REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 51 OF 2018

PETER AFULA WANGA.....1ST APPELLANT

ADAN OMWANGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellants herein had been charged, in Mumias SPMCCRC No. 14 of 2016, with the offence of gang rape, contrary to section 10 of the Sexual Offences Act, No. 3 of 2006, and were convicted and sentenced to fifteen years imprisonment.

2. Being dissatisfied with the conviction and sentence, the appellants lodged the appeal herein, vide petition of appeal, dated 24th April 2018. In his petition of appeal, the appellant raised four grounds of appeal, namely, that the trial court erred in presiding over a trial without considering their application to be served with prosecution evidence, in failing to observe that they were not subjected to corresponding medical investigation under section 36 of the Sexual Offences Act, in finding that penetration was proved even in the wake of flimsy and inadequate evidence, and in rejecting their defence without proper evaluation.

3. The duty of the first appellate court was set out in the *Okeno vs. Republic* [1972] EA 32, where court said:

> *"The primary duty of an appellate court is to re-analyse and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions."*

4. The same was reiterated in *David Njuguna Wairimu vs. Republic* [2010] eKLR, where the court of appeal stated:

> *"The duty of the first appellate court is to analyse the 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 appellant 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 decisions."*

5. It is the duty of the court in this case to re-evaluate the evidence adduced by the prosecution, in support of the charges, and by the defence, and make its conclusion, as to whether the prosecution proved its case to the required standard.

6. In this appeal, the appellants contend that the hearing was not conducted in a fair manner since they were not furnished with statements to enable them properly conduct their defences.

7. Disclosure of prosecution evidence to the accused before trial is provided for under Article 50(2)(c)(j) of the Constitution. The provision states:

> *"(2) Every accused person has the right to a fair trial, which includes the right—*
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> *(c) to have adequate time and facilities to prepare a defence;*
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> *(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."*

8. In *Anthony Mutuku Mutua vs. Republic* [2020] eKLR, the court observed:

"*21. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront."*

9. In *Joseph Ndungu Kagiri vs. Republic* (2016) eKLR**,** where the appellants were not provided with witness statements before or during the trial, the court held:

"*I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50 (2) (j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused person with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to violation of their constitutional rights to a fair trial."*

10. According to the trial court record, when the matter came up in court of the 30th March 2016, the trial court ordered that the witness statements be availed to the appellants. When the matter came up for hearing, the appellants indicated that they were ready to proceed with the hearing. At no point during trial did they say that they were never supplied with evidence, and they carried on with the hearing with no difficulties.

11. On the second ground, of not being subjected to a medical examination, as per section 36 of the Sexual Offences Act, the provision alluded to states as follows:

"*36. Evidence of medical, forensic and scientific nature*

"(*1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders' databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)—

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; and

(b) in the case of blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against—

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to

imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both."

12. The Court of Appeal pronounced itself on the subject in *Martin Nyongesa Wanyonyi vs. Republic* [2015] eKLR, where it said:

> *"Turning to the question that the appellant was not subjected to a medical examination contrary to the provisions of section 26 of the Sexual Offences Act, in Kassim Ali vs Republic Cr. App. No 84 of 2005 (Mombasa) this Court stated,*
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> *"[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."*
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> *In Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010, this Court found no reason why the same principle should not be applied in the case of defilement, and stated thus,*
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> *"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."*
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> *As such, it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law and we find this ground to be unfounded."*

13. From the above, the medical examination of an accused person, in cases of this nature, is not mandatory. As per the trial court record, at page 18 of the proceedings, the appellants were subjected to medical examination, and, therefore, the ground has no merit.

14. On proof of penetration, it was the evidence of the complainant that the appellants took her to a forest, removed her biker and underpants, and each of the appellants inserted their penises in turns into her vagina. She stated that they both ejaculated inside her.

15. Section 2 of the Sexual Offences Act provides as follows on penetration:

> *"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

16. In the instant case, the only evidence of penetration was that adduced by the complainant, who stated that she was raped and that the appellants ejaculated in her. PW2, the clinical officer who examined her, stated that the complainant's vagina had no tears or spermatozoa. She confirmed that there was no recent penetration. She also stated that she did not see anything out of the ordinary. When examined by court, she confirmed that there was no sign of force or ejaculation. She, however, noted that there was a whitish discharge.

17. In *Mutali Nyamwea vs. Republic* [2019] eKLR, the Court of Appeal said:

> *"As shown above, there was medical evidence which showed in the same breath, the presence and absence of spermatozoa after conducting the HVS. The evidence also showed normal physical appearance of the genitalia but still opined that grievous harm was caused to the child. It also noted smelly greenish/whitish discharge from the vagina. The medical opinion that followed such examination was that there was no penetration. What do we make of such evidence? In the first place, it has been held before by this Court Mwangi vs. Republic [1984] KLR 595 that:*
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> *"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."*
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> *Secondly, the finding of injuries in the child's genitalia as well as a foul smell suggested that there was partial penetration. As the court stated in the case of George Owiti Raya vs. Republic [2013] eKLR: -*
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> *"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane…It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."*
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> *More importantly, however, the opinion of the clinical officer, PW8, was just that, an opinion which was not binding on the court. As this Court stated about expert opinions generally in the case of Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko [2007] 1 EA 139:*
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> *"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."*

The question is whether the offence was capable of proof to the required standard without medical evidence, and it clearly was, in view of section 124 of the Evidence Act which was amended to provide as follows:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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." [Emphasis added].

After re-evaluating the evidence on record, the High Court concluded as follows: -

"PW 1's testimony was clear and sufficiently detailed as to the fact that she was sexually assaulted by the appellant and that the appellant "inserted his penis in my vagina". Such insertion need not be complete. In view of section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya), the testimony of PW 1 did not require any corroboration if the learned magistrate believed that she was telling the truth. In the judgment, the learned magistrate assessed the credibility of PW 1 as follows, "In my mind I find that PW 1 did not lie in her evidence. Her evidence was [not] shaken in cross-examination neither did the accused show that the prosecution evidence was malicious." It follows then that the PW 1's testimony was complete on the issue of penetration. Any other evidence would only be corroboratory... On the other hand, the evidence of PW 8 pointed to the fact that there was no penetration...Although PW 8's testimony was clear that there was no penetration, such testimony as I stated elsewhere in the judgment would merely corroborate the testimony of PW1 ... In this case, the testimony of PW 1 was sufficient to establish that there was penetration. PW 1 described what occurred and there is no reason to believe she was lying. I therefore find that the learned magistrate erred in finding that penetration was not proved."

With respect, we agree with that conclusion."

18. The evidence of the complainant was corroborated by the presence of discharge, which was sufficient proof of penetration, and the appellants' arguments on the same cannot, therefore, stand.

19. Lastly, the appellants contend that the trial court rejected their defence. The appellants in their evidence denied committing the offence. The 1st appellant testified that on the date of the alleged offence, he was with complainant at the bar, and that he left her with the 2nd appellant. The same was the case with the 2nd appellant, who stated that they drunk at the bar, where the complainant worked, and left her there. That evidence was not corroborated. The trial court did not refer to or mention the defence evidence, that of itself, however, does not mean that the trial court did not consider it. The evidence adduced by the prosecution was overwhelming. It is my finding that the evidence by the prosecution outweighed that by the appellants, and, therefore, the court properly rejected the same.

20. In the upshot, it is my holding and finding that the prosecution had proved its case against the appellants to the required standard, and that the appeal herein has no merit, and it is hereby dismissed. The conviction is upheld and the sentences confirmed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020

W MUSYOKA

JUDGE