REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 31 OF 2017

PETER GUTO OWINO ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the conviction dated 13thMay, 2015 and sentence dated 9th June 2015 of the subordinate court in Criminal Case No. 360 of 2013 at Ogembo Law Courts before Hon.C.R.T. Ateya (R.M.)

JUDGMENT

1. The appellant Peter Guto Owino was charged with the offence of rape contrary to section 3 (1) (a) (b) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 27th March 2013 in South Gucha District within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of N. O. without her consent. In the alternative, the appellant was charged with the offence of committing an indecent act with an adult contrary to section 11 (A) of the Sexual Offences Act No. 3 of 2006. The particulars for this charge were that on the 27th day of March 2013 in South Gucha District within Kisii County, he intentionally touched the vagina of N.O. against her will.

2. The appellant has appealed against both sentence and conviction. His grounds of appeal are that :

a. The magistrate did not allow him to have the matter retried; and

b. The sentence imposed on him was harsh.

3. From his written submissions, the appellant also raises the following issues:

a. The complainant did not properly identify her assailant as visibility was poor and the conditions were not favourable for proper identification;

b. The medical evidence tendered did not conclusively prove the charge;

c. The witnesses gave contradictory testimonies and were mistaken on the time and the date the offence occurred;

d. The evidence tendered was insufficient to prove the offence as evidence such as the complainant’s clothes and photographs of the scene were not produced as proof; and

e. The trial court did not consider his defence and the alibi testimony of his wife.

4. Mr. Otieno for the State/Respondent opposed the appeal. He submitted that the complainant knew the appellant and positively identified him as the person who went into her home and raped her. She informed PW2 about it and even though she knew the appellant as Simeon, she confirmed and identified the appellant as the perpetrator. Counsel submitted that there was overwhelming evidence against the appellant to warrant his conviction and therefore the appeal should be dismissed.

5. I will proceed to analyse the evidence in its entirety, weighing any conflicting facts and reach my own conclusion as is required of a first appellate court. In doing so I will bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses testify. ***(See Okeno v. Republic (1972) E.A. 32.****and****Kariuki Karanja v Republic [1986] KLR 190)***

6. The complainant NO , a 77 year old widow, told the trial court that on 27th March 2013 at about 9:00 p.m.it was raining outside and she was at home preparing to go to bed. As she sang just before she could pray, she heard her door, which she had locked earlier, being hit hard.

Her door was knocked down then she heard someone enter her house. She saw the appellant by the light from her tin lamp. He was stark naked. He set upon her before she could scream and he held her by the neck so she could not breathe. She fell down on the floor. The appellant ordered her to put her legs apart and warned that he would stab her with a knife if she screamed. He kept saying he wanted her body. He slept on her, inserted his penis in her vagina and raped her and did not stop despite her pleading with him to leave her. She testified that the appellant raped her twice, took a rest and inserted his penis inside her anus and went on raping her. The complainant told the court that she did not know where she bled from but the accused left when he saw blood pooling around her stomach. The complainant stated that the lamp was on and bright the entire time. As the appellant escaped, she saw him grab a huge hammer and his clothes which he had left at the door and run out.

7. The complainant crawled to the door and called out for PW2, her daughter in law, who found the appellant, had already escaped. The complainant testified that PW2 gave her clothes to put on. They then called the Assistant Chief and village elder using PW2's phone. She stated that she was taken for treatment at Nyatige Hospital and later taken to Ogembo District Hospital. She reported the matter to Ogembo police station and took her blood stained clothes to the station the same night. She testified that she knew the appellant well as they were related. He was the son of her husband's brother and lived 1 kilometre away and had a wife.

8. PW2, EN testified that it was raining on the material day and at about 3:00 a.m., when it stopped raining, she heard the complainant screaming. She ran to her house, a few metres away from hers and found the complainant at her door lying down naked and bleeding from her private parts. The complainant told her that Simeon had entered her house and raped her. She knew the Simeon that the complainant was referring to, as he was her nephew. She testified that the appellant went by the name Simeon at home. She called the chief and a village elder who said they would come in the morning. PW2 spent the night with the complainant who was later treated. On cross examination she clarified that the incident occurred at 9:00 p.m. and she was certain about the time as she had a phone with her.

9. The Assistant chief of Iringu sub location, PW3, confirmed that he had received information from the clan elder about the rape of the complainant by the appellant. He told the court that he knew the appellant well as he came from his village. He went to the scene that night and found him already under arrest and he took him to Tabaka administration police post. PW6 who was working at the post at that time stated that when the complainant was brought in, she confirmed that the appellant was her assailant.

10. PW4 the clinical officer from Gucha Level 4 hospital stated that his examination of the complainant revealed that her labia minora and majora were normal but there was bleeding and a tear of the vaginal wall with visible blood which he stated could not have been menstrual blood. He stated that the weapon used was a penis. The complainant had received HIV and STI treatment and had also been given antibiotics. He produced the P3 form he had prepared as an exhibit. He was later recalled to produce the PRC form which had been filled by his colleague before she was transferred.

11. The investigating officer, PW5 testified that she received the information about the rape of the complainant on 28th March 2013. She escorted the complainant to receive medical attention then recorded her statement. She produced the copy of the treatment card as exhibit 1.

12. When put on his defence, the appellant stated that he was a married man with 4 children and that on the material day, his wife sent him to Rongo market to buy kerosene and salmon fish to sell. He left the market at 7:00 p.m. and went back home to sleep. The following morning, they went to plough a farm near their home. Later that morning, he was summoned by the chief and when he got there, he was accused of raping a lady in her home the previous night at 9:00 p.m. He stated that when the complainant gave her testimony she went back on what she had earlier stated. She had said that she was seated in bed talking to her assailant and that it was dark when she was raped. He claimed that the police officer who wrote the complainant's statement recorded a different version from what she had said and had refused to take his statement.

13. The appellant's wife DW2 testified that on the material day she was running her business of selling kerosene and omena. She sent the appellant to get those things from Rongo and he came back at 7:00 p.m. They ate, slept and the following day went to farm. On cross examination she stated that the appellant did not leave home that night. She however admitted that the complainant was related to her, that she lived alone and was like a grandmother to her. She also stated that she did not know why the complainant would make such an accusation.

DETERMINATION

14. The appellant raised a preliminary issue in his grounds of appeal. He argued that he was not given the chance to have his matter retried and as such he was not given the opportunity to cross examine the witnesses. The proceedings before the trial court show that the matter was initially heard by Hon. D. Ogola Ag. C.M. and concluded by Hon. C.R.T. Ateya R.M. When the succeeding magistrate took over the matter, all but one of the prosecution witnesses had given their testimonies. It was necessary for the appellant to be informed of his right to have the matter reheard in accordance with **section 200 (3)** of the **Criminal Procedure Code**. The record shows that the appellant was duly informed of this right on 18th August, 2014 and chose to have the matter proceed from where it had stopped. The appellant's argument that the trial court did not give him the opportunity to have the matter start *de novo* fails.

15. Turning to the substance of the appeal, the appellant was charged with the offence of rape contrary to Section 3 (1) (a) (b) of the Sexual Offences Act which provides:

> *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;*

16. From this definition, the prosecution ought to have proved that there was penetration of the complainant's genital organ; that the

penetration was not consented to and that the perpetrator was the appellant.

17. The complainant stated that the appellant broke down her door, came into her room naked and raped her despite her pleading with him not to. The coercive nature of the appellant's acts was further evidenced by his holding her by the neck and threatening to stab her if she screamed. Medical evidence tendered by PW4 further corroborated the complainant's testimony that there had been forceful penetration as his examination revealed bleeding and a tear of her vaginal wall. The Post Rape Care form (exhibit 3) produced by PW4 in accordance with Section 77 of the Evidence Act also shows that the medical officer who filled that form noted blood stains on the complainant's clothes and lacerations on her vagina and on her anal opening.

18. The proviso to Section 124 of the Evidence Act states that corroboration of the evidence a victim of a sexual offence is not necessary. The Court of Appeal in the case of ***Kassim Ali v Republic [2006] eKLR*** held:

> "*The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence."*

19. This court finds that the evidence tendered by the prosecution was sufficient evidence to prove the forceful penetration of the complainant's genitalia. It was not necessary to produce the complainant's clothing or photographs of the scene as was argued by the appellant.

20. The prosecution also needed to prove that the appellant had been positively identified by the complainant. The appellant contends that the conditions prevailing at the time were not conducive for proper identification. The offence occurred at night and the complainant was the only witness to the offence. There was need to analyse the conditions under which the complainant identified the appellant. A trial court is required to make inquiries as to the presence and the nature of light, the intensity of such light, the location of the source of light in relation to the accused and the time taken by the witness to observe the accused so as to be able to identify him ***(See Maitanyi v Republic [1986] KLR 198.)*** The Court of Appeal in ***Wanjohi & 2 Others v Republic [1989] KLR 415*** held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken.*"

21. The complaint testified that when the appellant charged into her room at night and draped her, her tin lamp was on the whole time and she was able to see him and recognized him as he was a relative. PW2 knew the appellant as her nephew. The appellant's wife, DW2, confirmed that the appellant was related to the complainant stating that she considered the complainant her grandmother. Both the complainant and PW2 knew the appellant by the name "Simeon." The prosecution should have incorporated his alias name to the charge sheet. Be that as it may, this court finds that the appellant was properly identified by the complainant the irregularity is curable under **section 382** of the **Criminal Procedure Code.**

22. The appellant also argued that there were inconsistencies in the witnesses' testimony. An analysis of the evidence shows that the witnesses were clear and consistent in their testimonies. The minor differences were not sufficient to warrant an interference with the conclusion of the trial court. The complainant must have lost track of time as the appellant subjected her to the heinous act. PW2's initial indication that the offence occurred at 3:00 a.m. can be taken as an inconsequential error in translation which she rectified on cross examination as 9pm. The Court of Appeal in ***Philip Nzaka Watu v Republic Criminal Appeal No. 29 of 2015 [2016] eKLR*** noted that, *"some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses."*

23. In his defence the appellant raised an alibi defence which was supported by his wife. The alibi defence raised by the appellant was that he was home that night. His wife testified in support of this. However when weighed against the overwhelming evidence of the prosecution, his defence does not raise any doubts of his culpability. His defence is rejected and his conviction upheld. The minimum sentence for the offence of rape is 10 years imprisonment. The appellant's conviction and sentence by the trial court was sound and is upheld. The appeal is found to be lacking in merit and is hereby dismissed.

Dated, **signed** and **delivered** at Kisii on this **24th** day of January **2019.**

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno For the State/Respondent

Rael Court clerk