REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 61 OF 2018

SAID EMMANUEL MLANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Alenga for the state

JUDGMENT

The appellant was charged, tried and convicted of rape contrary to Section 3 (1) (a) (b) as read with Sub-section 3 of the Sexual Offences Act. It was alleged in the particulars of the offence that on the 14.12.2014 at [Particulars Withheld] a village the appellant intentionally and unlawfully caused his penis (read male genital organ) to penetrate the victim female genital organ – namely vagina by using threat and without her consent.

The trial Court on consideration of the matter sentenced the appellant to 10 (ten) years imprisonment. He now appeals to this Court based on the following grounds:

> **(1). That the Learned trial Magistrate erred in Law and fact in failing to consider that the prosecution did not prove the case beyond the required standards of the Law.**
>
> **(2). The Learned trial Magistrate erred in Law and fact by not considering that there were massive contradictions and invariances.**
>
> **(3). That Section 3 (1) of the Sexual Offences Act denied the Learned trial Magistrate the discretion to factor in mitigation before passing sentence.**
>
> **(4). That the Learned trial Magistrate erred in Law and fact by considering the defence which was worthy to be considered.**

At the trial on appeal, the appellant placed reliance wholly on his written submissions. The appellant sought to discredit the Judgment of the trial on areas of identification and the unfavourable conditions prevailing at the time when the alleged offence took place. He invited the Court to consider the essential principles set out in **Terekali & Another v R {1952} EA 259, Cleophas Wamunga v R {1989} KLR 424, R v Turnbull {1973} 3 ALL ER 549** to impugn the conviction based on a mistaken and unreliable identification evidence.

The next significant feature also argued by the appellant is the findings which failed to take notice of the contradictions and inconsistencies of the entire prosecution case with regard to this, the appellant cited the following dictum: **David Ojeabuo v Federal Republic of Nigeria {2014}, Philip Nzaka Watu v R {2016} CR Appeal No. 29 of 2015.** According to the appellant, the inconsistencies and variances provided a clear and compelling evidence for the trial Court to resolve the benefit of doubt in his favour. Further on sentence, the appellant argued and submitted that the trial Court failed to take into considerations the period spent in remand custody in terms of Section 333 (2) of the Criminal Procedure Code. It was his contention that since arrangement and conviction of the trial he spent close to two (2) years in remand without being released on bail.

Typically, the appellant further asked of the Court to consider the question on sentence along the lines of the principles enunciated by the

Supreme Court in Muruatetu v R {2017} eKLR. The respondent counsel on his part opposed the appeal for lacking material grounds to set aside the conviction and sentence.

Outline of the facts

A fuller account of the events leading to the crime is well stated by **(PW1).** According to **(PW1),** on 14.12.2014, she was coming back from **Mama Freddy's** house. While on the way at about 10.00 p.m. she met with the appellant who got hold of her and pushed her to the near bush to commit sexual intercourse. At the trial **(PW1)** evidence which was central to the prosecution case explained the threats issued by the appellant while armed with a knife demanding she gives into the sex act. Following the rape **(PW1),** testified that she suffered injury to the genitalia necessitating her to be admitted while unconscious at the hospital. On the basis of the allegations a report was made to the police which resulted in the arrest of the appellant.

The Learned trial Magistrate accepted this evidence and that of **(PW2)** and **(PW3)** to make a finding of the charge being proved beyond reasonable doubt. **(PW4) – PC Kinuthia** of Malindi Police Station summarized the nature of the investigations carried out in response to the complaint lodged by **(PW1).** It was in the light of the investigations and evidence from **(PW1), (PW2)** and **(PW3)** the decision to charge appellant with the offence of rape became decisive.

The gravity of the alleged offence was corroborated by the testimony of **(PW5) Abudulahi Mohamed** of Malindi Hospital Sub-county. As a primary consideration on examination, **(PW5)** told the Court that **(PW1)** experienced vaginal tear manifestation of an act of penetration. In view of the evidence by the prosecution, it was found desirable to place the accused person in his defence. As one would expect the appellant denied ever committing the offence of rape against the complainant.

On this evidence, the Learned trial Magistrate accepted the case for the prosecution witnesses and rejected the defence. The Learned trial Magistrate drew the inference from the evidence that the appellant and no-one else was involved with the rape as alleged by the prosecution.

Determination

In view of the above on this first appeal, the Court must be guided by the principles laid down in **Ruwala v R {1957} EA 570**. The first ground of appeal which the appellant has raised with the Court covers the issue on identification. That the Learned trial Magistrate found amicably misdirected herself on the burden of proof.

In the case of **Maitanyi v R {1986} KLR 198**, the Court had this to say:

> **"Although the Lower Courts did not refer to the well known authorities Abdalla Bin Wendo v R {1953} 20 EACA 166 followed in Roria v R {1967} EA 589, it may be that the trial Court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition to wit: "Subject to the well known exceptions it is trite Law that a fact may be proved by the testimony of a single identifying witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a Judge or Jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error. In this case there is no other evidence circumstantial or direct. The decision must turn on the need for testing with the greatest care, the evidence of the single witness."**

In this case on appeal, the appellant simply argues that the prevailing circumstances were unfavourable for a positive identification. At the trial the fact on identification and placing the appellant at the scene came from the complainant **(PW1).** She explained that prior to the fateful day she had met the appellant who made attempts in having a love relationship with her. Relying upon the complainant's position, the Learned trial Magistrate on that account alone convicted the appellant.

In reviewing the evidence, it is not lost that the rape incident took place in a scene described by the complainant as a nearby bush. It is certainly a crime associated with night time more specifically at 10.00 p.m. It transpires from the complainant's testimony that she was able to identify the appellant through a source of moonlight and initial mobile phone torch.

It appears to the Court that the circumstances in which the identification took place at night and in the scene surrounded with bushes were difficult. It is also proper in such circumstances where the complainant was the sole identifying witness for the Court to warn itself of the danger of relying upon such evidence or look for corroboration altogether if possible.

From the Judgment of the Learned trial Magistrate, no such warning and caution employed in making positive findings as to the identification of the appellant to use another well-known principle the evidence on identification or recognition must be watertight and overwhelming.

At the outset and by way of context, it is relevant to note that the complainant never gave the description of the appellant nor state that she identified him by a known voice. The issue before the Court is whether the complainant was correct in her contention that she positively saw the appellant at the scene. Something of significance in her evidence respecting identification is the assertion on the source of light which assisted her to visually identify the appellant. The result to me was that the evidence of identification was highly suspect proceeding first on misdirections and non-directions in all circumstances in admitting the evidence of a single identifying witness.

I am satisfied that to admit the evidence concerning the identification process at [Particulars Withheld] village in Malindi resulted in unfairness and prejudice to the appellant. The Learned trial Magistrate failed to take every precaution reasonably available to guard against miscarriage of justice that can occur and in fact have occurred, because of honest but mistaken evidence of identification. **(See R v Turnbull**

& Others {1976} 3 ALL ER 549).

In the end, it is my view that the conviction of the appellant was unsound. It is therefore questioned and the sentence of ten (10) years imposed set aside. As a consequence, the appellant is at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER, 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. The appellant

2. Onyango for the state