REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 73 OF 2019

JOHN MAUNDU MUTETEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate Hon. E. M. Muiru dated 12/04/2019 in Kilungu SRM Criminal Case No. 45 of 2018.)

JUDGMENT

1. **John Maundu Mutetei** the Appellant was charged with the offence of rape of a person with mental disability contrary to section 7 of Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 16th day of January 2018 in Mukaa sub-county within Makueni county intentionally caused his penis to penetrate the vagina of FK without her consent, a person with mental disability.

He 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. The particulars being that the Appellant on the 16th day January 2018 in Mukaa sub-county within Makueni county intentionally touched the vagina of FK with his penis against her will.

2. The matter proceeded to full hearing with the prosecution calling five witnesses. The Appellant gave a sworn statement of defence without calling any witness. In her judgment the learned trial Magistrate found that the Appellant ought to have been charged under section 3 of the Sexual Offences Act which creates the offence of rape. She proceeded to convict the Appellant and sentenced him to 30 years' imprisonment.

3. Being aggrieved with the judgment he filed this appeal raising the following grounds:

a) **That,** the learned trial Magistrate erred both in law and facts by relying on prosecution witnesses who were contradictory and inconsistent in their testimonies.

b) **That,** the learned trial Magistrate erred in both law and facts by convicting him against the weight of the evidence as the case lacked crucial witnesses as per provision.

c) That, the learned trial Magistrate erred both in law and facts by dismissing his explosive and firm defence contrary to section 169(1) of the Criminal Procedure Code.

4. The prosecution case was that Pw1 **Jackline Mwongeli Kituku** who works at a hotel at Salama went home to her farm in Mayani. She met the complainant (F.K) who is mentally challenged and is a relative from her husband's side. F.K testified as Pw5. She stayed with her for some time. Before she left for Salama she noticed that Pw5's skirt did not have a zip. She therefore wrapped her with a lesso and let her put on her rubber shoes. She paid for Pw5 at Mama M's barber shop for her to be shaved. Pw5 was to go later to the barber shop. Pw1 then left for Salama.

5. She later received a call from Pw4 **MM** inquiring if she had left with the Pw5. She advised them to check at the barber 's shop. Later at 6:30 pm Pw4 called informing her they had found her. She said besides the lesso she had dressed Pw5 with a panty.

The matter was reported to the police and she was called to record a statement.

6. Pw4 **MM** is a sister in law to Pw5. She stated that on 16th January 2018 5:30 pm she had been looking for Pw5 when she found her with ugali in her hand. She was in their compound. Pw5 informed her that the Ugali had been given to her by the Appellant. Pw5 did not have a zip on her skirt and she noticed she did not have an inner wear.

7. She decided to take her to Mutungu hospital to be checked if she had been raped. It was her evidence that when she left for the chama on the 16th January 2018 she had left Pw5 with Pw1 who was visiting. She confirmed that Pw5 was 36 years of age and was mentally challenged. She also said Pw5 does not talk much nor scream but she responds to questions.

8. F.K testified as Pw5 after a *voire dire* examination. Her evidence was very brief. She said that the Appellant had sex with her and also gave her ugali. The clinical officer **Eric Kasiamani** testified as Pw3. He is a clinical officer at Kilungu sub-county hospital. He produced the P3 (EXB2) on behalf of Arnold Musyimi also a clinical officer at Kilungu sub-county. He said upon examination Pw5 was found heavily bleeding in her genitalia since her hymen had never been broken. He produced the treatment card and PRC form as EXB1 and 3 respectively.

9. It is not clear whether the Appellant gave a sworn or unsworn statement of defence as its not borne by the record. He denied the charge and decried the failure to have him taken to hospital. He said he was framed by Pw3 because of a struggle over land.

From the record it can't be Pw3 who was the clinical officer with whom he allegedly had a land issue. He must have meant Pw1 or Pw4.

10. The appeal was heard by way of written submissions. The Appellant has raised an issue of inconsistencies and contradictious in the evidence of the witnesses Pw1 and Pw4. He also wonders why Pw4 disappeared for long when she was required to testify. He also argues that Pw5 never complained to Pw4 about being raped yet Pw4 decided to take her to hospital. That in her evidence in cross examination F.K Pw5 at one point says he did nothing to her then she changes and says he did something to her. He also argues that the bleeding by Pw5 may have been her monthly menstrual bleeding.

11. He further submits that his sworn defence was not tested for its credibility by way of cross examination. Secondly the trial court did not consider the defence which raised pertinent issues.

12. Learned counsel for the State Ms. Gakumu in opposing the appeal submits that all the elements of the offence namely penetration and identification of the perpetrator were established. That Pw5's narration of the rape was confirmed by Pw3 who produced the medical reports which confirmed penetration.

13. Referring to the case of **Richard Munene –vs- Rep (2018) eKLR** she submits that even where there are some inconsistencies not all of them amount to rendering the prosecution case as falling below the required standard of proof. The Court of Appeal in the said case stated thus: -

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

14. On sentence and while relying on the Supreme Court decision in **Francis Karioko Muruatetu & Anor –vs- R (2017) eKLR** she submits that the 30 years' imprisonment meted out to the Appellant is justifiable and just. She asks the court to consider the seriousness of the offence committed against the complainant who is mentally challenged.

15. This is a first Appellate court and as such it is guided by the principles set out in the case of **David Njuguna Wairimu –vs- Rep (2010) Eklr** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

16. In a much earlier decision, the court of Appeal similarly held in **Okeno–vs- Rep (1972) E.A 32** 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 (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters Vs Sunday Post [1958] E.A 424."***

17. I have considered the evidence on record, grounds of appeal and the submissions by both parties. The main issue I find falling for the determination is the sustainability of the charge against the Appellant.

18. The Appellant was charged with rape contrary to section 7 of the Sexual Offences Act which provides as follows: -

> ***"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."***

19. From the onset, offence and the provision of the law cited did not support the main count. The particulars and the evidence adduced are that the Appellant intentionally caused his penis to penetrate the vagina of FK who had a mental disability and without her consent.

20. Section 7 of the Sexual Offences Act is not about rape of a mentally challenged person. The charge was therefore misplaced from the start.

21. Apparently the learned trial Magistrate realized this while writing her judgment and this is what she states at page 36 lines 2-6 of the Record of Appeal;

> ***"I do note that the charge herein is brought under section 7 of the Sexual Offences Act. However, the charges ought to have been brought under section 3 of the Sexual Offences Act which section creates the offence of rape. Nevertheless, I do opine that the charge as is not (sic) prejudicial to the accused as the accused person all through trial knew the charges against him the section under which they were brought notwithstanding."***

22. According to the learned trial Magistrate the Appellant ought to have been charged under section 3 of the Sexual Offences Act which provides:

> **Section 3 (1) A person commits the offence termed rape if –**
>
> ***a) He or she intentionally an unlawfully commits an act which causes penetration with his or her genital organs;***
>
> ***b) The other person does not consent to the penetration; or***
>
> ***c) The consent is obtained by force or by means of threats or intimidation of any kind***.

23. This did not solve the issue because for the offence of rape to stand there must be proof of

> *i. Penetration*
>
> *ii. Lack of consent or*
>
> *iii. If there was consent it was obtained by force, or threats or by intimidation.*

24. A charge under section 3 of the Sexual Offences Act could not therefore stand. The trial court took Pw5 who was aged 35 years through a short *voire dire* examination. She did this to establish whether the witness could give sworn evidence. She made an order for her to give unsworn evidence.

25. *Voire dire* examination is conducted before one testifies. It's basically meant to guide on how a child of tender years should give his or her evidence. It enables the court to determine whether the witness is intelligent enough to give evidence and secondly whether the witness understands the meaning of an oath. See **Johnson Muiruri –vs- R (1983) KLR 447; Peter Kariga Kiune Criminal Appeal No. 77/82 (UR); Gabriel S/O Maholi –vs- R 1960 E.A 159 and Mbitha –vs- R (C.O.A) (2019) eKLR.**

26. Section 19(1) of the Oaths and Statutory Declarations Act provides:

> ***(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***

27. The law and the decisions above confirms that *voir dire* examination is only conducted when a witness is a child of tender years. It is therefore not clear under what provision of the law the *voir dire* examination in this case was conducted on Pw5 who was aged 35 years though mentally challenged.

28. She further made a finding in her judgment at **page 36 lines 11-13** that Pw5 was incapable of giving consent to sex. This is what she states:

> ***"Therefore under the law as above provided under section 43(4) (e) of the Sexual Offences Act the complainant had no capacity to consent to sex."***

29. Since she was incapable of giving consent the Appellant could not be charged under section 3 of the Sexual Offences Act as suggested by the trial court. He ought to have been charged under section 146 of the Penal Code. Which provides: -

> **Section 146. Defilement of idiots or imbeciles**

"Any Person who, knowing a person to be an idiot or imbecile has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."

30. From her judgment despite her finding that the charges were not brought under the proper provisions of the law she still held that since the Appellant knew the charges facing him which means she convicted him (*though not stated*) of Rape contrary to section 7 of the Sexual Offences Act. The particulars and evidence do not support the said charge.

31. Coming to the evidence, Pw1 stated that she left Pw5 at the homestead alone but she knew she was to go to the barber's place. It was Pw4's evidence that infact Pw1 took Pw5 to the Appellant's home to be shaved. The person paid by Pw1 to have her shaved was one Mama M, who operates the barber shop. Did Pw5 ever go to Mama M's barber shop for shaving as planned by Pw1? And if she went who took her there? Mama M was not called to testify, to confirm or deny this.

32. It was also Pw4's evidence that Pw5 is her husband's sister with whom she has lived since 2016. She added that she never leaves Pw5 alone at home. If she has to leave she locks her in the house. Pw4 left Pw1 with Pw5 on the material day. There is no evidence that she gave Pw1 any instructions of locking up Pw5 in the house if she was to leave her alone.

33. Pw4 found Pw5 near the Appellant's fence. Besides the zipless skirt and the ugali Pw5 was holding there is nothing else she noted on Pw5. In any event Pw1 had Pw5 with a zipless skirt! Further Pw5 did not tell her that apart from the Appellant giving her the ugali she held, he had done anything else to her let alone defiling her. So what made her take Pw5 to the hospital? She does not explain that in her evidence.

34. If the evidence by Pw3 is anything to go by, Pw5's clothes should have been blood stained. Pw3 told the court that Pw5 was heavily bleeding since she had never indulged in sex before. If there was any such bleeding it could not have escaped Pw4's eyes.

35. The medical evidence which was produced by Pw3 was received in a very casual manner. Pw3 was not the maker of the P3 form (EXB2). The maker was a clinical officer at Kilungu sub-county hospital just as Pw3 was. There was no explanation given to the court as to why the maker was not availed. Secondly and most importantly the court did not find out from the Appellant if he had any objection to Pw3 producing the P3 form or if he would have had specific questions for the maker. Production of documents by a person who is not the maker is not automatic. A basis for such production must be laid.

36. The record shows that the Appellant elected under section 211 CPC to give an unsworn statement. However, when he gave his evidence it is shown that he was duly sworn. There was however no cross examination by the prosecution. His evidence therefore remained unchallenged. It is only the trial court, Appellant and prosecution who know what actually transpired.

37. The conduct of Pw4 and Pw5 in disappearing from home and hiding whenever they were sought to testify is quite telling. Several summons and warrants of arrest were issued against them. This happened between 24th October 2018 – 27th March, 2019. They finally appeared after the prosecution had closed its case and the case fixed for ruling, forcing the court to re-open it under section 150 Criminal Procedure Code.

38. Upon considering all that I have outlined above, I find that the Appellant was first of all charged under the wrong provisions of the law. Secondly the admission of the P3 form (EXB2) by Pw3 was unprocedural. Thirdly, the evidence adduced was not sufficient to even have him convicted under section 146 of the Penal Code.

39. I find merit in this appeal which I hereby allow. The conviction is quashed and sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 26th day of June 2020, in open court at Makueni.

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H. I. Ong'udi

Judge