REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NO 96 OF 2017

DAVID MBAKO.....1ST APPELLANT

FREDRICK NYAKUNDI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against both the conviction and the sentence of Hon. Liz Gicheha (SPM) delivered on 10th *November 2017 in Nakuru Chief Magistrate's Court Criminal Case No. 583 of 2016.**]***

JUDGMENT

1. The two Appellants were charged before the Chief Magistrate Court in Nakuru with one count of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge as contained in the charge sheet were as follows;

> *On the 20th* day of February 2016 in Njoro Sub County within Nakuru County jointly, [the two Appellants] unlawfully and with common intention committed an act by inserting their male genital organs (Penis) in turns into female genital organ (vagina) of MWK an adult aged 25 years which caused penetration.

2. An alternative charge of indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The details of time, place and victim are the same as those in the main count.

3. The Appellants pleaded not guilty and the case proceeded to full hearing. The Prosecution called three witnesses. At the end of the prosecution case, the Appellants were placed on their defence. They each gave unsworn statements and called no witness. The Learned Trial Magistrate after the trial found the Appellants guilty and imposed a 10 year imprisonment sentence.

4. The Appellants are aggrieved and have filed the present appeals. The Court consolidated their two appeals. Initially, the two Appellants filed identical grounds of appeal as follows:

> a. The Trial Magistrate erred in law and in fact by failing to invoke the provisions of section 137 (1) (2) (b) and 333 of the Penal Code to account for the period on one year 8 months they suffered in prison remand from 29th *of February 2016 to 10th November 2017*
>
> b. The Trial Magistrate erred in law and facts by failing to appreciate that the medical evidence produced by the prosecution before the Court did not support the charge

5. The 1st Appellant filed amended grounds of appeal together with his written submissions thus:

> a. The Trial Magistrate erred in law and fact by failing to appreciate that the prosecution evidence on identification and its entirety was marred with inconsistencies and glaring contradictions and could not sustain a safe conviction.
>
> **b.** The Learned Trial Magistrate erred in law and in fact by *failing to appreciate that critical witnesses were not called upon by the prosecution to testify*
>
> **c.** The Learnd Trial Magistrate erred in law and in fact by *failing to appreciate that the medical evidence adduced by the prosecution did not any way corroborate the charges.*

d. The Learned Trial Magistrate erred in law and in fact by *failing to appreciate that the evidence tendered by the prosecution describing the nature of arrest was scanty and contradicting*

e. The Learned Trial Magistrate erred in law and in fact by convicting the Appellant on the basis of the evidence of a single witness which was not corroborated and without cautioning herself on the dangers of relying on such evidence.

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R (1957) EA 336***, ***Ruwala vs. R (1957) EA 570***.

7. The trial in the Lower Court was short and rather straightforward. Only three witnesses testified. The Complainant testified first. She testified that on 05/02/2016, in the evening, she had come from work farming potatoes in Keriko. A certain Baba Ken had helped her carry a sack of potatoes. She decided to go to the shops. She met with the 2nd Appellant who was in the company of the 1st Appellant. The 2nd Appellant called her out. She testified that since she knew his reputation as a "bad person" who raped girls, she refused to respond. She said that the 2nd Appellant got a whip and started whipping her. He also gave the whip to the 1st Appellant who continued beating her. She fell down. The two Appellants also attacked Baba Ken who took off. They then called for a motor cycle. They put her on the motor cycle and took her to the 2nd Appellant's house. There, they took turns to rape her. They threatened her with a panga if she dared screamed.

8. The Complainant said that they raped her the whole night – taking turns. She left the following morning. She met a friend by the name W who advised her to report to the Police. She did. She was referred to Njoro clinic where she received treatment and was examined. A P3 Form was later filled out.

9. The Complainant testified that she knew both the Appellants although not by name. She knew them by physical appearance and by reputation; and had seen them around the neighbourhood. She also knew the 2nd Appellant by the name Mbago.

10. At Njoro Police Station, the Officer assigned to the case was PC Rebecca Shuma. She testified as PW2. The matter was minuted to her on 21/02/2016. PC Shuma testified that the Complainant went to report at the Police Station that she had been raped by two men she knew. She told the Officer that she knew the men and could identify them. The Officer gave her a P3 Form and sent her to the hospital. She also told her to alert her if she saw the men. After a week, the Complainant called PC Shuma and told her that she had traced the Appellants. PC Shuma adviced her to report to the AP Post at Kihinga which she did. This led to the arrest of the Appellants who were then taken to Njoro Police Station.

11. The Clinical Officer who attended to the Complainant at Njoro Hospital was Jacob Chelimo. He testified as PW3. He testified that the Complainant went to the facility on 22/02/2016 with a history of being assaulted and raped by two people who were known to her. On examination, the Clinical Officer found that she had tenderness and pain on her thorax and abdomen as well as the left arm and lower limbs and left thigh. He concluded that the injuries were caused by a blunt object. On investigating her genital area, he found an old perforated hymen and pus cells but no injuries. However, upon urinalysis, they found presence of spermatozoa. He concluded that the Complainant had been penetrated. The Clinical Officer filled out the P3 Form and and PRC Form and produced both as exhibits in the case.

12. Put on their defence, the 1st Appellant gave an unsworn statement saying that on the 20/02/2016, the Complainant, who he claimed was his girlfriend, went to the stage where he worked and told him that he (1st Appellant) would "suffer". He claimed that the Complainant had a grudge against him and insinuated that the charges were in furtherance of the revenge she promised. The 2nd Appellant only said that on the day he was arrested some people came to the stage and asked where his boss was – since he was employed by the 1st Appellant. He claimed that he was only arrested because he was living with the 1st Appellant.

13. The Learned Trial Magistrate identified two issues for resolution: Whether the two Appellants "committed an act by inserting their penises in turns into the [Complainant's] genital organs" and whether they had consent to do so.

14. The Learned Trial magistrate was persuaded that there was penetration as proved by the medical evidence; and further that it was the two Appellants who caused the penetration. She believed the Complainant's story that she had recognized the two Appellants. She was also persuaded that the penetration was without consent.

15. For the Prosecution to obtain a guilty verdict in the case, it needed to prove the following four elements:

a. Penetration as defined by section 2 of the Sexual offences act;

b. Penetration by more than one assailant who are acting in concert or with a common intention to carry out the act of penetration;

c. Positive identification of the persons who caused the penetration; and

d. Lack of consent by the victim.

16. Were all these elements present in the present case in sufficient quantum to reach a conclusion that they were proved beyond reasonable doubt?

17. Penetration in this case was proved by the oral testimony of the Complainant as well as the medical evidence. The Complainant gave straightforward and compelling evidence about what happened. Her story about penetration is partly corroborated by her complaint to the Police immediately the Appellants set her free; and the medical evidence which found evidence of spermatozoa in her genital organs in the morning after the alleged rape.

18. As to who caused the penetration and whether it was more than one person acting in concert, direct testimony was provided by the Complainant. It was evidence of recognition not mere identification. She knew the Appellants and had seen them in the neighbourhood. The Appellants not only attacked her on her way to the shop; but they put her on a motor cycle and took her to the 1st Appellant's house where they took turns at raping her the whole night. The Complainant said that there as light from a candle and was able to see them properly. Looking at all the *Turnbull* factors listed in ***Regina v Turnbull [1976] 3WLR 445***, there is no reasonable possibility that the evidence of recognition was mistaken.

19. In addition, the Complainant made a report at the earliest opportunity and described who the assailants were to PC Shuma. Indeed, she was later able to trace the two assailants and alert the Police. Upon presentation to the hospital for examination, she also told the Clinical Officer that she knew her attackers. This consistency is corroborative of the fact that the Complainant was clear about the identity of her attackers.

20. The Complainant was also quite clear about what happened to her: the two assailants took turn to rape her hence satisfying the element that there be two actors acting in concert or with a common intention. The act here was done not only without consent – but forcefully and with much depraved violence. There is no question that this element of the offence is satisfied also.

21. On appeal, the Appellants complain that the conviction was improper because an essential witness was not called. This is W; the friend of the Complainant who advised her to report the matter to the Police. It is true that our law is that the Prosecution is obliged to call:

> **…**all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution *case*. ***Donald Majiwa Achilwa & 2 Others V Republic [2009] eKLR***. See, also, ***Bukenya & Others v. Uganda [1972] EA 549***).

22. The rule, however, applies to essential witnesses who are necessary to prove the case. In this case, there is no sense in which one can say that W was essential and necessary to prove the Prosecution case. She was not and eyewitness; and she would not have been necessary to prove any element of the offence of gang rape.

23. The 1st Appellant also complains on appeal that there was contradictory evidence which should have entitled them to an acquittal. She says that the Complainant contradicted herself on whether she knew the Appellants or not. I have found no such contradiction upon a contextual re-reading of the testimony of the Complainant. She testified that she knew both Appellants but only knew the name of the 2nd Appellant as "Freddie." She maintained that position throughout.

24. The other alleged contradictions are truly minor and only merit to be ignored: the P3 Form says the Complainant is 23 while in her testimony she said she is 27; the P3 Form said the offence happened on 21/02/2016 and not on 20/02/2016. Nothing really turns on this pettifogging inconsistencies which do not go into the core of the case.

25. The 1st Appellant also objects to the conviction based on a single witness. The only answer to that objection is section 124 of the Evidence Act which permits such conviction provided that the Court believes that the witness is telling the truth. Such was the case here.

26. Finally, nothing too, turns on the complaint that no evidence about the arrest of the Appellants was adduced by the arresting officer. It is, usually, good practice for the arresting officer to testify in most cases. However, where there is evidence from other witnesses to establish all the elements of the charged offence, a conviction is not vitiated merely because the arresting officer did not testify. See, for example, ***Alfred Bumbo & Others v Uganda*** **(Supreme Court Case No. 28 of 1994**).

27. All in all, therefore, the conviction herein is affirmed against both Appellants

28. On sentence, the DPP served the Appellants with a Notice of Enhancement of sentence. The two Appellants were sentenced to ten years imprisonment while the minimum sentence allowed under section 10 of the Sexual Offences Act is fifteen (15) years imprisonment. The Learned Trial Magistrate did not justify this departure from the prescribed minimum.

29. The Court explained the effect of the Notice of Enhancement to both Appellants in Kiswahili and inquired whether they intended to proceed with their appeal. They both confirmed that they had been served with the Notice; that they understood it; and that they intended to proceed with their appeal.

30. Now that the conviction has been upheld, the Court must decide whether to enhance the sentence. The new jurisprudence spawned by ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015*** is that Courts have departed from the position that the

minimum sentences provided for in the Sexual Offences Act are categorical and immutable prescriptions from which a sentencing Court cannot depart regardless of the circumstances of the individual case before them. This was perhaps most clearly held by the Court of Appeal in ***Dismas Wafula Kilwake v R [2018] eKLR***. However, the Courts have held that the minimum sentences prescribed are "strong" guidelines of what the sentence should be upon conviction and sufficient reasons are needed to depart from them.

31. In this case, the Appellants violently attacked the Complainant. They beat her up with a whip and caused documented injuries to her. They abducted her and forcefully put her on a motorcycle. They took her to the home of the 1st Appellant where they took turns to rape her for the whole night. In my view, the Appellants were fortunate not to face multiple charges including abduction and assault forcing actual bodily harm for their cruel and barbaric actions. The Appellants did not deserve a reduction of the minimum sentence in the statute. They deserved its enhancement. In my view, even though the Appellants were first offenders, the aggravating circumstances in this case coupled by the Appellant's utter lack of remorse calls for a sentence of twenty 20 years imprisonment. That is the sentence this Court will impose.

32. The upshot, then, is the following:

a. The appeal against conviction is dismissed as unmeritorious. The conviction is hereby affirmed.

b. **The Prosecution's appeal against sentence succeeds.**

The sentence imposed on the Appellants for the conviction for the offence of gang rape is hereby set aside. In its place, a prison sentence of twenty (20) years imprisonment is imposed.

33. Orders accordingly**.**

Dated and delivered at Nakuru this 30th day of April, 2020

……

JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita Rotich, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.