REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 113 OF 2018

BETWEEN

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PHILIP OSENDO MLEFU.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against sentence passed by Hon.F. Kyambia SPM on 12.7.2018 in Mombasa CMCCr. Case no. 382 of 2015)

JUDGMENT

Introduction

1. Appellant was charged before the trial court with the offence of **Rape Contrary to Section 3(1) (a) (c) (3) of The Sexual Offences Act of 2006**. In the alternative count appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11 (A) of **The Sexual Offences Act of 2006.**

2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the main count, and that the trial court sentenced him to serve ten (10) years imprisonment, after taking into account his mitigation and treating him as a first offender.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence vide Amended Grounds of Appeal filed in Court on 10.8.2020, on the following grounds.

1. That the trial magistrate erred in law and fact as he failed to comply with Section 200(3) of the criminal procedure code.

2. That the trial magistrate erred in law and fact by failing to take into account the massive inconsistencies in the prosecution evidence.

3. That the trial Court magistrate erred in law and fact since he failed to interrogate the evidence of identification in regard to the manner of my arrest.

4. That the trial Court magistrate erred in law and facts by allowing the prosecution to withhold crucial evidence.

5. That the trial Court magistrate erred in law and fact in failing to consider that the investigations carried in this matter was too shoddy to sustain a conviction.

6. That the trial Court magistrate erred in law and fact by failing to consider that the sentence mete on the Appellant was not commensurate with the offence committed in regard to minimum mandatory sentences.

SUBMISSIONS

4. The Appellant filed his written submissions and relied on the same. On non-compliance with Section 200(3) of the criminal procedure

code. The Appellant submitted that the evidence of PW1 and PW2 was heard by Hon. R Ondenyo, thereafter, Hon D.N Ogoti took the evidence of PW3.However, when Hon. F. Kyambia took over the matter, the Appellant indicated that he wished the matter to start afresh so that that he could have all the witnesses testify before a single magistrate. The Appellant's request was denied without any explanation from the Court.

5. On the massive inconsistencies in evidence, a case in point related to PW1 who alleged that she ran to a neighbor's house with her trouser and shirt immediately after the incident but later in evidence PW1 alleged that she got clothes to wear from one Rosaline. Further, the Appellant submitted that the medical evidence, which revealed that the complainant had a broken hymen with an old scar, disproved the allegations that the complaint was a virgin before the alleged incident. The Appellant also submitted that Stephen committed the rape and not Pastor according to the complainant's first statement to the police. Therefore, the controversy and contradiction ought to have been resolved in his favour.

6. On arrest, the Appellant submitted that the arresting officer was not called by the prosecution to state how and why they arrested him. Since identification evidence is crucial, the trial Court ought to have evaluated the evidence on identification.

7. The Appellant further submitted that the investigations by the prosecution were shoddy since no identification parade was conducted and the police did not investigate the complainant's cousin who allegedly gave him the complainant's phone number.

8. On the sentence, the Appellant relied on **Francis Karioko Muruatetu & Another -Vs- Republic (2017) eKLR** in respect to the mandatory minimum sentence which he argued deprived the trial Court of its legitimate discretion.

9. **Ms Mwangeka** Learned Counsel for the D.P.P adopted and relied on her written submissions. She submitted that in this case, the Appellant pulled the victim into his house, he strangled her to prevent her from screaming, the Appellant then forcibly removed the victim's clothes and threatened to stab her with a knife while he put the victim on his bed and raped her. Counsel further submitted that the victim's version was corroborated by PW2 and pw3 and the medical evidence in the PRC form filed on 12.2.2015 a day after the incident noted that the victim had abrasions on the outer genitalia, her hymen was broken, and there were lacerations on the victim's anus at 6 and 12 o'clock. Consequently, the prosecution established that the element of lack of consent.

10. On identification, counsel testified that the Appellant was a well-known pastor. Further, PW2 and PW3 that they say the Appellant throw clothes at PW1 who was running towards them while half-naked. The Appellant did not controvert that evidence.

12. On sentencing, Counsel submitted that the trial Court exercised its discretion after taking into account the Appellant's mitigation. Therefore, this Court ought not to interfere with the sentence.

DETERMINATION

13. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

> **"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely 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 finding 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. ….**

THE EVIDENCE PRESENTED IN THE TRIAL COURT

14. The prosecution's case forms part of the record of appeal and I need not reproduce the same, however I purpose to summarize the prosecution's case and the defence. The evidence that emerged from the Trial Court was as follows. The Complainant testified as PW1. She testified and stated that the Appellant got her phone number from her cousin and he called her on 11.2.2015 promising to get her a job and insisted they meet at the gate of Ushindi Baptist Church. When they met, the Appellant insisted that he had forgotten the job Application at his house. Therefore, he needed to pick them. PW1 further states that when they reached the Appellant's house, he pulled her into his house. When she started to scream, the Appellant strangled her and warned her against screaming. The Appellant then removed the complainant's clothes, and after overpowering her, he undressed, threatened to stab her if she made any noise. The Appellant then placed a knife on a stool next to the bed. Thereafter, he put the complainant on his bed and raped her without using any protection for nearly 15 minutes.

15. PW1 further testified and stated that it was only after she pleaded with the Appellant to let her go for a short call, that he agreed to let her go, on condition that she did not go with her clothes. PW1 stated that she then wrapped a bedsheet on her body and on reaching the door, she picked her trouser and her shirt and ran to a neighbor's (Elizabeth) place leaving behind her mother's I.D and her inner pants. At the neigbour's bathroom, she requested the gate to be locked behind her and explained to her what happened. She then took her to Rosaline's house where she was given clothes.

16. Upon cross-examination, PW1 confirmed that she saw the Appellant for the 1st time when he raped her and that he had promised to get her a job at mwembe tayari.

17. Roseline Auma Ojwang PW2 testified and stated that on 11.2.2015 she saw PW1 standing in their communal bathroom wearing a black trouser and covered with a white sheet but she was looking distressed. She asked PW1 what was wrong and she explained that she had run

away from the Appellant who wanted to strangle her.

18. Upon cross-examination, PW2 stated that she did not know the complainant before the incident and that the case was not a fabrication.

19. Anne Mwende Donald PW3 testified and stated that on the 11.2.2015 a neighbour's daughter entered her house while holding her private parts and crying. Blood was on her lesso. PW3 stated that the complainant informed her that a person known to her had raped her. She went with PW1 to the plot where the incident happened and met PW2 who explained to her how she had helped the complainant with a lesso. Pw3 testified and stated that the Appellant approached her demanding to talk while asking she was asking where PW1's items were. PW3 states that the Appellant asked where his items were. The Appellant then went into his house, on returning, he threw PW1's bra, panty, her mother's I.D , phone and shoes at her. PW3 picked the said items and they proceeded to the village elder to report the incident.

20. Upon cross-examination, PW3 confirmed that she did not go to the scene of the rape or to the police on the day of the rape since she was cooking. She further confirmed that she gave PW1's items to her mother who took the said items to the police. PW3 also confirmed that she saw blood and sperms.

21. Dr. Julius Maneno Sango PW5 testified and produced the P3 Form together with the PRC form on Behalf of Dr. Ibrahim whom he had worked with for 3 years. PW5 stated that upon examination of the victim, her hymen was broken with old scar there were laceration on the anus at 6 and 12 o'clock and abrasions at the fourchette**.**

22. In his defence, the Appellant stated that on 26.2.2015 at 11:00PM, police officer knocked his door. When he opened they asked him his name. After the Appellant told them his name, the police officers asked about the whereabouts of one Steve, to which question, the Appellant responded that Steve was away at work. The police officers then left. However, they returned shortly, arrested the Appellant, and took him to the station where he was later charged with the present offence.

23. Under section 3(1) of the ***Sexual Offences Act***:

> **"A person commits the offence termed rape if-**
>
> **a. He or she intentionally and unlawfully commits an act which causes penetration with his or 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."**

24. The ingredients of the offence of rape therefore include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In **Republic vs. Oyier (1985) KLR pg 353**, the Court of Appeal held as follows:-

> **"The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.**
>
> **To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**
>
> **Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."**

25. The first issue for determination is whether there was an intentional and unlawful penetration of the genital organ of PW1. In her evidence, PW1 narrated how she was sexually assaulted. According to the P3 form, upon being examined by **Dr Ibrahim** who prepared the post rape care form (PRC) on 12.2.2015, PW1 had laceration on the anus at 6 and 12 o'clock, vaginal abrasions at the fourchette and abrasions at the outer genitalia. It was however noted that the hymen was broken and there was an old scar. It is therefore clear that there was sufficient evidence of penetration.

26. The second issue for determination is whether that sexual intercourse was consensual. In my view, the injuries sustained by PW1 cannot possibly be said to have been sustained in the course of a consensual sexual contact. They were more compatible with a non-consensual sexual contact coupled with the fact that the Appellant never controverted the testimony of PW1 that he had strangled her and threatened to stab her if she screamed. Accordingly, I find that the sexual contact was not consensual.

27. On the third issue, PW1 stated that it was the first time she was meeting the Appellant and that the Appellant had promised to secure her a job at mwembe tayari. Further, PW1 stated that the Appellant persuaded her to follow her into his house since he had forgotten the job Application forms. It was therefore not a question of recognition but identification. The approach on issues of identification was emphasized in the case of **Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001** (UR) where the Court of Appeal 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 scrutinised 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. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:

"…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 and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

28. In this case, PW1 stated that she met the Appellant at 5:00pm and they walked to the Appellant's house where he subsequently raped her. PW3 corroborated PW1's statement when she testified that she accompanied PW1 to the Appellant's house to ask for PW1's items that had been left behind. PW3 further stated that the Appellant asked to talk to her and later on threw PW1's items to her. The Appellant in my view never controverted the issue of him having demanded to talk to PW3 and that he threw PW1's clothes at PW3. In the premises, I am convinced that the evidence on record is enough to ascertain that the appellant was positively identified as the perpetrator of the alleged rape. It is therefore my finding that the Learned trial Magistrate correctly found the same to have been established beyond reasonable doubt.

Non-compliance with Section 200 (3) of the criminal procedure code.

29. On 14.2.2017 when Hon. Kyambaia took over the matter, The Appellant was afforded an opportunity under Section 200(3) of the Civil Procedure Code to choose whether to start the case afresh or continue with the case where it had reached. The Appellant stated that he wished to start afresh because he did not do his case as well as he had expected. **Mr. Wangila** for the prosecution did not object to the trial starting afresh. However, on the 27.9.2017, Miss. Maina for the stated objected to the Appellant's request for the trial to start *de novo* for reasons that she will have a difficulty in procuring the attendance of witnesses who had already testified. With such a development arising, the Hon. F Kyambia Vide ruling delivered on 7.11.2017 exercised his discretion and found that no prejudiced would be occasioned on the appellant if the matter proceeds from where it had reached. The accused was even informed of his right to Appeal against the ruling within 30 days. Having considered the above record, I am satisfied that the succeeding trial magistrate complied with section 200(3) of the Criminal Procedure Code. I find and hold that the Appellant was given reasons as to why the trial was not started afresh and informed of his right of Appeal. Consequently, ground one of the Amended Grounds of Appeal fails.

30. On the ground that the learned Magistrate erred in convicting the Appellant on the basis of contradicting evidence. The court has perused the record of the proceedings vis-à-vis the submissions by counsel for the appellant concerning the contradictions in the evidence adduced by the prosecution witnesses. Though there are some contradictions, they are not material contradictions as to affect the main substance of the prosecution's case. How to treat contradictions in a case was stated in the case ***Court of Appeal at Nairobi, in Criminal Appeal No. 91 of 2017 JKM VS R***. wherein they adopted the positions in law as stated in the case of ***Joseph Maina Mwangi vs. R. (Criminal Appeal No. 73 of 1993*** that:

"in any trial there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

30. In the result, it is my finding that the conviction was safe and the sentence meted out on the appellant was proper, as it is what is spelt out in law.

31. As regards the sentence, the legality of minimum mandatory was decided in the case of **Francis Karioko Muruatetu & Another -Vs- Republic (2017) eKLR** where the said court declared the mandatory sentence for murder under Section 204 of the Penal Code to be unconstitutional for the reason that it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case. Subsequently Guided by the above supreme court decision the court of appeal in the case of **Christopher Ochieng vs. Republic stated;**

"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act, and if the reasoning in the supreme court case was applied to this provision, it too should be considered unconstitutional on the same basis…. Needless to say, pursuant to the supreme court's decision in Francis Karioko Muruatetu (supra) we would set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 20 years imprisonment"

32. In **Nicholas Mukila Ndetei –V- Republic (2019) eKLR**, Odunga J. considered what the court has to consider in a re-sentencing hearing and held that:-

"In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report."

33. I am alive to the developing jurisprudence on minimum sentences and the need for the courts to sentence convicted persons based on the nature and circumstances of the offence and other mitigating circumstances such as the antecedents of the accused. However, I find that

taking everything into consideration the sentence of imprisonment for ten years was justified in the circumstances of this case. The same is upheld and the appeal is dismissed in its entirety. The sentence to commence from when appellant was arrested and remanded 2.03.2015.

It is so ordered.

Right of appeal in 14 days.

Dated, signed and **delivered online by MS TEAMS,** this **17th** day of **December, 2020**

HON. LADY JUSTICE A. ONG'INJO

JUDGE