REPUBLIC OF KENYA

IIN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 43 OF 2019

HASSAN ABDALLA KARISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. D.W. Nyambu, Senior Principal Magistrate, delivered on 30th June, 2016 in Kilifi Senior Principal Magistrate's Court Criminal Case No. 73 of 2014).

JUDGMENT

1. The appellant was convicted for the offence of rape contrary to Section 7 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 11th day of February, 2014 at [particulars withheld] village, Mtsara wa Tsatsu sub-location in Ganze District within Kilifi County, he intentionally caused his penis to penetrate the vagina of RKW [name withheld] without her consent within the view of RKW a person with mental disabilities. He was found guilty as charged and sentenced to 10 years imprisonment.

2. He was dissatisfied with the decision of the lower court and filed grounds of appeal on 20th April, 2018 at the High Court at Malindi. On 21st November, 2018 for reasons that are not clearly borne out by the record, he applied for the transfer of his appeal from Malindi to the High Court at Mombasa. On 1st August, 2019, with leave of the court, the appellant filed amended grounds of appeal. These are:-

i. That the Learned Trial Magistrate erred in law and fact by admitting the evidence of identification of a single witness, PW1, without considering that the same was not corroborated as required by law;

ii. That the Learned Trial Magistrate did not consider that the appellant was victimized hence Chapter 46 Force Standing Orders was not applied;

iii. That the Learned Trial Magistrate did not see that PW4 was not a reliable witness;

iv. That the Learned Trial Magistrate did not consider that the prosecution failed to summon two witnesses which breached Section 150 of the Criminal Procedure Code and Section 109 of the Evidence Act; and

v. That the Learned Trial Magistrate erred in law and fact by not considering the appellant's defence which was reliable.

3. In his written submissions, the appellant stated that the complainant (PW1) testified that the man who raped her was short and had *rastas*, which information she gave to her mother and to the police station where she reported the incident. He pointed out that PW1 failed to state the name of the person who raped her, which according to him, was a clear indication that she was unfamiliar with her assailant. He argued that PW1's evidence with regard to identification was highly doubtful. He submitted that an identification parade should have conducted for purposes of identifying PW1's assailant.

4. The appellant submitted that the procedure of taking him to PW1's house for identification as was done in this case, was wrong. He relied on the case of **Sangura Mbae v Republic** Criminal Appeal No. 32 of 2004 (unreported), to support his argument.

5. The appellant raised the issue that he was taken to PW1's house by Ali Kenga and Kenga Kazungu but they did not testify in court to state how they knew that he was the one who raped PW1. Further, that PW4 said that he saw PW1 and a man talking near a shamba as he rode a bicycle, a distance from them. The appellant pointed out that PW4 did not know him prior to the date of the alleged offence. It was his view that he did not add any value to the prosecution's case. In citing the case of **Rona v Republic** [1967] EA 538, the appellant submitted that the Trial Magistrate did not warn herself of the dangers of convicting on the evidence of a single identifying witness. He asserted that PW1 was mistaken in having identified him as her assailant.

6. The appellant argued that PW1 was found to have pus cells in her urine but he was not medically examined to find out if he had the same infection. He contended that there was no evidence to connect him to the offence of rape.

7. The appellant submitted that the Doctor who examined PW1 said that she kept on laughing during the examination and her mother said that she suffers from a mental disorder. Further, that when the Doctor asked her about her last monthly period, she laughed but never dislcosed the date. The appellant therefore concluded that PW1 was not of sound mind due to the evidence given by the Doctor. He submitted that as such, PW1's evidence could not be trusted. He urged this court to give him the benefit of the doubt and allow his appeal.

8. In her written submissions filed on 26th November, 2019, Ms Mwangeka, Prosecution Counsel, opposed this appeal. With regard to PW1's mental state, she submitted that PW7, a nurse at Kilifi County Hospital gave evidence that on 13th February, 2014 when PW1 went to the hospital, she was accompanied by her mother. PW7 testified that PW1 was not of very sound mind and she kept on laughing. That the said witness also testified that she was told by PW1's mother that PW1 suffers from a mental disorder. The Prosecution Counsel indicated that PW7 produced the treatment booklet for psychiatric treatment as an exhibit to show that PW1 was mentally challenged.

9. It was submitted that the Trial Court in its Judgment noted that PW1 gave sworn evidence which meant that she could communicate clearly and if she had any mental disorder, it was mild. She also submitted that the Hon. Magistrate (who took down her evidence) did not note it down, and if the said court had noted it, it would have conducted *voir dire* examination. The Prosecution Counsel referred to a part of the proceedings where the court held that the mental illness suffered by PW1 was not severe and even if she was mentally retarded, she never consented to the act of penetration by the appellant. Ms Mwangeka asserted that as such, PW1 was forcefully penetrated.

10. The Prosecution Counsel relied on the decision in **Changawa Karisa v Republic** [2018] eKLR, a decision of the High Court which was to the effect that the evidence of a single witness can be safely accepted and can form the basis of a conviction if it is free from the possibility of error. It was submitted that the offence in this case happened at 11:00a.m., and that PW1 and the appellant spoke to each other. The Prosecution Counsel was therefore of the view that PW1 had ample time to see the appellant.

11. She submitted that although there was an error in the charge as the appellant was charged under the provisions of Section 7 instead of Section 3 of the Sexual Offences Act, it was her view that the defect in the charge was curable under the provisions of Section 382 of the Criminal Procedure Code. She relied on the High Court decision in **Zacharia Gachie Mwangi v Republic** [2019] eKLR, to support the said submission. She was of the view that the prosecution proved its case beyond reasonable doubt and prayed for the appeal to be dismissed.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

12. The evidence by the prosecution was adduced by PW1, RKW [name withheld]. It was her evidence that on 11th February, 2014 at 11:00a.m., she was collecting firewood in the bush when carrying her child on her back. She saw the appellant who approached her and asked her where she was from. She stated that he placed a knife on the side of her neck. He also asked her where palm wine dealers were, but she said she did not know.

13. PW1 testified that the appellant threw her on the ground and raped her. She stated that she knew him well, as Hassan, and that after raping her, he ran away. That she screamed a lot. She stated that she went to tell her father who was at shamba nearby what had happened and they returned to the scene. They then went home and her parents took her to Bamba Police Station. They were referred to hospital. It was PW1's evidence that she told her father the identity of the person who raped her. She further stated that his home was near the police station. She indicated that the appellant went to their home with a certain young man and they went to the police station. PW1 stated that she was given medication in hospital and the Doctor wrote down what she said.

14. PW2 [KK] name withheld was PW1's mother. She recounted that on 11th February, 2014 at about 10:30a.m., her daughter (PW1) left home to go and fetch firewood. She indicated that she delayed in returning home. PW2 left their home to go and buy food but when on the way, her husband called and told her that PW1 had been ambushed and raped in a bush. PW2 went back home and waited for them.

15. PW2 testified that PW1 told her that she was raped in the bush by a man with *rastas* who was wearing a coloured hat. PW2 stated that PW1 was full of sand on her body and her child was also dirty. They took PW1 to the police station, where they were referred to hospital. PW2 further testified that the following day, she asked PW1 again about the incident and she said that she did not know the man who raped her but he was short and had dreadlocks. PW2 indicated that there were 2 young men who said they saw the man leaving the scene and could avail him. They left and returned with the appellant. She testified that they called PW1 who said she was certain that the appellant was her assailant. That the appellant in their presence denied knowing anything about the incident and said she was mistaken.

16. PW2 gave evidence that they went to the village elder and the appellant said he did not know PW1. She in turn said he had raped and threatened her with a knife. PW2 indicated that PW1 was taken to Kilifi Police Station the following day accompanied by her father and the appellant. She explained that PW1 had epilepsy and it had affected her mentally and that she was slow but could speak clearly.

17. PW3, Dr. Daisy Juma of Kilifi County Hospital produced the P3 form on behalf of Dr. Rukiya, whose handwriting and signature she was acquainted with. In referring to PW1's P3 form, she said that she had mild tenderness on the neck region. Her genitalia was normal but her hymen was not intact. She had pus cells signifying a urinary tract infection. The degree of injury was assessed as harm.

18. PW4 was Joseph Kazungu Charo. His evidence was that on 11th February, 2014 at 10:00a.m., as he was heading home from the shops, he saw PW1 talking to a man. He stated that PW1 and the man were at a distance and he did not know the man he had seen her with. He was only shown the appellant in court as the alleged rapist.

19. PW5, Kazungu Ruwa, the village chairman of Bamba Godoma testified that on 12th February, 2014 at noon, PW1 reported to him that she had been raped when she was collecting firewood. She told him she did not know her assailant. He further stated that the appellant was

taken to him by members of the public as he was allegedly involved in PW1's case. PW5 took the appellant to the police station.

20. PW6, Dr. Khadijah Abdulnasir testified on behalf of Dr. Rukiyah who was to be called on a request made by the appellant. She went through the findings captured on the P3 form and produced it although it had previously been produced in evidence by PW3.

21. PW7, Justina Chome of Kilifi County Hospital examined PW1 and filled her PRC form after she stated that she had been raped. PW7 testified that she asked PW1 questions and she said that her mother knew who the offender was. On being medically examined, it was found that PW1 had pus cell and she was treated. In PW7's opinion, PW1 was not of very sound mind because she kept on laughing. Her mother told PW7 that PW1 suffers from a mental disorder. PW7 further stated PW1 had children but when she asked when she had her last monthly period, she laughed and never told PW7 the date. PW7 produced the PRC form and a treatment booklet for PW1 for her psychiatric treatment.

22. PW8 was No. 78304 PC Stanley Martin of Bamba Police Station. He received a report of rape from PW1, who was accompanied by PW2. The report which he received and recounted in court was similar to the evidence adduced by PW1.

23. PW8 stated that he accompanied PW1 to Bamba Hospital but she was not treated as the said hospital had no medicine. They went to Kilifi County Hospital where her P3 and PRC forms were filled.

24. PW8 further stated that the appellant was escorted to Bamba Police Station after being identified by PW1 as the man who raped her.

ANALYSIS AND DETERMINATION

25. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent conclusion while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact. In **Kiilu and Another v Republic** [2005] 1 KLR 174, the Court of Appeal stated thus on the duty of the 1st appellate court:-

> **"1. An appellant on 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.**
>
> **2. 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."**

26. On 5th May, 2014, after PW1 and PW2 testified, the appellant indicated that he did not have the statement for PW2. The prosecutor informed the court that was the position. The court stood down PW2 and ordered the prosecutor to furnish the appellant with copies of witness statements on the same day.

27. When the case came up for hearing on 4th July, 2014, the appellant prayed for his case to start afresh. He explained that because it was his first time in court, he did not ask the relevant questions. The prosecutor indicated that he had no problem in recalling of witnesses. The Trial Magistrate made an order for ***PW1 and PW2 to be recalled for further cross-examination*** on 1st August, 2014. PW1 was ***cross-examined further*** on that day. PW3, Doctor Daisy Juma testified on the same date.

28. The hearing of the case was taken over by Hon. D.W. Nyambu, SPM, on 22nd September, 2015. The appellant was informed of his rights under the provisions of Section 200(3) of the Criminal Procedure Code. He opted to have his case proceed from where it had reached. He requested to have ***PW2 recalled***. The appellant also applied for Dr. Rukiya and Justina Chome who filled the PRC form to be recalled. The court made an order for ***Dr. Rukiya to be recalled*** and for Jusitna Chome c/o Bamba Dispensary to appear and testify before the court.

29. On 12th November, 2015 when the case came up for hearing, the prosecutor informed the court that the appellant had made an application for ***PW2 recalled*** and for ***Dr. Rukiya to be called***. The prosecutor indicated that Dr. Hadija was the one who was in court as Dr. Rukiya would be on maternity leave until January 26th. The said prosecutor suggested that if it was agreeable to the appellant, they could proceed with the hearing and prayed for the P3 form to be released to him. The appellant agreed that the P3 form could be produced by the Doctor who was in court. The P3 form was released to the Dr. Hadija by the court. The said Doctor then proceeded to testify.

30. Despite the fact that an order had been made for ***PW2 to be recalled for further cross-examination***, when the said witness came to court, ***she took an oath and went on to give evidence afresh***. It is thus apparent at that stage that the Trial Magistrate lost sight of the order she had made for ***PW2 to be recalled for purposes of further cross-examination***. Looking at the evidence adduced by PW2 on 12th November, 2015 it is very detailed. It is clear that she aimed at filling any gaps that she left out, when she testified the first time. This court is therefore left with 2 sets of evidence from PW2. The evidence as per the proceedings of 5th of May, 2014 and the proceedings of 12th November, 2015. This court is at pains to decide which version of evidence it should consider in making a determination in this case due to the glaring variance in the 2 sets of evidence.

31. Section 146(4) of the Evidence Act provides for the recall of witnesses in the following terms-

> **"The court may in all cases permit a witness to be recalled <u>either for further examination-in-chief or for further cross-examination</u>, and if it does so the parties have the right of further cross-examination and re-examination respectively."** (emphasis added).

32. On 12th November, 2015 the Trial Magistrate gave express orders for ***PW2 to be recalled for further cross-examination***. Having given such orders, the said Magistrate should not have allowed PW2 to be taken through examination-in-chief for the 2nd time. The use of the words *"either for examination-in-chief or for cross-examination"* under Section 146(4) of the Criminal Procedure Code denote that once an order has been made for the recall of a witness for a specific purpose, the court should ensure that its order is complied with as it is in control of the proceedings in its court. It should not give leeway to the prosecution to take a witness through examination-in-chief if the orders granted were for further cross-examination of a witness.

33. The other issue of concern to this court is the fact that the Trial Court allowed the prosecution to call Doctor Hadija as PW6 to testify on the P3 form which had already been produced by PW3, Dr. Daisy Juma, on behalf of Dr. Rukiya. The appellant had expressed the wish to have Dr. Rukiya called for cross-examination. Dr. Rukiya had not testified at all and therefore the court erred when it made an order for the said Doctor to be recalled for cross-examination. Since she had not testified in the first place, she could not have been subjected to cross-examination.

34. This court finds that the testimony of Dr. Khadija Abduluasir was superfluous as evidence touching on the P3 form had already been tendered by PW3 and the P3 form had been produced by the said Doctor. It is apparent that the proceedings in the lower court were not conducted in an orderly manner.

35. In this case, it is apparent that what transpired before the Trial Court worked against the appellant's right to a fair trial contrary to Article 50(2)(k) of the Constitution of Kenya. As earlier stated, a comparison between the initial evidence of PW2 and the evidence-in-chief she gave later leaves no room for doubt that she worked towards filling the gaps that previously existed in her evidence, when she was erroneously given a second opportunity to adduce evidence.

36. The other critical element in this appeal is if the appellant was positively identified by PW1 as her assailant. It was her evidence that she was accosted by a man whom she did not know before the incident. She further stated that the time was 11:00a.m., and the man talked to her when he asked her where she was from and where palm wine dealers were. At that time the assailant had placed a knife on the side of her neck. He then threw her down and raped her. After her assailant ran away, she looked for her father and informed him. They then went to the scene but did not find the assailant. She said that she told her father the person who had raped her and that the appellant was taken to their home by a certain young man. PW1 identified him as the person who had raped her.

37. On being cross-examined PW1 said that she was certain that the appellant was the one who raped her. It is however worth noting that on 5th May, 2014 when she was cross-examined by the appellant on the statement which she recorded at the police station, she had indicated that she did not know the person who raped her. She said that what was in her statement was the truth but in the same breath, she said that even if it was not in her statement, she knew that the appellant was the one who raped her. PW5, the village chairman, to whom PW1 reported the incident on 12th February, 2014 said that PW1 told her that she did not know her assailant. In her evidence, PW2 indicated that the day after the incident, she asked PW1 again about it and she said that she did not know the man who raped her but he was short and had dreadlocks.

38. In court, PW1 did not adduce any evidence regarding the appearance of her assailant. Her father, who was the 1st person to whom she reported the incident, was not called to testify. Had he testified, he would probably have assisted the court in stating if PW1 gave him a description of her assailant.

39. PW1 denied that she was mentally disturbed at the time she reported that she was raped. She referred to her mental condition as a disability. On being examined by the court, she said that she used to have mental problems but she had healed. PW2 said that PW1 used to suffer from epilepsy but she had recovered from her illness.

40. The lower court proceedings do not disclose if the Trial Magistrate noted any signs of mental illness in the demeanour of PW1, who did not deny that she used to have mental problems. PW7 was the one who noted that PW1 was not of very sound mind as she kept on laughing when she was being interviewed, when undergoing medical examination.

41. On the issue of identification, the court of Appeal in **Wamunga v Republic** [1989] KLR 424 stated thus:-

> **"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize the danger. Whenever the case against a defendant depends wholly or to a greater extent to the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification …. It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."**

42. In the present case, in her Judgment the Trial Magistrate found that the appellant was properly identified by PW1 as the man who raped her. She also held that PW4 saw the appellant speaking with PW1 in the morning. A careful analysis of the evidence adduced before the lower court reveals that the Trial Magistrate misdirected herself by stating that PW4 saw the appellant with PW1. In his evidence, PW4 stated that he was riding his bicycle at a distance when he saw PW1 talking to a man. On being shown the appellant in court, he said that he had never seen him before. As to the piece of evidence that the appellant had dreadlocks and lots of blue clothing, it came from PW2 who was not an eyewitness to the incident. Those facts should have been recounted by PW1 who was the victim of the crime. She seems not to have given that information to the police or the PW5, who was the village chairman.

43. PW1 did not state in court that the person who raped her had dreadlocks and blue clothing. The 2 young men who arrested the appellant based on the dreadlocks and blue clothing he wore, were not called in court to give evidence as to the reasons why they arrived at the conclusion that the appellant was the one who raped PW1. This court finds that in the circumstances of this case, failure to call the two young

men to testify in court weakened the prosecution's case and gives the impression that the prosecution withheld material information from court.

44. The Court of Appeal decision in **Donald Majiwa Achilwa & 2 *Others v Republic*** *[2009] eKLR, applies in this case. The* Court sated thus:-

> **"The law as it presently stands, 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."** (emphasis added).

45. Having analyzed the evidence as a whole, I hold that identification of the appellant was shaky and should not have formed the basis of a conviction. Coupled with the earlier observation by this court of the appellant not having been given a fair trial, it is my finding that the appellant's conviction was unsafe.

46. One last thing that this court would like to address is the defect that is apparent on the charge sheet. It is a matter which was raised by Ms Mwangeka in her written submissions. The appellant was charged under the provisions of Section 7 of the Sexual Offences Act. The particulars of the charge were as follows-

> ".....on the 11th day of February, 2014 at Godoma village, Mtsara wa Tsatsu sub-location in Ganze District within Kilifi County, he intentionally caused his penis to penetrate the vagina of RKN [name withheld] without her consent within the view of RKW a person with mental disabilities." (emphasis added).

47. It is obvious that the above particulars were meant to give the impression that the appellant defiled PW1, who was a person with mental disabilities. The said particulars were however poorly drafted as by their literal meaning, they indicate that PW1 *was raped in her own view, as a person with mental disabilities*. Section 7 of the Sexual Offences Act 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."** (emphasis added).

48. It is clear from the above wording that the provisions do not apply in instances where a person with mental disability is raped, but to instances where a person is raped in the view of a person with mental disabilities, or within the view of a family member or a child.

49. In the case of **Zacharia Gachie Mwangi v Republic** [2019] eKLR, the High Court when considering a case where the appellant had been charged under Section 7 of the Sexual Offences Act and the victim was mentally challenged stated as follows-

> **"Clearly this provision does not disclose the offence of rape of a person with mental disability. The sexual offences act does not specifically provide for the offence of rape of a person with mental disability. The Appellant ought to have been charged under Section 3 of the Act. The fact that a complainant is a person with mental disability can only be seen as an aggravating factor in sentencing…"**

50. Having made a finding in paragraph 45 of this judgment that the conviction was unsafe, it is hereby quashed. I also set aside the sentence of 10 years imprisonment. The appellant shall be set at liberty forthwith unless she is otherwise lawfully held. It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **19th** day of **June, 2020. Judgment delivered through microsoft Teams online platform due to the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel, for the DPP

Mr. Oliver Musundi- Court Assistant.