REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 35 OF 2017

(Being an appeal against the judgment of Hon D. Nyambu (CM) delivered on 25th August, 2017 in Naivasha CMCR 15 of 2017)

JOSEPH LOKITOL….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Joseph Lokitol was charged with rape contrary to **Section 3 (1) (a) (b) (3**) of the **Sexual Offences Act**. The particulars were that on 15th February 2017 at Marula in Gilgil, he intentionally caused his penis to penetrate the vagina of MCT without her consent. An alternative charge of unlawfully touching the complainant's vagina with his penis was also laid.

2. After a full hearing, the Appellant was convicted for rape and he was sentenced to twelve years imprisonment on 25th June 2017. Dissatisfied he has appealed against conviction and sentence. His amended grounds of appeal filed his submissions on 21st May 2020 are that:

> *1. That, the learned trial magistrate erred in law and fact by convicting me in the instant case yet failed to appreciate the identification was not positively proved.*
>
> *2. That, the learned trial magistrate erred in law and fact by failing to find that the ingredients of the offence were never proved.*
>
> *3. That, the learned trial magistrate erred in law and fact by dismissing the appellant's defence yet failed to find that the same was cogent and believable.*
>
> *4. That, the learned trial magistrate erred in law and fact by sentencing the appellant to a sentence that is not only harsh but also unconstitutional.*

3. The DPP opposes the appeal and also filed written submissions. The issues that arise for determination are:

- Whether the appellant was properly identified.

- Whether the ingredients of rape were proved and whether the appellant's defence was fully considered.

- Whether the sentence meted was lawful and appropriate.

4. This court's role is to re-evaluate the evidence adduced at the trial and to come to its own conclusion being mindful not to ignore the trial court's conclusions (**Okeno v R. (1972) EA 32**). The evidence was briefly, as follows.

5. 0n 15th February 2017 at about 10.00am the complainant was walking along the road at Marula area. She was with her friend Susan Rashid, PW2, and had her baby on her back. She felt the need to go for a short call and stopped at a bushy area. Susan was many paces ahead of her. Soon after she finished she felt a strong hand suddenly grab on the hand.

6. She saw the accused holding her and though he was a guard at Marula Farm. He quietly dragged her as she resisted. Then he slapped her on both cheeks and caned her on her buttocks with a stick. He also hit her on the head. They were now in the bush. M panicked and screamed. He covered her mouth.

7. M saw a motorbike a short distance away. She asked her assailant whose it was, as she continued to resist his dragging her. An idea came to her on how she could escape, and asked him to let her put the child on the ground so they could talk. He refused. She placed her child on the ground and asked him what he wanted. The child started crying and she said she needed to breastfeed. Then the accused started soothing the baby.

8. At about that time, she heard Susan calling her. Susan realized that M was in trouble. M's clothes had torn off whilst she was being ragged. Her blouse apart and the accused pulled it off. She remained on her top, the skirt torn in the middle.

9. The accused then pressed her to the ground and she fell on her back. She tried to rise, but he pinned her down with his hands, legs and body. He removed her panty. Then he removed his penis and inserted it to her vagina, as he asked her why she wanted to deny him her sweet vagina: *"unataka kuninyima kuma yako na vile iko tamu hivyo."* M screamed. He covered her mouth. He tried to kiss her. She resisted. She felt him ejaculate and remove his penis. The child then came close to her, and when she turned she saw her husband behind her. The accused was trying his trouser as he ran towards the motorbike in the bush. At the same time she was trying to return her child on her back. Susan was not in sight.

10. Shortly, her husband WT, PW3, arrived. He asked her what had happened. She told him she had been raped. Her pantie was on the ground. So, too were her clothes. PW3 proceeded to where the accused had ran to the motor bike. He saw the accused try to start the motor bike which was about 50 metres away from where she was. It did not start.

11. Now she realized she had injuries all over. Her knee, thighs and back were all bruised. She had been injured by the stones and grass on the ground, and the Appellant's assault. She saw the accused run away. Her husband chased after him, but was unable to catch up and trace him. Her brother-in-law W, took the motor bike and pushed to the house. When she got back home, she fed her child, and was advised to go to hospital. Susan, her husband and some neighbours escorted her to Gilgil Hospital, where she was treated and discharged.

12. Afterwards, she reported the incident at Gilgil Police Station and recorded a statement. Whilst there the accused was brought to the station by civilians. He was injured and had changed his clothes. Everybody had heard about the incident. He was in a white trouser with jeans inside, but at the station he had the white T-shirt and jeans on. She saw him clearly during the incident which occurred in daylight.

13. M identified the Treatment Notes from Gilgil Hospital, the Post Rape Case Form and P3 Form. In cross-examination she was consistent. She stated that her daughter was not injured during the scuffle with the accused, and did not need to go to hospital, despite falling. She asserted that she recalled to his red motor cycle, which he left behind in the bush; that she clearly identified him from the mark on his lip because he was tall and dark complexion. Her screams during the ordeal were muffled and stifled by his hand.

14. M was recalled to identify the clothes she wore on the day of the incident. She said after the incident she tied a lesso and the clothes she wore were left at the police station as exhibits. She identified: her brown torn skirt, blue pantie and the motor cycle the accused had tried to flee with but had refused to start.

Identification of Accused

15. The Appellant argues that the evidence of identification was insufficient; that the fact that the complainant's description of the appellant to the police was never recorded was suspicious; that evidence of the first report by the complainant is important as it provides a good test of accuracy; that the failure by the trial magistrate to state the duration the complainant allegedly spent with the assailant was not stated, and in fact was only a fleeting glance; that her evidence shows she was in a state of shock during the incident, had been slapped and beaten and had panicked, and therefore positive identification of the assailant would have been unlikely.

16. Finally, he argued that other prosecution witnesses identified him by reference to his motorbike. Yet there was conflicting evidence that the motorbikes number place was cut off. PW4 and PW6 said it was complete, and that PW4 had a bone to grind with the Appellant

17. With regard to identification the trial court noted that the assailant was seen by PW1, PW2, PW3 and PW4. PW1 had a clear visual of the assailant, PW3 saw his face and PW1 was able to describe him clearly.

18. What is the legal standard for proving identification? The Court of Appeal emphasized what the approach on identification should be in the case of **Francis Kariuki Njiru & 7 Others v. Rep. Criminal Appeal No. 6 of 2001 (UR)** where it stated:

> ***'The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. (see R. v.Turnbull [1976] 63 Cr. App. R.132). Among the factors:***
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> ***".....it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone…..."***

19. PW1 said she did not know the accused before, but she saw his face clearly whilst he was assaulting and raping her. She said she gave the description of the accused to the police. That he had a mark on the lip and a broken front tooth; that he was dark and tall. However she admitted in cross-examination that that description was not recorded in her statement. She also admitted in cross-examination that the police did not record a description of his clothes in the statement. In re-examination she reiterated that she told the officer at the station the

description of the accused but it was not in the statement. However, when the accused was brought to the station she identified him.

20. The other aspect of identification she used of the accused was his motorbike. She testified that at the time she was assaulted and raped she saw the motorbike which was a short distance away. It was an old motor cycle without side mirrors and number plates. The accused left it at the scene and ran away when it failed to start. Thus it was her brother-in-law, Wesley, who pushed it to the house. In cross-examination she said the motor bike was a boxer red in colour; that later took it to the police station.

21. PW3, WT, did not see the accused properly during the incident. He however saw the accused's motorbike. He said that he had Wesley, pushed the motor bike to the house. When they reported at the Police Station they were advised to bring the motorcycle to the station. They brought it on the same day. They then asked boda boda riders if they knew the owner. The riders brought it on the same day identified the accused, rounded him up and brought him to the police station. When recalled, PW3 testified that the motor cycle MFI 6 was the one they took to the house. The registration number was KMCG, but he could not recall the other numbers. In cross-examination he said the motor cycle was red in colour, but he did not check its make. He said its number plate was cut and the numbers are not clear. He was the one who took the motor cycle from the scene to the house, and from the house to the Police Station.

22. PW6, the Investigating Officer, testified that she was assigned the case. She checked the OB and noted it was a report of a rape case. The report was of a rape by a person who could be identified. She later recorded statements.

23. In cross-examination, PW6 said concerning identification of the accused that: PW1 had said that if she saw the accused again she would identify him; that she saw him when he was on top of her. In re-examination PW6 stated that the complainant identified the accused, and the police arrested him and put him in the cells. PW2 and PW3 also identified the accused.

24. With regard to the motor cycle PW6 said in cross-examination that: the motor bike was presented at the station, and no description of it was given save for the torn number plate. No colour or number plate of the motor cycle was given.

25. From the forgoing, it is clear that the police did not record the description of the accused at the earliest opportunity. Further, no identification parade was conducted. Instead the police relied on the identification of the accused by PW1 who said she could identify him from the marks he had if she saw him again.

26. The evidence on the motorcycle, was consistent that it was red in colour. The complainant said it had no side mirrors and number plates. PW3, said he pushed the motorcycle home with W, and later took it to the police station. He said the number plate was KMCG, that the plate was cut and the numbers not clear. PW4 said it was registration number KMCG. PW6 the Investigating Officer identified the motor bike brought to the station and produced it as Exhibit 5. The registration number is not indicated in the evidence of PW6. However, in the unsworn defence statement Exhibit 5 is indicated as Registration KMCG. What is inconsistent is PW6's evidence that the "number plate is complete."

27. The ownership of the motorcycle was not established so it cannot be presumed that it belonged to the Appellant who denies that fact in any event. However all the evidence points to the fact that it was the motorbike the accused had and tried to start at the scene of crime then abandoned it when it did not start. In **Gabriel Kamau Njoroge v Rep. (1982-1988) 1 KAR** the Court of Appeal pointed out that:

> ***"A dock identification is generally worthless the court should not place much reliance on it, <u>unless this has been preceded by a properly conducted identification parade</u>. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.*** (Emphasis Added)

28. Where a complainant is very clear that she or he was able to identify an accused by sight due to certain distinct physical or other features of the accused, that information should be given to the police. This would enable to police to search for the person who matches these features and avoid arrests of persons where there is no indication of recognition due to prior knowledge or contact between the accused and the complainant. Thus, when the accused is ultimately brought to the identification parade, the complainant would readily identify him as the perpetrator. The weight of the evidence of identification is greater where the first description to the police readily matches the evidence of identification at a parade.

29. In the present case, the evidence is clear that the complainant was at the police station making a report when the accused was brought there after being arrested by members of the public. Accordingly she immediately identified the accused, without a parade, and he was arrested. PW6 confirmed that PW1 identified the accused at the station and that she said she observed his face, teeth and facial features during the rape.

30. In **Nathan Kamau Mugwe v Republic Criminal Appeal No 62 of 2008**, the Court of Appeal dealt with a situation where it was complained that the witness had not given the description of the Appellant before the parade. The court stated:

> ***"……we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in Gabriel's case, (supra) the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person.***

31. The above situation is not dissimilar to the present case. The complainant knew the features of the accused. Then whilst at the station the accused was brought in by members of the public. It was there that the complainant identified him.

32. In my view, given that all the conditions for proper identification were appropriate, that is that the accused assailed the complainant in broad daylight; that they talked before he committed the offence; that they were together for a period of time which allowed her to see him; that she did see him and noted certain facial features and marks and was therefore able to confirm he was her assailant.

33. Accordingly, I find that there was proper identification and trial court's finding on identification was proper.

Proof of the Offence and Defendant's defence

34. The next issue is whether the ingredients of the offence were proved. The ingredients, other than identification which we have already considered are: whether there was penetration by the Appellant confirmed with the absence of consent.

35. In a charge of rape, the state is required to prove the ingredients in **Section 3 (1)** of the **Sexual Offences Act** which states:

> ***"(1) 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; or***
>
> ***(c) the consent is obtained by force or by means of threats or intimidation of any kind."***

The ingredients of rape are thus intentional and unlawful penetration of the genital organs of another with the absence of consent.

36. The Appellant argues that it is clear from the evidence that there was penetration of the complainant's genitalia and ejaculation therein. However, he denies that he was the perpetrator. He says that when the complainant went to hospital she was examined. A vaginal swab taken showed she had sperms which were not moving according to the evidence of PW5, doctor's evidence; that there had been penetration. According to the same doctor PW5, in cross-examination, *"the perpetrator ought to have been presented to hospital for a medical examination, this was not done."* Further, that no DNA test was performed on him.

37. The complainant went to hospital immediately after the incident, was examined and treated, and thereafter went to the police station. The occurrence of the incident was at about 11.00am. It appears she was in the police station by afternoon, because when the Appellant was arrested and brought there, she was able to identify him. I think it is important to take into account the negligible time lapse between the occurrence of the offence and the identification and arrest of the Appellant.

38. The other aspect requiring proof is whether there was consent to the sexual act, or whether it was obtained by force, threats or intimidation. The evidence is replete from PW1 that the Appellant grabbed her by the hand he dragged her and forced her to go with him. She resisted. He slapped both her cheeks; he caned her buttocks with a stick; he hit her head. When she screamed he blocked her mouth. She tried to shout for help. He tore her skirt. PW2 said she saw PW1 being wrestled to the ground; she thought her fried was in trouble. PW1 was afraid the assailant would beat her.

39. All this, including the injuries and bruises noted in the P3 form, show that there was no consent and in fact that the penetration was obtained through force, and beatings.

40. The Appellant's unsworn testimony was not believed by the trial magistrate. It was in effect an alibi. He said that he was accosted by neighbours as he rode his motorbike in a busy area. These were PW3 and PW4; they beat him, and to escape further beatings, he fled to Gilgil Police Station. There, it was reported that he was a thief and he was arrested and later charged with the offence. I also do not believe that story. When the Appellant cross-examined PW3 and PW4, he did not raise the issue of their having beaten him and breaking his hand.

41. The standard of proof required in a criminal case is that of proof beyond reasonable doubt. It is not that the proof should be beyond a shadow of a doubt. In my view the offence was proved, and I see no reason to impugn the trial court's decision on this ground.

Propriety of the sentence meted

42. The Appellant states that his mitigation was not considered as it had no positive bearing on the sentence. In his mitigation he told the trial court that he had three children and was a single parent; that his children would suffer and depended on him, that he was a first offender. He argues that he and should have been sentenced to ten (10) years imprisonment.

43. **Section 3** of the **Sexual Offences Act** gives a trial court discretion to mete a sentence of not less than ten (10) years; but it may be enhanced to life imprisonment.

44. The **Judiciary Policy Guidelines 2016** require a judicial officer to, interalia, take aggravating circumstances into account in meting sentence. These include some of the one that were evident in this case. Serious physical or psychological effect on the victim; continued assault on the victim; targeting of vulnerable groups such as in this case, a woman carrying a child. The Guidelines also require the officer to consider the mitigating circumstances such as whether there was provocation, or negligible harm; being a first offender; pleading guilty at the earliest opportunity.

45. The Trial Magistrate sentenced the Appellant to twelve years, only two years more than the minimum sentence. The Learned Magistrate gave the reason for this action which is within the Judiciary Policy Guidelines. She said that the offence was serious; that the manner in

which it was committed was brutal, and that a stiff sentence would act as a deterrent to others. The evidence shows that the Appellant dragged the complainant into the bush despite the fact that she had a child on her back; he threw her down; the complainant's clothes got torn; he hit her repeatedly of the face and on her rear side; he muffled her screams out with his hand and tore off her clothes.

46. As already stated **Section 3 (3)** of the **Sexual Offences Act**, the minimum sentence for which the Appellant was liable was ten years. Considering the aggravating circumstances, I do not think the sentence given was at all excessive or inappropriate. This ground fails.

Disposition

47. In light of all the foregoing, the appeal fails in all its grounds, and hereby dismissed. The Appellant's conviction is affirmed.

48. As for the sentence, I note that the trial magistrate properly considered the mitigation availed. She adequately explained why she imposed a stiffer sentence than the minimum sentence allowable. I agree with the Learned Magistrate's reasoning and affirm the sentence as meted.

Administrative directions

49. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

50. A printout of the parties' written consent, if any, to the delivery of this judgment shall be retained as part of the record of the Court.

51. Orders accordingly.

Dated and Delivered in Nairobi by teleconference this 22nd Day of October 2020

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Joseph Lokitol - Appellant in Naivasha Maximum Prison

3. Court Clerk - Quinter Ogutu