REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 21 "A" OF 2019

MUIRURI KANGETHE …………………………….APPELLANT

VERSUS

REPUBLIC ……………………………………..…RESPONDENT

(Appeal from original conviction and sentence (Okuche, SRM), dated 30th November 2017 in criminal case No. 7 of 2017 at Loitokitok)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to Section 3(1) a (1) (b) of the Sexual Offences Act No. 3 of 2006. Particulars were that on 18th April, 2017 at [particulars withheld] area within Loitokitok sub-county, Kajiado County, intentionally and unlawfully caused his private organ to penetrate the private organ of **MN** without her consent.

2. The appellant faced an alternative count 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 the 15th day of April, 2017 in Loitokitok District within Kajiado County intentionally touched the private organ of **MN** without her consent.

3. The appellant denied both the main and alternative counts and after a trial in which the prosecution called 6 witnesses, the trial court found him guilty on the main count, convicted him and sentenced him to serve 10 years imprisonment. The appellant was aggrieved with both conviction and sentence and filed a petition of appeal on 30th April, 2019 and raised the following grounds of appeal, Namely:

> ***1. That the trial magistrate erred in both law and fact by failing to notice that the prosecution did not prove the allegation to the required standards and only relied on uncorroborated and circumstantial evidence to push their case.***
>
> ***2. That the learned trial magistrate failed to consider the fact that there was inadequate lighting to identify the suspect.***
>
> ***3. That the learned trial magistrate failed to be faithful to the law and to be cautious enough to notice or appreciate the inconsistences, yawning gaps or missing links and lacunas evidence while sentencing in this case.***
>
> ***4. That the medical exhibits used by the prosecution was insufficient.***
>
> ***5. That the learned trial magistrate did not adequately consider his defence.***

4. During the hearing of this appeal, the appellant relied on his written grounds of appeal and submissions and urged the court to allow the appeal, quash conviction and set aside the sentence.

5. In his written submissions dated 5th November, 2019 the appellant also included amended grounds of appeal to the appellant to the effect that the trial magistrate failed to find that the prosecution did not prove its case beyond reasonable doubt; that the trial court relied on uncorroborated evidence; that there was inadequate lighting for purposes of a proper identification; that the court did not consider the inconsistences in the prosecution evidence; that medical exhibit used by the prosecution were inadequate and that the trial court did not consider his defence.

6. In the submissions, the appellant argued that the prosecution failed to prove its case beyond reasonable doubt as required by section 107 of the Criminal Procedure Code. According to the appellant, the prosecution's case was based on circumstantial evidence which was weak and worthless. He relied on ***James Mwangi v Republic*** [1983] KLR 327 for the submission that in a case based on circumstantial evidence, in order to justify the inference of incrimination, facts must be compatible with the innocence of the accused.

7. He argued that the prosecution's case was marred by inconsistences and unresolved contradictions. He relied on ***Sarah Wanjiku Kamau v***

Republic HCCRA No. 17 of 2004 Nyeri **(Khamoni, J),** for the submission that it is the duty of the prosecution and not the Judge to prove its case against the accused beyond reasonable doubt, and that the standard of proof cannot be achieved where the prosecution has contradictory evidence.

8. The appellant pointed at the evidence of PW1 which stated that the offence took place on 14th April, 2017 while PW2, PW3 and PW5 stated that it was on 18th April, 2017; that PW1 had no injury on her hands although she alleged that she had been tied.

9. The appellant further argued that there was insufficient light for purposes of recognition of the attacker. According to the appellant, PW1 testified that she had put off light and that she recognized the attacker through light from a torch which the appellant contends was not possible. He relied on ***Republic v Turnbull Pokers*** [1976] 3 All E R 549 on recognition.

10. He also relied on ***Julia Chepkorui v Republic*** Criminal Appeal No. 13 of 1987 for the submission that when the case has no eye witnesses the evidence adduced is not corroborated and ***Sawe v Republic*** [2003] KLR 364 for the submission that suspicion however strong, cannot be a basis of inferring guilt.

11. On medical proof, the appellant submitted that the Doctor did not explain the extent of injury and that there're was no proof that he was the one who committed the offence since he was not medically examined. He relied on ***Vincent Yatich v Republic*** Criminal Appeal No. 88 of 1992 for the submission that where an accused was not taken for medical examination he deserved to be set free. He also argued that his deffence was not considered and that there was no cogent reason for rejecting his defence.

12. On sentence, the appellant argued that the court did not consider that he was remorseful, was a first offender and the sole bread winner hence the sentence imposed was manifestly harsh.

13. Mr. Njeru Learned Assistant Deputy Prosecution counsel supported the conviction and sentence. He relied on their written submissions dated 27th August, 2019. Counsel submitted that the appellant was properly identified by the complainant; that there was sufficient lighting and that complainant informed the village elder, (PW2), on the same night that it was the appellant who had committed the offence.

14. Regarding sentence, counsel submitted that according to crime committed and in the manner it was committed, the sentence meted out was commensurate with the offence. He urged the court to dismiss the appeal, uphold conviction and affirm the sentence.

Determination

15. I have considered the appeal submissions by the appellant and those of the respondent and the authorities relied on. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reanalyze and reassess the evidence and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that **(See Okeno v Republic** [1972] EA 32***)***

16. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> "***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. 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; 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."***

17. And in ***Garpat v State of Haryana (2010) 12 SCC59***, The Supreme Court of India underscored this duty stating:

> "***The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."***

18. PW1 MNM testified that on 14th April, 2017 she was sleeping in her house. She work up only to see a spotlight being flashed in her bedroom. She saw a person and raised an alarm but the person ordered her to keep quiet. The person was holding a panga and threatened to kill her if she did not keep quiet. She had switched off lights. She recognized the person through the spotlight. She only knew him by appearance but not by name. He did not have an incisor tooth. The person tied her hands from behind, ordered her to lie on the bed on which her children were also sleeping, removed her trouser, switched off the torch and had sexual intercourse with her. She could not tell whether or not he had a condom. When he was done, he left warning her that he would come back.

19. She told the court that she never raised an alarm because of the threats. She got up naked and her hands still tied and ran to a neighbour called Jane Njeri, called her through the window. Njeri came out and covered her with a lesso. Njeri also called her children who came and untied her. The witness testified that the neighbour called a village elder with whom they went round the compound and found a big hole into the sitting room through which the person gained access to the house. She was taken to Loitokitok police station and later to Loitokitok hospital. She was issued with a P3 form and PRC. She later learnt that the person had been arrested. She identified him in the dock.

20. In cross-examination, the witness told the court that she used to do casual work with the appellant and that she was lying on her back and that is how she was able to identify the appellant through the missing incisor tooth.

21. PW2, Mary Nyambura, testified that on 18th April, 2017 at about midnight she was sleeping when her phone rang. When she checked,

she noticed that it was Jane Njeri who was calling. Jane Njeri asked her to go to PW1's house who told her that she had been raped and she had covered her with a lesso. They checked around the house and saw a big hole. She called young men who took PW1 to hospital. She went back to her home. PW1 described the person who had raped her and after 3 days, they went and arrested him.

22. PW3, Jane Njeri, testified that on 18th April, 2017 at about midnight, PW1 went to her house and woke her up while naked. She had her hands tied behind her back. The witness took a lesso and covered her. Her son came and untied PW1. The witness then called the area village elder through her phone. They went to PW1's home where they saw a hole on the wall. PW1 did not tell her what had happened. She left and went to her home. She later recorded a statement with the police.

23. PW4, Dr. Alexander Mwai Gatimu, a medical officer based at Loitokitok Hospital, testified that on 19th April, 2017 he examined PW1 who went to the hospital with a history of sexual assault. The incident had taken place 12 hours earlier. He assessed the degree of injury as grievous harm. He filled and signed the P3 form. The weapon used was a male organ. He produced the P3 form and PRC as PEX 1 and 2 respectively. Lab test results were also produced as PEX 4.

24. PW5, No 79734 PC Kirui Kipngetich attached to Loitokitok police station testified that on 18th April, 2017 a case of defilement was reported at the station. He was called by fellow officer PC Eunice and they proceeded to the scene, PW1's house built of timber. They found a hole; they then went to the appellant's home and found that he had been arrested by members of the public. They took him to the police station.

25. PW6, No. 104639 Eunice Mwendi, also a police officer attached to Loitokitok police station, testified that on 19th April, 2017 she was instructed to investigate the case. She went with colleagues, Abdi, Joshua and Kibet to the scene where they found a hole that was used to access the house. While at the complainant's home, she received a call from the village elder and when they went to her home, they were shown where the appellant was. They arrested him and took him to the police station. The complainant identified him and he was charged. She prepared an exhibit memo and sent a flash disk to Nairobi for processing photographs. She produced the exhibit memo as PEX 6(a), PRC as PEX 6(b) and Photographs as PEX 3.

26. When put on his defence, the appellant testified that on 14th April, 2017 he went to buy maize flour from a shop, he met PW1, greeted one another and after pleasantries, she asked him for money and he gave her Kshs. 200. He asked her whether he could go to her house but she asked him to visit her on a Monday. He visited her on that Monday as they had agreed; PW1 welcomed and served him tea. They then went to bed and had sexual intercourse. When he wanted to leave, PW1 demanded money but he told her that he did not have money and promised to pay her the following day. PW1 raised an alarm but he pleaded with her not to raise the alarm but to no avail. He left her house and went to sleep. After two days police officers went, arrested him and charged him with the offence.

27. After considering the evidence of both the prosecution and the defence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced to 10 years imprisonment him prompting this appeal.

28. I have carefully considered the prosecution's evidence and that of the defence. For the prosecution to prove its case it was required to prove the ingredients, that there was sexual intercourse and that it was without the consent of the victim. That is, the appellant had an unlawful intercourse with the complainant. In that regard, section 3(1) provides:

> ***"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) the other person does not consent to the penetration;***

29. The evidence of PW1 was that the appellant had a non-consensual sexual intercourse with her on the material night. The appellant himself admitted in his defence that he had sexual intercourse with PW1 but that it was consensual. The trial court considered the evidence of both the prosecution and the defence raised by the appellant as well as the circumstances of the case and stated at page 24 of the judgment:

> ***"...can it be said that the sexual intercourse was consensual. Given my derivation (sic) above and the circumstances of this case I will find that the sexual intercourse between the accused person was not consensual, the penetration was obtained by threats and use of force. The accused was armed with a panga, he tied the complainant's hands at the back and dared her not to raise any alarm lest he kills her. These are all the ingredients of the offence rape. The defence of the accused person that the sexual intercourse was consensual therefore does not hold any water, it is not believable and this court will thus dismiss it."***

30. The trial court was satisfied that the sexual contact was not consensual and dismissed the appellant's defence.

31. For my part, the only question for determination in this appeal is whether the intercourse was consensual. This is so because even though the appellant has raised a number of grounds including identification, they do not have any bearing in this appeal given that he admitted that he had sexual intercourse with PW1. The question of identification or recognition did not arise before the trial court neither should it be an issue in this appeal.

32. I have gone through the evidence on record. PW1 testified that the appellant went to her house at night armed with a panga and threatened to harm her if she raised an alarm. He forced her on the bed, removed her cloths; undressed and had sexual intercourse. PW1 tried to raise an alarm but he threatened to harm her if she dared. He had tied her hands, when he was done, he left threatening to come back.

33. After the appellant left, PW1 went to PW2's place while naked and her hands tied. She called her out and informed her had happened. PW2 came out and gave PW1 a lesso to cover her nakedness. PW2 called her son who came and untied PW1. PW3 was informed. They went

to PW1's house and they found a hole through which the appellant entered.

34. The appellant on his part argued that he went to PW1's house with her permission; had tea and thereafter they had consensual sexual intercourse. After they were done, PW1 demanded money. When he told her that he did not have money she threatened to raise an alarm. He went away and was arrested three days later and charged.

35. There is therefore denial that the appellant had sexual intercourse with PW1. Had the appellant denied that he committed the offence, then he would have been entitled to raise any other defence including identification. That is not an issue in this appeal. The issue is whether the sexual act was consensual.

36. The law is clear that sexual intercourse without consent or where consent is obtained by any other means such as through a promise, it is not consensual and is therefore unlawful. PW1 testified how the incident happened. In other words, it was not consensual sex. She was invaded at night, tied and the appellant had sexual intercourse. He threatened to harm her if she raised an alarm. According to PW1, the appellant went into her house at night without her knowledge or consent.

37. The appellant claimed that he was invited to PW1's house but in his defence but did not say what time he went to the house. He stated that the door was opened for him but the witnesses told the court that entry was forceful through a hole. If one was to accept the appellant's defence that he had a consensual sex with PW1, who tied PW1's hand behind her back and why? Why would PW1 do to PW2's house at night and naked? What would have been the motivation for her to do such a thing at night? Furthermore, PW2, PW3 and police officers, PW4 and PW6 confirmed that they went to PW1's house and found a hole through which access to PW1's house was made possible.

38. With all this evidence, it is clear to me that the appellant forcefully entered PW1's and had unlawful sexual intercourse with her. I agree with the trial court's finding of fact that the appellant committed the offence and that his defence that the he had consensual intercourse had no basis. I am satisfied that the prosecution proved its case beyond reasonable doubt.

39. The appellant also argued that the sentence meted out was excessive. According to him, the court did not consider that he was remorseful; was a first offender and the sole breadwinner for his family hence the sentence imposed was manifestly harsh.

40. Section 3(3) of the Sexual Offences Act under which the appellant was charged provides for the sentence for the offence. The section provides that ***"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."***

41. Section 3(3) provides for a minimum sentence of ten years. However, as the Supreme Court has held in ***Francis Karioko Muruatetu & Others*** Supreme Court Petition No. 15 of 2015,[2017] eKLR, mandatory sentences deprive courts discretion to met out appropriate sentences depending on the circumstances of each case. That means in meting out sentence trial courts still have discretion to impose any other sentence other than the mandatory sentence.

42. The sentence imposed by the trial court was the minimum but lawful sentence. Considering the circumstances under which the offence was committed, the sentence imposed was appropriate. I see no reason to interfere with that sentence.

43. In the end, having reevaluated the evidence and analysed it myself, I am satisfied that he prosecution proved its case as required by law. Consequently, this appeal is dismissed, conviction upheld and sentence affirmed.

Dated, signed at delivered at Kajiado this 13th day of March, 2020.

E.C. MWITA

JUDGE