REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 87 OF 2018

BENSON MULANDI MULAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by Gilbert Shikwe, Senior Resident Magistrate while sitting at Kithimani Law Court in Criminal Case (SOA) No.2 of 2015 on 18th January, 2018)

JUDGEMENT

1. This is an appeal that was lodged herein on **2nd October, 2018** by the Appellant, **Benson Mulandi Mulako**, against the conviction and sentence imposed by the Senior Resident Magistrate, **Hon. Gilbert Shikwe**, in Kithimani Senior Resident Magistrate's **Criminal Case (SOA) No. 2 of 2015**. The Appellant had been charged before the lower court with the offence of Rape contrary to **Section 3(1) (a) (b) (3)** of the **Sexual Offences Act**, **No. 3 of 2006**. In the alternative, he was charged with the offence of Indecent Act with an adult, contrary to **Section 11(a)** of the **Sexual Offences Act**. The offences were alleged to have occurred on **20th December 2014** at Yatta sub-county within Machakos County.

2. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the Learned Trial Magistrate on **18th January, 2018.** The Appellant was found guilty of the offence of Rape, was convicted thereof and sentenced to serve 10 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal on the following grounds:

> ***a) That the Trial Magistrate erred in both law and fact by failing to find that the charge of rape against the appellant was not proved beyond any reasonable doubt;***
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> ***b) That the Trial Magistrate erred in both law and fact in convicting the appellant on insufficient evidence;***
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> ***c) That the Trial Magistrate erred in law and fact in holding that the evidence as adduced proved the offence against the appellant as charged;***
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> ***d) That the Trial Magistrate erred in law and in fact in failing to consider and or rejecting the defence case without giving any reasons therefore ;***
>
> ***e) That the Trial Magistrate erred in law in failing to find that there was consensual sex between the appellant and the complainant;***
>
> ***f) That the Trial Magistrate erred in law in failing to consider the appellants submissions;***
>
> ***g) That the sentence is manifestly excessive in all the circumstances of the case.***

3. Accordingly, the Appellant prayed that the conviction be quashed and sentence set aside.

4. In his written submissions, learned counsel for the Appellant submitted that the trial magistrate failed to find that the charge against the appellant was not proved beyond all reasonable doubt. He submitted that the complainant testified that she did not know the appellant before, however the evidence she gave the police indicated that she knew him before and therefore her evidence was not credible. Counsel cited the case of **Ndungu Kimanyi v R (1979) eKLR 282** that observed that "the witness upon whose evidence is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about his trustworthiness or to do or say

something which indicates that is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence." He submitted that the complainant is not a trustworthy person. He further pointed out that the appellant testified that the complainant was his girlfriend since 2013 and had consensual sex together and hence he did not rape her. Counsel pointed out that the persons who allegedly heard her scream were not called as witnesses in court and the totality of the evidence on record does not prove the offence of rape. He submitted that the trial magistrate erred in failing to consider the defence case without giving any reasons and stated that "the testimony by the accused can best be described as fantastic. If indeed they had been having consensual sex for one year then what was the motive of the complainant's testimony..." He also emphasized that the sex was consensual and the trial magistrate failed to find so; there is no evidence of threat or intimidation as a means of obtaining sex. He cited the provisions of Section 42 of the Sexual Offences Act that expounds on the issue of consent and Section 43(1) (2) that defines coercive circumstances. He also cited the case of **R v Oyier (1985) 353 KLR** that observed that lack of consent is an essential element in the offence of rape and this is a mental element; that the mental element is proven by proof of resistance; if a woman yields through fear of death or duress, then consent is not an excuse. Learned counsel submitted that the totality of the evidence should convince the court to find as a fact that the offence of rape was not committed by the appellant as charged hence the appeal should be allowed and the sentence set aside and the conviction quashed.

5. Learned counsel for the Respondent conceded to the appeal. Counsel framed two issues for determination, *to wit*; whether the charge of rape was proved beyond reasonable doubt and whether the prosecution failed to call crucial witnesses. On the first issue, counsel submitted that the evidence of Pw1 does not support the offence of rape and questioned whether a torn skirt is evidence of struggle. He observed that the clinical evidence does not indicate any form of laceration, bruise, bleeding or trauma around the vaginal area that is indicative of forceful penetration. He submitted that there is no evidence of forceful penetration and invited the court to observe that there was misapprehension of evidence on the part of the trial court and to find that the conviction was therefore unsafe.

6. On the second issue, it was the submission of counsel for the Respondent that failure to call all persons involved in the transaction is not necessarily fatal unless the evidence adduced is barely sufficient to sustain the charge as per the provisions of Section 143 of the Evidence Act and the cases of **Bukenya & Others v R (1972) EA and Mwangi v R (1984) KLR 595** were cited in support. However the crucial eye witnesses were not called by the prosecution, and the selectiveness of the investigating officer in suppressing some of the evidence for no apparent reason and the and the action by the trial magistrate in disregarding the same raised doubt on the evidence of the prosecution witnesses. Counsel submitted that the constitutional guarantees to a fair trial as per Article 50 of the Constitution ought to be conformed with and in this regard counsel accordingly submitted that the conviction was unsafe.

7. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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..."**

8. The Appellant had been charged with **Rape contrary to Section 3(1)(a) (b)(3)** of the **Sexual Offences Act**; and the particulars thereof were that on 20th December, 2014, at Yatta Sub county within Machakos County the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **CNN** without her consent. In the alternative, the Appellant was charged with Indecent Act with an adult contrary to **Section 11(a)** of the **Sexual Offences Act**; in that on the **20th December, 2014** at Yatta Sub-county within Machakos County, the Appellant intentionally touched the vagina of CNN with his penis against her will.

9. The Prosecution called a total of five witnesses before the lower court in proof the particulars of the charges, the first of whom was the Complainant (**PW1).** Her evidence was that, on the **20th December, 2014** at 5.00 p.m., she was with her nephews and nieces back from escorting her cousin and she met the appellant who greeted her. She testified that after the appellant pulled her away and chased away her nephew and nieces, he pulled her to a house and took off her clothes and started having sex with her for 30 minutes without her consent. She screamed and no one came to her rescue. She produced the green dress that she was wearing and the white panty as evidence.

10. It was further the evidence of **PW1** that she went to Matuu Police Station and the next day went to Matuu Level 4 hospital where she was issued with a P3 Form that she produced together with the treatment notes which were duly marked for identification before the lower court. On cross-examination, she confirmed that the statement recorded on 20.12.2015 was hers and which was marked for identification before the lower court.

11. **PW2, HK,** testified that she was home alone on the **20th December, 2015** at 6 pm when her three children came crying that their aunt had been taken by someone. She went to the compound that the children directed her to and after calling her sister's name, the appellant came out followed by the complainant who was holding her skirt to the waist. She stated that the appellant threatened to beat her and she screamed forcing other neighbours to come out. She told the court that she took her sister to Matuu Police Station. On cross-examination, she confirmed the names of the two neighbours as Miriam Kalulu and Ndinda Kitili. However the two did not record statements.

12. The Senior Clinical Officer, **Benjamin Maingi (PW3),** told the lower court that on the **21.12.2014** the Complainant, **CN**, a 19 year old female, presented herself to him for examination after reporting an incident of a rape against her on 20.12.2014 by a stranger. On examining her, he found her with normal genitalia, no signs of trauma but a whitish discharge. He also noted the presence of spermatozoa in her vagina and that the complainant had a torn skirt indicating struggle. He accordingly filled and signed the P3 Form on 7.1.2015 which he produced before the lower court as the Prosecution's **Exhibit No. 4.**

13. It was further the testimony of **PW3** that the Appellant was also presented to him for purposes of medical examination. He was in fair

general condition, however due to the blackout, no tests were conducted on him. On cross-examination, he testified that no DNA tests were conducted.

14. **PW4** was **Pc Sammy Kipkirui,** who testified that on 2.12.2015 he took the appellant who had been detained by Administration police officers on suspicion of housebreaking and discovered that he had a case number 780/2013 for housebreaking and he booked him as a suspect.

15. **Pw5 was Senior Seargent Virginia Njeri**, the Investigating Officer in the case having taken over from a Cpl Diana. She testified that the complainant and her cousin reported the matter on **20th December, 2014** and she was escorted to Matuu Police Station where her statement was recorded. It was further the evidence of **PW5** on cross-examination that the file was handed over along with the clothes that the complainant was wearing (Pexh 1 and 2) to her in January 2015 and hence she did not receive the complainant or record her statement. She produced the said clothes which were marked as **Prosecution Exhibit 1 and 2**, respectively. The court found that a prima facie case was established against the appellant and put him on his defence.

16. In his defence, the Appellant told the lower court that on **20th December, 2014** he met the complainant who was her lover for more than a year. His version was that she was with her nieces whom she advised them to leave and then she entered his home where they had sex then they showered when her Sister Hellen came in and they left together. He heard that he was being sought by the police and he denied raping the complainant. He also produced her police statement as indicative that she knew him and on cross-examination he testified that he used to sell water in the village and Hellen owed her Kshs 320/- that she offered to repay via sex to which he had refused. He testified that the genesis of this case was a water dispute with H who was a sister to Pw1.

17. From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal are:

> **[a]** Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Rape to the requisite standard;
>
> **[b]** Whether there were any procedural infractions by the prosecution or the Learned Trial Magistrate that would vitiate the conviction that was recorded against the Appellant.

18. On the first issue**, Section 3** of the **Sexual Offences Act** provides for the offence of Rape in the following terms:

> **"(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.**
>
> **(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.**
>
> **(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."**

19. Hence, the Prosecution was under obligation to prove its allegations that there was penetration of the Complainant's genital organ and that consent for such penetration was procured by force. In this respect, the Prosecution adduced evidence that was corroborated by the appellant that the Complainant was alone in the Appellant's house and they had sex. Pw1 testified that two neighbours were notified of the occurrence however they were not called to testify.

20. The senior Clinical Officer who examined the complainant and filled the P3 Form in her case, found no signs of trauma but found spermatozoa that he noted was indicative of recent sexual activity and a torn skirt indicative of struggle. That evidence is therefore corroborative of the Complainant's evidence that she was subjected to penetration however not in the manner envisaged by **Section 3(1)(a)** as read with the definition thereof set out in **Section 2** of the **Sexual Offences Act**. That evidence was scanty, the Appellant's defence before the lower court being consent; namely, that he was the boyfriend of the complainant who trotted all the way to his abode in the company of the nieces who were conveniently chased and thereafter they engaged in consensual sex after which she showered and then left in the company of Pw2 . There was therefore reasonable doubt created in the evidence of the prosecution and there was no proof of the mental element to satisfy the proof of the offence that the appellant was charged with before the lower court to beyond reasonable doubt. It came out quite clearly that the appellant and the complainant had been lovers. The adventure seems to have been interfered with by the complainant's nieces who alerted their mother who immediately rushed to the appellant's house and raised alarm attracting two neighbours who apparently did not testify.

21. I do note that in his testimony, Pw3 appears to have been faulted for not subjecting the appellant and or the complainant to DNA profiling. Whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to**

order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."

22. Similarly, in **AML vs. Republic [2012] eKLR** the Court expressed the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

23. In addressing the 2nd issue, it appears that the evidence relied upon by the trial magistrate was purely circumstantial. The law concerning circumstantial evidence was laid down in ***Ndurya v R*** **[2008] KLR 135** by the Court of Appeal where it was held that before convicting someone on the basis of circumstantial evidence, the court has to be sure there are no other co-existing circumstances which would weaken or destroy the inference of guilt. Similar holdings were reached in ***Sawe v Republic*** **[2003] KLR 364** and ***R v Kipkering arap Koske and Another*** **16 EACA 135**.

24. There is no evidence produced of any menaces or force or duress that was used on the complainant. Further there is no evidence of witnesses to corroborate the same. The two neighbours who are alleged to be witnesses were not called to testify. It transpired that the complainant upon having sex with the appellant proceeded to take a shower before her sister arrived. Such kind of behavior does not sit with a situation of alleged sexual intercourse that had no consent from the complainant. It is highly likely that the complainant gave her consent but only changed her mind upon being discovered by her sister. I am satisfied that the prosecution did not prove the charge against the appellant beyond any reasonable doubt. The appellant's defence that he and the complainant had been lovers created doubt upon the prosecution's case. The benefit of such doubt should have been resolved in favour of the appellant bearing in mind that he who alleges must prove to the required standard in a criminal case so as to secure a conviction. From the evidence, I find that the trial court incorrectly convicted the appellant and hence the said conviction was unsafe in the circumstances.

25. In the result therefore, I am not satisfied that the conviction of the Appellant for the offence of Rape contrary to **Section 3(1**) was based on sound evidence. The sentence equally was unsafe.

26. I find merit in the Appellant's appeal. The same is hereby allowed. The conviction is hereby quashed and the sentence set aside. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, signed and delivered at Machakos this 24th day of June, 2019.

D. K. KEMEI

JUDGE