REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 82 OF 2017

ALFRED NYONGESA CHEMUROGI...............APPELLANT

VERSUS

REPUBLIC..PROSECUTOR

(Being an appeal from the original conviction and sentence in Criminal

Case Number 6035 of 2015 in the Chief Magistrate's court at Eldoret –Hon. G. Adhiambo (SRM)

JUDGMENT

1. The herein, **Alfred Nyongesa Chemurogi**, was charged with the offence of rape contrary to section 3(1) (a) (b) and 3(3) of the Sexual Offences Act. The Particulars of the offence were that on 21st October 2015 at [particulars withheld] the appellant intentionally and unlawfully caused his penis to penetrate the vagina of D J without her consent. The appellant also faced the alternative charge of committing an indecent act Contrary to Section 11(A) of the Sexual Offences Act.

2. The appellant was further charged with a second count of Stealing Contrary to Section 275 of the Penal Code the particulars being that that on the same date, he stole a Mobile Phone Techno worth Kshs. 4000/- the property of D J R.

3. PW1, D C, a college student then aged 27 years was the complainant. Her testimony was that she was on 21st October 2015 at about 7pm going to lock their gate when she saw 4 people ahead of her. The appellant, who was in the said group called her and greeted her by shaking her hand before knocking her down, dragging her to the bush where he raped her. She testified that the appellant also snatched her Techno mobile phone. She went to the hospital the following day and the appellant was arrested and her mobile phone recovered from him.

4. PW2 S R was the complainant's father. He escorted her to hospital following the rape incident. He testified that the appellant was found in possession of the complainant's phone at the time of his arrest.

5. PW5 Dr. Temet produced a P3 form in court which showed that the complainant had blood stained biker shorts, pain in the neck, stomach, and legs. He testified that the complainant also had bruises and fresh tears on the vagina which confirmed that she had been sexually assaulted.

6. PW6 PC W was the investigating officer. He issued the complainant with the P3 form which, together with the complainant's clothes, was produced as exhibits during the trial. He also stated that the appellant was found in possession of the complainants' phone at the time of this arrest.

7. When placed on his defence, the appellant gave a sworn statement in which he conceded that the complainant was known to her as a friend but denied that he stole her phone. He further wondered why he was the only one who was arrested yet the complainant claimed that she was attacked by 4 people.

8. DW2 E N testified that he knew the complainant as his neighbour and added that the appellant was his friend. He confirmed that the appellant had a white Techno mobile phone as he saw him with it on 22nd October 2015.

9. At the close of the trial, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and convicted him on both charges of rape and stealing. Consequently, the appellant was sentence to 15 years imprisonment on 1st count and 9 months imprisonment on the 2nd count.

10. Aggrieved by the trial courts findings on both the conviction and sentence, the appellant filed the instant appeal wherein he faults the trial magistrates for convicting him based on the evidence of prosecutions witnesses which was doubtful contradictory and not proved beyond reasonable.

11. At the hearing of the appeal, the appellant relied on the written submissions filed on 3rd August 2018 in which he argued that the complainant's testimony was doubtful and a fabrication that raised more questions than answers. The appellant submitted that the complainant's testimony was not credible as she did not explain where the rest of the people she had seen at the gate were at the time she was attacked and neither did she raise an alarm or fight the attacker whom she did not say was armed.

12. On the theft of the phone, the appellant submitted that there was no sufficient proof of ownership of the phone or its Orange sim card. The appellant also argued that he was not positively identified as the complainant's assailant considering that the incident took place at 7pm when it was already dark.

13. It was the appellant's case that the medical evidence adduced by the prosecution did not support the charge of rape to the required standards. The appellant relied on the decision in the case of **Joseph Onyango Deny vs Republic – Mombasa Criminal Appeal No. 177 of 2001** in which it was held that the inconsistencies of the sequence of events and the confused state of the medial evidence was sufficient reason to give the appellant the benefit of doubt. He further faulted the prosecution for failing to avail the evidence of crucial witnesses especially the complainants mother and brother who were the first people that she allegedly informed about the alleged rape ordeal. The appellant argued that he was entitled to the least severe sentence provided for under the law and that the charge of rape attracts a sentence of not more than 10 years imprisonment yet he was sentenced to 15 years imprisonment. He further faulted the trial court for failing to invoke the provisions of Section 169(1) and (2) of the Criminal Procedure Code (CPC) in his judgment.

14. On her part, Miss Mumu, learned counsel for the state, submitted that the offences of rape and stealing were proved beyond reasonable doubt.

15. As the first appellate court the duty of this court is to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle requires me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings. See ***Okeno v Republic* [1973] E.A. 32**; ***Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570**.

Determination

16. I have considered the instant appeal, the record of appeal and submissions by both the appellant and counsel for the state. The critical issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.

17. Section 3(1) (a) (b) and 3(3) of the Sexual Offences Act stipulates as follows:

> ***3(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.***
>
> ***3(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.***

18. In the present case, I find that the complainant's testimony was consistent can was not impeached on cross examination. She testified as follows on the rape and theft incident.

> ***"I found 4 people ahead of me. It was 7pm. There was moonlight. While locking the gate, one called me "sister to K. " I stood. I saw him. He is known as to me. He is called Alfred, a neighbor. When he greeted me, he held my hand and threw me down. I asked what was wrong he said he had been sent to kill me. I had a Techno phone, which he snatched. This is the one. He knocked me on the knee, I fell down. He dragged me into a bush, he tore my skirt. This is the one (MF1-2)***
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> ***He removed my biker (pmf1 3) and cut my pant which has not been recovered. He then raped me. When he finished, I asked for the phone and he said I can't get anything. I went home. I was stained and ashamed to tell anyone. My father was asleep and my mother had gone for a funeral. In the morning, I informed my mother and my brother. I went to hospital was examined and reported to the police."***

19. PW2 confirmed that he sent the complainant to lock the gate on the evening that she was raped. PW5, a medical doctor, confirmed through the evidence presented in the P3 form, that the complainant sustained injuries that were consistent with rape. I am therefore satisfied that the prosecution proved, to the required standards, that the complainant was raped on the night in question.

20. On the identity of the appellant as the complainant's assailant, I note that the complainant stated that the appellant was in company of 3 other people and that it was dark at the time of her attack. She stated that the appellant was known to her as a neighbor and that she was able to identify him as there was moonlight. I find that in the circumstances of this case and considering the fact that rape is an act which brings the assailant in very close and intimate contact with the victim, the complainant was able to positively identify the appellant as her attacker. Furthermore, the complainant testified that the appellant was well known to her as a neighbor, he greeted and talked to her before, during and after the attack. The appellant submitted that the prosecution's case was not proved to the required as the complainant's mother and brother, who were the first people she allegedly informed of the rape incident, were not called as witnesses during the trial. Section **143** of the

Evidence Act provides as follows:-

No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

21. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive. See **Julius Kalewa Mutunga vs Republic, Court of Appeal, Criminal Appeal No. 31 of 2005.**

22. In the case of ***Bukenya & Others vs Uganda* {1972}E.A.549** the East African Court of Appeal held that the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent, that the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case and where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution. In the same vein the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence submitted in the lower court brings me to the conclusion that this is not a proper case for the court to make an adverse inference because as I have already found in this judgment, the evidence tendered was sufficient to prove the facts in issue.

23. I am further guided by the rule in ***Jones vs Dunkel* (1859) HCA 8** which outlines the circumstances under which an adverse inference may be drawn where a witness is not called which rule is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. I find no reason to make adverse inference for failure by the prosecution to call the said witnesses who, in any case, were not at the scene of the rape incident.

24. I have carefully evaluated the evidence tendered in the lower court, the requisite ingredients of the offence and I am persuaded that the offence of rape was proved to the required standard.

25. I have considered the evidence presented by the appellant when places on his defence and I note that the appellant confirmed that the complainant was well known to him as a neigbour. The appellant steered clear of challenging the complainant's testimony on the rape incident and concentrated on denying any involvement in the theft of the phone. It is therefore my finding that the appellant's defence did not dislodge the otherwise watertight evidence presented by the prosecution on the offence of rape.

26. Turning to the offence of theft of the complainants mobile phone I note that no evidence was tendered by the prosecution to prove that the phone in question actually belonged to the complainant save for the claim that the phone was given to her by her aunt. The said aunt was not called as a witness in the case. Furthermore I note that the said phone was not produced as an exhibit during the trial and neither was the Orange sim card that was also alleged to belong to the complainant. If indeed the phone and the sim card belonged to the complainant, nothing would have been easier than for the prosecution to tender evidence from the mobile phone service provider to show the person registered with them as he owner of the said sim card or if the complainant had made received calls from the said sim card. I therefore find that the offence of theft was not proved to the required standards or at all. I therefore allow the appeal partially on the second count of stealing and consequently quash the conviction on the said count and set aside the 9 months imprisonment sentence.

27. In conclusion I affirm and uphold the trial court's findings on the first count of rape. Having regard to the provision of section 3(3) of the Sexual Offences Act on the punishment for rape, I find that the sentence of 15 years imprisonment meted out on the appellant was lawful and I find no reason to interfere with it. Consequently, I dismiss the appeal in respect to the 1st count and uphold the trial court's conviction and sentence on the said count of rape.

Dated and signed at Nairobi this 16th day of January 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019.

H. A. OMONDI

JUDGE

In the presence of:

Ms Mumu for the state

Appellant present in person

Court Assistant – Towett