REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO.38 OF 2018

COSMAS KIPLANGAT alias KETIENYA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence in Bomet CM Criminal Case No.15 of 2017 – P. Omwansa PM*)

JUDGMENT

1. The appellant was convicted of rape contrary to section 3(1) as read with section 3(3) for the Sexual Offences Act No.3 of 2006 and sentenced to serve 20 years imprisonment.

2. The particulars of the offence were that on the 6th October 2007 at [particulars withheld] village in Konoin sub-county within Bomet intentionally and unlawfully caused his penis to penetrate the vagina of PNT (name withheld)

3. Aggrieved by the decision of the trial court, the appellant has come to this court on appeal on the following grounds in his amended petition of appeal –

1. The learned magistrate erred in law and fact by convicting him on inconsistent evidence which was not sufficiently cogent, was a conspiracy and fabrication against him.

2. The magistrate contravened section 165 as read with section 165(1) of the Criminal Procedure Code with respect to the appellant.

3. The magistrate erred in convicting him on uncorroborated prosecution evidence.

4. The trial court contravened section 169(1) of the Criminal Procedure Code with respect to the appellant.

5. The appellant also filed written submissions, which he relied upon and elected not to highlight the same in court. I have perused and considered the said written submissions.

6. The learned Principal Prosecuting Counsel Mr. Murithi opposed the appeal and submitted that the ordeal of rape occurred for long between 8pm and 8am and the appellant was not a stranger to the victim, PW1 who was 90 years of age. Counsel contended that the evidence of PW2, PW3, PW4 and PW5 corroborated the evidence of PW1 in all material respects since PW3 used to care for the victim.

7. According to counsel PW6 a Clinical Officer confirmed sexual penetration through the medical report which he produced in court. Counsel contended that the unsworn defence of the appellant was a blanket denial.

8. This being a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusion and inferences – **see Okeno – vs – Republic [1972]EA 32.**

9. I have re-evaluated the evidence on record. The offence occurred at night and the conviction is predicated on identification. Both PW1 the complainant and PW2 DCK the caretaker of the complainant (victim) stated clearly that they knew the appellant well. The appellant did not challenge this and infact in cross-examination the appellant suggested that he was a lover of PW2.

10. The evidence of PW1 at the trial was that the person who went to her house that night and put off the solar light and raped her was the appellant. However, the witnesses who visited the complainant the next morning that is PW2 D C K, PW3 R C C, PW4 J K and PW5 E B said that the complainant did not name the assailant, nor state that she could identify the assailant.

11. PW7 Sergeant Galana Bakari the investigating officer also did not say that the complainant or any other person mentioned the appellant as the culprit, but merely said in cross-examination that the appellant had disappeared from work as a tea plucker.

12. The burden was on the prosecution to prove the identity of the appellant as the culprit beyond reasonable doubt. With the evidence on record, in my view, though the complainant was raped, it was not proved beyond any reasonable doubt that the appellant was the culprit, as the appellant merely worked in a nearby tea farm and disappeared from work and went to his rural home. In my view that creates a mere suspicion which cannot be the basis of finding a conviction in a criminal case.

13. With regard to the contention of the appellant that his defence was not considered by the trial court, I find that the defence of the appellant was considered by the trial court and disbelieved, which the trial court was entitled to do.

14. However, as the identification of the appellant as the culprit was not positive, his conviction is not safe. I thus allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated this 29th day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Ms Fundi prosecuting counsel and the appellant.