REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 16 OF 2016

FIKIRI CHARO *alias* FIGO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal against the Judgment by conviction and sentence in Criminal Case No. 72 of 2013 by Hon. Wandia)

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Appellant in person

JUDGMENT

Charo alias Figo, the appellant being dissatisfied with the Judgment on conviction and sentence of twenty five (25) years imprisonment for the offence of attempted rape contrary to Section 4 of the Sexual Offences Act has preferred an appeal to this court.

In his Memorandum of Appeal he states as follows:

> **(1). That the Learned trial Magistrate erred in Law in convicting and sentencing the appellant on a charge which was not proved beyond reasonable doubt.**
>
> **(2). That the Learned trial Magistrate erred in convicting the appellant on the evidence of a single witness.**
>
> **(3). That the Learned trial Magistrate failed to rule on the Law by being selective where a sentence of twenty five (25) years imprisonment was imposed.**

Background

The case set to be proved by the trial court was presented on the brief facts that on 6.9.2014 at Milano area – Malindi, the appellant intentionally and unlawfully attempted to cause his male organ mainly penis to penetrate the female genital organ namely vagina of **R L** without her consent.

The prosecution evidence was based on the evidence of four witnesses, whose summary is as follows:

PW1 RL, the complainant testified that on 6.9.2014 on or about midnight she woke up to answer a call of nature. On her return to bed, the door to the bedroom was forcibly opened and the appellant entered by first introducing himself to the complainant as follows: ***"Ni mimi Fikiri Charo nyamaza."*** The appellant then moved to hold her neck followed by some acts of assault to disempower her from raising any alarm. However, according to the complainant she was able to scream and neighbours who heard the distress call came to her rescue.

As at that time the complainant told the court that the appellant came into the house with only a sweater on without a trouser. The responders who arrived at her house caught up with him as he attempted to take flight.

The incident was reported to the police as supported by the evidence of **PW4 Cpl Fatuma Ali** of Malindi Police Station. In PW4 testimony,

on the investigations carried out showed that the appellant went to the house of the complainant with the sole intention of committing the act of rape. Having put together the necessary credible evidence PW4 told the court that she preferred a charge of attempted rape against the appellant.

PW2 SB; the mother in law to the complainant testified that on the material day she heard the screams from the complainant's house. She asserted as having rushed to the complainant's house to confirm the reasons for the screams at that hour of the night. PW2 further told the court that she was informed by the children that the purpose of the screams was that the appellant had gone to the complainant's house.

PW3 Ibrahim Abdullahi, a clinician attached to Malindi Hospital stated that on 12.9.2014 he examined the complainant who came to the hospital with a history of assault and attempted rape. On examination the complainant was found with tenderness on the throat and chest. PW3 opined that the complainant suffered physical harm. The P3 duly signed was produced as **Exhibit 3.**

At the close of the prosecution case, the appellant was placed on his defence but elected to remain silent.

Appellant submissions

The appellant in challenging the conviction and sentence, submitted that Learned trial Magistrate failed to take into account the glaring inconsistencies and contradictions in the evidence rendering the elements of the offence to remain unproven beyond reasonable doubt. More specifically the appellant contended that the uncalled witnesses held the key to the prosecution case on identification but the prosecution chose not to call them to shed light on the allegation that he was caught red handed while attempting to escape from the complainant's house.

He relied on the principles in **Bukenya v Uganda {1972} (EA)** to buttress the legal position on this ground. On this the appellant invited the court to draw an adverse inference against the prosecution case.

Ms. Sombo, Learned counsel for the respondent opposed the appeal. she submitted the single identifying witness evidence of the complaint was watertight and remained uncontrolled by the appellant.

She further submitted that the complainant's testimony was corroborated with the medical evidence by PW3 who examined the complainant and did establish that she suffered harm to the neck, throat and chest. To this Learned counsel argued that its consistent with the complainant testimony as to the events of 6.9,2014 at midnight in her house. Learned counsel prayed for dismissal of the appeal by confirming the trial court Judgment.

Analysis and determination

This is a first appeal the court is therefore entitled to examine the evidence, to re-hear the case, reconsider the matter afresh and to reach its own conclusions and decision. In doing so the cautionary principle is that the trial court Judgment should not be disregarded and must importantly the advantage the trial court had of hearing witnesses, evaluating their respective demeanors and credibility is an advantage not accorded an appeal court (see **Ruwala v R {1957} EA 370**).

The ultimate question in this appeal is whether the prosecution discharged the burden of proof beyond reasonable doubt against the appellant. The burden of proof in Law is settled that and the burden bearer starting with the provisions under Section 107 (1) of the Evidence Act and the principles in the various case law in criminal cases its always vested with the prosecution (See the guiding principles in **Woolmington v DPP AC {1935} AC, Kioko v R {1983} KLR**).

> **"The constant principle is that pursuant to Article 50 (2) (a) of the Constitution the accused is presumed innocent until the contrary is proven."**

Therefore, the duty to prove that the accused is not innocent lies with the prosecution and it never shifts to the accused, save in exceptional circumstances where upon the prosecution discharging its burden of proving existence of certain facts. The law places the burden on the accused to explain reasonably on matters stated to be within his knowledge (See Section (III) of the Evidence Act).

As appreciated in the holding in the case of **Woolmington v DPP and Court of Appeal decision in Kioko v R (supra)** the accused at all material times can only be convicted on the strength of the prosecution evidence and not vice versa.

In the instant case, the elements of the offence expected to be proved by the prosecution fails with the provisions of Section 388 (1) of the Penal Code and Section 4 of the Sexual Offences Act. The case against the appellant on identification was based on the testimony of the complainant.

As stated by the court in **R v Turnbull {1976} 63 CR APP R 132:**

> **"The principles to influence the courts decision on positive identification and to properly convince on such evidence are now well settled. What matters is the quality of the evidence by the single identifying witness when it comes as to which witness to believe in all the circumstances."**

In terms of the guiding principles in **Ruwala case (supra),** the Learned trial Magistrate retains an upper hand by virtue of the advantage she had of observing the demeanor of witnesses.

As an appellate court, I can only fault such a finding if there is clear evidence of misapprehension and misdirection on the facts and law

leading to an erroneous decision.

In relation to the appellant conviction for the offence of attempted rape, at the trial the complainant testified on how the appellant went to her bedroom wearing only upper garment without a trouser. The complainant was held by the throat so that she is not able to scream or raise any distress call. The complainant said that she was already a sleep but due to call of nature she stepped out to answer it, when apparently, the appellant seized the opportunity to gain entry into the bedroom.

According to the complainant, immediately on entry the appellant in a move to make her comfortable, introduced himself by name with a caveat **(*Nyamaza*)** meaning keep quiet.

According to the complainant appellant tore the net grabbed her and with his nakedness ready to commit the sexual act, the complainant though in that distressful condition managed to scream and adjacent neighbour who happened to be her mother in law (PW2) confirmed the incident. The evidence of PW1 and PW2 on the face of it correctly affirms as to the occurrence of the incident where PW1 screamed out for help. The time when the alleged attempted rape was planned to take place happened to be at 12 midnight.

On cross-examination the record shows, that the appellant never impeached the sufficiency of the evidence by the complainant on identification, the attempts to have carnal knowledge with her on the fateful day, and the acts of assault to the throat and chest as a prelude to commit rape without her consent.

According to the evidence by the clinical officer (PW3)who undertook a medical examination and filled the P3 he confirmed the injuries as earlier suffered by the complainant.

At the end of it, I am satisfied that the medical evidence satisfied the requirement on corroboration as stated in the case of **Uganda v George Wilson Simbwa CR Appeal No. 37 OF 1995** where the court held:

> **"Corroboration affects the accused by connecting or leading to connect him with the crime. In other words, it must be evidence which implicate him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it fails within the rule of practice at Common Law or within the class of offences for which corroboration is required."**

The conviction of the appellant was therefore based upon direct and circumstantial evidence of PW1, PW2, PW3 and PW4. The weight, I give to such evidence and the circumstances in the bedroom is consistent with the principles in the case **Ernest Asami Bwire Abanga alias Onyango v R NBI CR Appeal No. 32 of 1990** the court has observed that the complainant and the appellant were not complete strangers as deduced from the record. The appellant in his introduction said *'Ni mimi – Fikiri Charo nyamaza.'* In essence that was meant to calm the complainant and accommodate the appellant to have unlawful sexual penetration. The force or coercion used to accomplish the act was as explained by the complainant and later confirmed by the medical evidence of PW3.

In my view, if sexual penetration means the penis intrusion however slight of any part of a victim genitals, then any act done to complete that sexual intercourse is an attempt towards that act.

As clearly settled in Law under the Penal Code and Sexual Offences Act the appellant intentionally engaged in an action and the circumstances surrounding the conduct are as the complainant believed them to be that rape was about to take place on 6.9.2014. The acts of assault, gaining entry into the house at midnight, tearing the net, placing himself on the bed of the complainant and grabbing the complainants throat are acts and conduct of the appellant meant to further the commission of the offence.

It may also be inferred as to the complainants evidence that the appellant came into the house half naked. The touching of the complainant covering her immediate area of intimate parts can be reasonably construed as being for the purpose of sexual arousal to activate penetration of the genitalia.

Going by the record I am satisfied that the appellant intended to sexually penetrate the complainant and that his forcing her by threats of assault, telling her to shut up, lying on bed with her, while naked constituted a substantive step toward accomplishing the act.

The appellant elected to remain silent. In accordance with the principles in **R. T. Bhatt v R {1957} EA** the prosecution had discharged a prima facie case on the elements of the offence in terms of Section4 of the Sexual Offences Act.

The trier of facts had nothing else to go by as the elements of attempted rape accompanied with coercion were proved beyond reasonable doubt against the appellant, under the reasoning of **Shah v Mbogo.** I conclude that there was not a shred of evidence that the Learned trial Magistrate misdirected herself in the evidence or did apply wrong principles to arrive at the decision. The appeal on conviction fails.

The remaining second point is on sentence. The decision in the cases of **Shadrack Kipchoge Kogo v R CR Appeal No. 253 of 2003** the essence of the principles in this case are that:

> **"Sentence is essentially an exercise of discretion of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor, or that a wrong principle was applied or shown of those. The sentence was harsh and excessive that an error in principle must be inferred."**

As pointed out above at the very beginning in exercising discretion during sentencing a trial court has various legal tools which contain broad

guidelines and principles to assist in determining a proportionate sentence. I have in mind one of key tool is the sentencing policy guidelines. Thus to a large extent Article 50 (2) (p) of the Constitution provides as follows:

> **"The accused has a right to the benefit of the least severe of the prescribed punishment for an offence."**

At the hearing on sentence, the court has to ascertain the aggravating, mitigating and any extenuating circumstances of the crime an accused person has been convicted of at the end of the trial.

The crucial question in this appeal on sentence is whether the trial Magistrate misdirected herself in imposing a twenty five (25) year imprisonment for the offence.

As regards sentence, under Section 4 of the Act, parliament prescribed a minimum sentence of five (5) imprisonment for the offence of attempted rape. Relying on that Section the Learned trial Magistrate enhanced the sentence to twenty five (25) years imprisonment.

Quite clearly, it would be unrealistic not to acknowledge of the fact that there are no reasons on record why the Learned trial Magistrate enhanced the sentence against the appellant from the minimum of five to a maximum of twenty five (25) years imprisonment.

In my view there is a striking disparity between the prescribed sentence and the one which the Learned trial Magistrate imposed. The absence of any compelling or aggravating factors as to what influenced the decision calls upon this court to apply the principles in **Shadrack Kipchoge Kogo case and Mbogo v Shah.**

There is overwhelming evidence to demonstrate that the sentence of twenty five (25) years was excessive and punitive to be a subject of review on appeal. The Learned trial Magistrate failed to consider the relevant factors and tended to overemphasize the victim impact statement. In the end the trial court failed to show the aggravating factors outweighed any mitigating factors to warrant a sentence far beyond the minimum of five (5) years provided under Section 4 of the Act.

I find it perfectly in order to invoke appellate jurisdiction to vary and set aside the twenty five (25) years sentence and substitute it with a five (5) year prison sentence. This is in accordance with Article 50 (2) (p) of the Constitution that

> **"the appellant has a right to the benefit of the least severe of the prescribed punishments for an offence."**

Having considered the appeal, I find no merit on conviction as argued by the appellant. The same is dismissed. In the result this appeal on sentence partially succeeds to the extent of varying the sentence with the five (5) years term of imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 27TH DAY OF FEBRUARY, 2020.

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R. NYAKUNDI

JUDGE