REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 38 OF 2019

WILSON KIPLAGAT....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. P.W. Wasike, SRM in Kapsabet SPM's Criminal Case No. 3184 of 2016 delivered on 26th day of February 2019)

JUDGMENT

[1] Before the lower court, the appellant, **Wilson Kiplagat**, was charged with the offence of attempted rape contrary to **Section 4** of the **Sexual Offences Act, No. 3 of 2006**. The particulars thereof were that on the **28th day of September 2016** at [Particulars Withheld] in Kaptildil Location within Nandi County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **AC** without her consent. In the alternative, the appellant was charged with the offence of indecent act with an adult contrary to **Section 11A** of the **Sexual Offences Act**. It was alleged, in respect of the alternative charge that on the **28th day of September 2016** at [Particulars Withheld] in Kaptildil Location within Nandi County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of **AC** without her consent.

[2] The appellant denied those allegations and upon being taken through the trial process, was found guilty of the alternative count, for which he was convicted and sentenced to 10 years' imprisonment on **26 February 2019.** Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **4 March 2019** on the following grounds:

> **[a]** That the learned magistrate erred in law and in fact in holding that the Prosecution had proved its case beyond reasonable doubt while the evidence stated otherwise;
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> **[b]** That the learned magistrate erred in law and in fact in holding that there was indecent act with an adult by the appellant while in fact there was no offence established as committed by the appellant;
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> **[c]** That the court erred in relying on a doctored P3 Form that does not disclose any offence against the appellant;
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> **[d]** That the learned magistrate erred in law and in fact in failing to consider and evaluate the evidence of the prosecution witnesses in totality and generally the history of the case;
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> **[e]** That the trial magistrate erred in law and in fact in shifting the burden of proof to the appellant;
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> **[f]** That the learned magistrate erred in law and in fact in sentencing the appellant to 10 years' imprisonment, which sentence was excessive in the circumstances;
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> **[g]** That the learned magistrate erred in law and in fact in sentencing the appellant to 10 years' imprisonment which sentence was unlawful in the circumstances;
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> **[h]** That the learned magistrate erred in law and in fact in sentencing the appellant to 10 years' imprisonment without an option of a fine;
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> **[i]** That the learned magistrate erred in relying on uncorroborated and unsubstantiated evidence.

[3] It was for the foregoing reasons that the appellant prayed that his appeal be allowed in its entirety and that the conviction and sentence on him be quashed forthwith. The appellant's appeal was urged on his behalf by **Mr. Nabasenge, Advocate**. He relied on the written submissions filed herein on **2 September 2019** and the List and Bundle of Authorities annexed thereto. In **Mr. Nabasenge's** view, the 9 Grounds of Appeal yield only two issues for determination, namely whether the evidence of the complainant was corroborated and whether the prosecution witnesses were hostile. He, thus, fashioned his submissions along those lines and cited the case of **Samwel Godfrey Otili vs. Republic** [1992] eKLR and **Section 124** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** to support his contention that in the absence of corroboration, the evidence of the complainant was worthless.

[4] In respect of the evidence of **RC (PW4)** and **FC (PW5),** it was the submission of **Mr. Nabasenge** that they ought to have been declared hostile witnesses, granted that they had to be remanded in custody for seven days for failing to attend court. He relied on **Elly Otieno Ogwang vs. Republic** [2018] eKLR and urged the Court to find that there was no credible evidence presented before the lower court to sustain a conviction.

[5] On sentence, Counsel relied on **Arthur Muya Kariuki vs. Republic** [2015] eKLR for the applicable principles; and **Meshack Maingi Kitheka vs. Republic** [2015] eKLR for the proposition that the sentence of 10 years' imprisonment is excessive. To support his proposal that the appellant was entitled to the option of a fine, Counsel cited **S W vs. Republic** [2016] eKLR and **Fredrick Wadia Masanju vs. Republic** [2014] eKLR. Accordingly, Counsel urged the Court to either acquit the appellant or sentence him to pay a fine as opposed to custodial sentence. He also proposed a third option, namely, that the period of about 5 months between **26 February 2019,** when the appellant was sentenced, to **21 June 2019,** when he was admitted to bail pending appeal, be deemed commensurate and adequate punishment by the Court.

[6] While conceding that the sentence of 10 years' imprisonment was unlawful for the offence of indecent act with an adult, **Ms. Mokua**, learned Counsel for the State, opposed the appeal on conviction, contending that the evidence of the complainant before the lower court was well corroborated by the evidence of **PW4** who was attracted to the scene by the complainant's screams for help. She also relied on **Section 124** of the **Evidence Act** to underscore her submission that corroboration was not a necessary requirement. As to the probative value of the evidence of **PW4** and **PW5**, **Ms. Mokua** urged the Court to find that they were never declared hostile; and that the reason they were placed in custody was because warrants had earlier been issued against them in the belief that they had been served with witness summons but failed to attend court. It was therefore the submission of the State that the two witnesses were never coerced into giving evidence, as alleged by Counsel for the appellant.

[7] I have given careful consideration to the appellant's Grounds of Appeal. I have also taken into account the written and oral submissions made herein by the learned Counsel for the appellant and the State in the light of the proceedings and Judgment of the lower court. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions on the basis thereof. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"An appellant on a 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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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; 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..."**

[8] The appellant's trial opened before the lower court on **13 March 2017**. The Prosecution called 5 witnesses in proof of the charges levelled against the appellant. The complainant, **AC**., testified as **PW1** and stated that, at 9.00 a.m. on **28 September 2016**, she was at [Particulars Withheld] where she used to sell offcuts and tree branches; and that while there, someone came from behind her and started touching her breasts. That she quickly turned to face the person and realized it was the appellant, **Wilson Kiplagat**. She resisted and struggled with the appellant to extricate herself from his grip; and that the appellant then punched her on the left eye and tore her skirt in a bid to rape her.

[9] The complainant further testified that it was at that point that she screamed for help, as the appellant tightened his stranglehold of her and hit her with the flat side of his panga. Her screams attracted **R (PW4)**, who found her already on the ground and pleaded with the appellant to leave her alone. She added that **R** was closely followed by **F (PW5);** and that, with their support and encouragement, she thereafter went to **Kapsabet County Referral Hospital** for treatment; after which she reported the matter to the police. Before the lower court, **PW1** identified her treatment documents, receipts for expenses paid as well as the P3 Form issued to her which was duly filled and returned to the police station. She also identified the jacket and skirt she was wearing on the date in question, which she had handed over to the investigating officer for use as exhibits. The lower court noted that both the skirt and jacket were torn; and that the contention of **PW1** was that they were torn by the appellant during the struggle aforementioned.

[10] Duncan Gichangi, a Clinical Officer based at **Kapsabet County Referral Hospital,** testified before the lower court as **PW2**. His evidence was that the complainant visited their facility on **28 September 2016** under Outpatient No. [Particulars Withheld] with a history of having been assaulted by a man well known to her at 9.00 a.m. on the **28 September 2016.** He confirmed that the complainant was attended to and produced her treatment chits, receipts issued at their facility and the P3 Form as exhibits before the lower court (marked **the Prosecution's Exhibits 1a and b, 2 and 3)**. **PW2** also testified that the complainant had tenderness on her back and that her clothes were torn. He identified the said clothes before the lower court.

[11] The third prosecution witness was **Corporal Norah Jemutai (PW3),** the investigating officer in the matter. She testified that, while on duty on **28 September 2016**, she perused the OB and noted that this case of attempted rape had been minuted to her for action. She thus proceeded to conduct her investigations; after which she caused the appellant to be arrested and charged accordingly. She produced the complainant's torn jacket and skirt before the lower court as exhibits.

[12] RC (PW4) testified that on **28 September 2016**, she had gone to graze her cows near the river when she heard some screams of a

distressed woman saying *"niachilie niende"* and *"niachilie Kiplagat niende"*. She responded to the screams and rushed to the scene where she found the appellant, a person well known to her, holding the complainant using his left hand and a panga on the right hand. It was her evidence that he called the appellant by his name and asked him to let the complainant go; and that the appellant then walked away without saying anything. It was further the evidence of **PW4** that the complainant had visible injuries on the shoulders; and that she told them that the appellant had attempted to rape her. **PW4** confirmed that shortly thereafter, **F**, a neighbour of the complainant's came to the scene with other people, seeking to know what the matter was; and that the complainant was then advised to go to hospital for treatment and to have the matter reported to the police.

[13] FC (PW5), also told the lower court that her attention was attracted to the scene by the screams she heard on the **28 September 2016** at about 9.00 a.m. She ran to the river and there found the complainant and **R (PW4).** She also mentioned that on her way to the scene, she saw the appellant at a distance of about 10 metres, walking away from the scene with a panga in his hands; and that the complainant told her that the appellant had beaten her and that he had attempted to rape her. **PW5** told the lower court that she noted that the complainant's skirt and jacket were torn. She then accompanied the complainant to **Kapsabet Hospital** for treatment and then to **Kapsabet Police Station** where they recorded their statements.

[14] In his defence, the appellant told the lower court that he was on duty at K**obujoi** on the **28 June 2016;** and that his arrest was attributable to a land dispute he had with the complainant on **24 September 2016** when he told her that she would not plant for the year **2017;** and that the complainant had gone ahead and reported the matter to the assistant chief. He stated that it took him by surprise that the matter was turned into a case of attempted rape; an offence he did not commit.

[15] The learned trial magistrate considered the evidence presented before him and took the view that:

> **"The evidence which is uncontroverted is that the accused touched PW1's breasts using his hand without her consent. He even physically assaulted her though he was lucky he was never charged with assault.**
>
> **The evidence tendered proves the accused committed an indecent act with PW1 (an adult). The accused has not given any reasonable justification for committing the indecent act. The accused is found guilty and convicted of the alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act pursuant to section 215 CPC. The main charge is dismissed…"**

[16] In the light of the foregoing, the key issues for reconsideration are whether **the ingredients** of the offence of indecent act with an adult, as prescribed **by Section 11A** of the **Sexual Offences Act**, were proved by the Prosecution beyond reasonable doubt and if so, **whether the appellant was positively identified** as the perpetrator of the offence. These two issues are broad enough to cover the two issues proposed by Counsel for the appellant, namely, the question of whether the evidence of the complainant was sufficiently corroborated and whether the evidence of **PW4** and **PW5** had any probative value, granted that their attendance before court as witnesses was compelled by way of arrest and incarceration.

[17] Section 11A of the **Sexual Offences Act**, pursuant to which the appellant was convicted, stipulates that:

> **"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

[18] Hence, the key ingredients of that offence are the commission of an indecent act; and that the complainant was an adult at the time. What amounts to an indecent act must of necessity be looked at from the prism of **Section 2** of the **Sexual Offences Act**, which defines the phrase thus:

> **"indecent act" means an unlawful intentional act which causes –**
>
> > **a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
> >
> > **b. exposure or display of any pornographic material to any person against his or her will;**

[19] PW1 gave evidence before the lower court that she was alone at the riverside at about 9.00 a.m. on … when the appellant surreptitiously grabbed her breasts from behind and made remarks to the effect that he was surprised to know that she could be found at the riverside at that hour. What ensued was a struggle between the complainant and the appellant, in which the appellant not only tore the complainant's clothes but also hit her on the left eye and other parts of her body before **PW4** went to her rescue. Clearly, therefore, by the time **PW4** got to the scene, the *actus reus* of touching the breasts of the complainant had already happened; and therefore **PW1** was the only witness to the nefarious act. Hence, granted the submissions by Counsel for the appellant, the question to pose is whether it was open for the trial court to act on the evidence of **PW1** without corroboration; and whether **PW4** and **PW5** could provide the requisite corroboration.

[20] The appellant relied on the persuasive authority of **Samwel Godfrey Otili vs. Republic (supra),** wherein it was held thus, following **Chila vs. Republic** [1967] EA 722**:**

> **"In sexual offences generally like rape, the trial magistrate should warn himself of the danger of acting on the uncorroborated testimony of the complainant. Having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If there is no such warning a conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice…"**

[21] It is noteworthy however that in that case, the victim was a minor aged 13 years and that the two decisions predated both the **2003** and the **2006** amendments to the **Evidence Act,** such that, by dint of the Second Schedule to the **Sexual Offences Act,** and in particular, by **Paragraph 2** thereof, the proviso to **Section 124** now reads thus:

> **Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

[22] It is manifest from the Judgment of the lower court that the trial magistrate found the evidence of the complainant credible in itself, taken along with her torn clothes which were exhibited before it, as well as the treatment documents and the P3 Form exhibited by **PW2**. In the treatment notes marked **the Prosecution's Exhibit 2**, it is manifest that at the first opportunity, the complainant mentioned that her assailant had touched her inappropriately and that when she resisted, he assaulted her. The same information was restated in the P3 Form; and in addition, in Section B of Part II of the P3 Form, **PW2** noted that the complainant had breast pains bilaterally in addition to severe back pains.

[23] Thus, there was cogent evidence to support the appellant's conviction even without the evidence of **PW4**, who saw the accused assault the complainant; and **PW5** who saw him walk away from the scene. As to the value of the evidence of **PW4** and **PW5,** there is no dispute that they were arrested and placed in custody before their testimony was taken; and therefore the question to pose is whether that, of itself made them hostile witnesses. Needless to say that a court of law has the power and mandate to compel the attendance of witnesses; and, to ensure that once in attendance, a witness discharges his/her obligation to testify. It is for this reason that **Section 152** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** does provide that:

> **"Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence –**
>
> **a. refuses to be sworn; or**
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> **b. having been sworn, refuses to answer any question put to him; or**
>
> **c. refuses or neglects to produce any document or thing which he is required to produce; or**
>
> **d. refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him…"**

[24] From the proceedings of **12 October 2018** and **18 October 2018,** it is manifest that the committal of **PW4** and **PW5** was never done pursuant to the above mentioned provision, but under **Sections 144 to 149** of the **Criminal Procedure Code**, with a view of compelling their attendance. This is a totally different scenario from that which is envisaged by **Section 161** of the **Evidence Act**, which provides that:

> **"The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."**

[25] The implication of the **Section 161** scenario was well explained in **Batala vs. Uganda** [1974] EA 402, thus:

> **"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable, it enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight."**

[26] As was rightly pointed out by **Ms. Mokua**, no request was made by the Prosecution to have either **PW4** or **PW5** treated as a hostile witness and therefore they were not subjected to cross-examination by the Prosecutor. Consequently, I have no hesitation in holding that the submissions of **Mr. Nabasenge** at Paragraph 2.2 of his written submissions; and the case of **Elly Otieno Ogwang** (supra) which was cited by him, are off the mark, in so far as they dealt with the situation envisaged by **Section 161** of the **Evidence Act.** That being the case, there is absolutely no reason for impugning the evidence of **PW4** and **PW5,** seeing that no leave was applied for or given by the Prosecutor to treat them as hostile witnesses. Indeed, it is manifest from the lower court record that the two witnesses were never served with witness summons in the first place and therefore their arrest and incarceration were altogether unwarranted.

[27] As to whether the prosecution evidence placed the appellant at the scene of crime at the time of the subject occurrence, there was overwhelming evidence tendered before the lower court to show that the appellant assaulted the complainant and was, in fact, found in the act by **PW4. PW5** who went to the scene shortly after **PW4** said she saw the appellant walking away from the scene of crime. That account was entirely unshaken, granted that in his unsworn statement of defence, the appellant opted to refer to prior events that took place on **28 June 2016** and **24 September 2016**. And, in the Judgment of the lower court, that defence was duly considered and found to be untenable. While the learned trial magistrate erroneously took the view that the appellant was under obligation to call the village elder or chief to verify his defence, that misdirection did not occasion any miscarriage of justice.

[28] In the result, I am satisfied that the Prosecution discharged the burden of proving the offence of indecent act with an adult as envisaged by **Section 11A** of the **Sexual Offences Act** and therefore that the appellant's conviction therefore was well founded. Under that provision of the law, the penalty is a fine of **Kshs. 50,000/=** or 5 years' imprisonment. It is manifest therefore, and as rightly conceded by **Ms. Mokua** for the state, the penalty of 10 years' imprisonment imposed by the lower court is unlawful. The same is accordingly set aside. In lieu thereof, and on account of the ongoing global corona virus pandemic, it is hereby ordered that a Probation Officer's Report be filed for the Court's consideration and further orders.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2020

OLGA SEWE

JUDGE