that she would not have identified her assailant cannot stand. The decisions of *Maitanyi and Benson Chege (Supra)* on single witness identification do not apply to this case.

From the court records, plea was taken on 17/10/2011, the case was not determined till 18/10/2017, a period exactly 6 years. Article 159 of the Constitution requires justice to be done to parties without delay. Article 50(2)(l) of the Constitution also requires that a trial should begin and be concluded without unreasonable delay. I believe what amounts to unreasonable delay will depend on the special circumstances of each case and may vary from case to case.

I have perused the lower court record. This case was adjourned about 30 times. Out of the 30, the matter was adjourned 10 times because the magistrate was away on official duty. Twice, the magistrates were transferred. Most of the other times, the police file was missing or witnesses did not attend court.

It is unfortunate that the magistrate was engaged in other official junctions on many occassions when the matter came up for hearing. The trial court cannot be blamed for the times when the magistrate had to attend other official duties.

The other delay was caused by change of magistrates upon transfer. That cannot be blamed on the court. The court can only be faulted for the many times it allowed adjournments due to lack of witnesses or the police file. But having taken the above into consideration, the court could have taken the period of delay when sentencing. Though the court notes that apart from having to visit the court severally, the appellant was out on bond. In my view, the said delay cannot be fatal to the prosecution case.

The appellant was charged with the offence of rape contrary to Section 3(1)(a) & (b) of the Sexual Offences Act. To prove an offence of rape, the prosecution has to prove that:

(1) There was penetration of the victim;

(2) That the complainant did not consent to the act.

Penetration is defined in Section 2 of the Sexual Offences Act as:

> "*penetration" means "the partial or complete insertion of the genital organs of a person into the genital organs of another person".*

PW1 testified that after a scuffle with the appellant, he inserted his penis in her vagina. She was examined by Doctor Nginyo on 5/10/2011 about 3 days after the incident. The Doctor found the external genitalia tender, the hymen was perforated, no spermatozoa were found. However, PW1 had bathed twice and that may have been why there were no spermatozoa or the penetration may not have been complete. In any event, presence of spermatozoa is not the only proof of penetration. However the evidence on record clearly corroborates PW1's testimony that there was penetration.

During cross-examination of PW1, the appellant seemed to be suggesting that he paid the complainant to have sex with her. Later in cross-examination of PW3, he alleged that he was a friend to PW1.

In his defence, he also claimed to have been a friend of PW1 but that he did not fulfill what he had promised her and that is why she framed him. He never divulged what it is that he had promised PW1. PW1 told the court that the incident was on 2/10/2011 and she went to the hospital the next day on 3/10/2011. PW1 reported to the police on 5/10/2011. The appellant did not convince the trial court that he was PW1's boyfriend or that there was any grudge between them. Even if the appellant was PW1's boyfriend, sex with her was not automatic. It had to be consensual. The appellant's varying versions of the events is evidence of untruths. The trial court believed PW1 as a reliable witness and I have no reason to find otherwise.

I am satisfied that the prosecution proved that the appellant had unlawful sex with the complainant. There was no consent. I agree with the finding of the trial court. I uphold and affirm the conviction.

The appellant complains that the sentence of 10 years is harsh and excessive. Under Section 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."*

From the above Section, one is liable to be sentenced to a period of 10 years which can be enhanced to life imprisonment. The trial court considered the applicant's mitigation and the fact that he was treated as a first offender. I take into account the delay in hearing of this case. In the exercise of this court's discretion, I hereby set aside the sentence of 10 years. Instead, I sentence the appellant to a period of 8 years imprisonment. The prison sentence to commence on 18/10/2017 when he was sentenced by the trial court.

The appeal succeeds to that extent.

Dated, Signed and Delivered at *NYAHURURU* this *27th* day of *February,* 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – Prosecutor

Ms. Ndegwa holding brief for Mr. Muchangi for appellant

Eric – Court Assistant

Appellant - present