REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 24 OF 2017

JOHN TAIKO MEREU.....APPELLANT

VERSES

REPUBLIC….....RESPONDENT

(Being an appeal from the original conviction and sentence dated 24th June 2019 in Criminal Case No 1141 of 2014 in the Chief Magistrate's Court at Narok, Republic v John Taiko Mereu)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of rape contrary to section 3 (1) (a) (c) (3) of the Sexual Offences Act No 3 of 2006.

2. Mr. Omwega for the respondent has supported both the conviction and sentence.

3. In this court, the appellant has raised five grounds in his amended grounds of appeal. I will deal with ground 2 and 5first for convenience followed by grounds 3, 1 and 4.

4. In grounds 2 and 5 the appellant has faulted the trial court both in law and fact for convicting him, when he was not positively identified. The evidence in this regard is that the appellant and another accomplice who was not arrested went and forced open the house of MS, who is the complainant (Pw 1). PW 1 was asleep with her husband, Peter Kironji (Pw 2). One of the two men made a swing to slash her husband but Pw 2 shielded himself with a plastic chair. He then ran to a near police road block at Ntulele and alerted No xxx Sgt Joseph Langat (Pw 4). Pw 4 was in charge of the road block. As a result, Pw 4 immediately rang Cpl Darius Mwangi (Pw 3). Pw 3 who was on patrol with other police officers rushed to the house of Pw 2. They found the house open with no one inside. As they were hovering the single roomed house, they heard murmurs in the maize plantation. They went there and found one male suspect standing, who upon seeing them escaped. They then shore their torches and saw a man lying on top of a woman. This man was in the act of raping the woman. The woman was naked. The appellant was a half-naked. They arrested him and then handcuffed him. They then dressed up the lady, since her clothes were near there.

5. The lady now the complainant was bleeding profusely from just near below the knee. She was unable to stand and she was unable to walk. The complainant was taken to Narok referral hospital in company of her husband. The appellant was booked and put in police cells. Pw 3 recovered the blood stained jean trousers of the appellant at the scene of rape, which were put in evidence as exhibit Pex 2.

6. The unsworn defence of the appellant was that he took too much alcohol and as a result, he slept on the road at Ntulele, wherefrom the police arrested him and put him in cells. He further testified that the complainant was a total stranger to him. And that he was surprised when he was charged with this offence.

7. It is clear from the foregoing that the appellant was caught red handed in the act of raping the complainant. This is not a case of the appellant being mistaken for another person. It therefore follows that the issue that the appellant was not positively identified does not arise at all. Grounds 2 and 5 lack merit and are hereby dismissed.

8. In ground 3 the appellant has faulted the trial court both in law and fact in convicting him and yet failed to find that Pw 5 was not the maker of the P3 form, which he has stated violated his fair trial rights under article 50 of the 2010 Constitution. In support of this ground the appellant has submitted that the medical report popularly known as the P3 form was put in evidence without the maker being called to give evidence. The clinical officer who examined the complainant was Edwin Kiprotich, but his report of examination of the complainant was put in evidence by Benjamin Tum, who was a fellow clinical officer in Narok referral hospital. He was allowed to put in evidence that report because Edwin Kiprotich had been transferred to Sakutiek health centre, which is outside Narok town. This was in the interests of expediting the trial. The report was put in evidence under section 33 (b) of the Evidence Act (Cap 80) Laws of Kenya. Benjamin Tum had worked with Edwin Kiprotich before and was familiar with his handwriting.

9. The injuries sustained by the complainant, according to the clinical officer include the following. The complainant looked confused and

was in shock. There was a deep cut wound on the right leg probably inflicted by a sharp object. The wound measured 10 cm long and 4 cm deep. The tendons were exposed as a result of the deep cut wound. A whitish and smelly discharge was noted in the vagina. A high vagina swap (HVS) showed a deposit of male spermatozoa. The victim was pregnant at the time she was assaulted. As a result, the examining clinical officer concluded that the victim had been raped and that she suffered actual bodily harm. The consent of the appellant was not required before the report was put in evidence. The procedure used was in accordance with the law. The report was therefore properly put in evidence as exhibit Pexh. A and B, the latter being a lab request form. This ground of appeal fails and is hereby dismissed.

10. In ground 1 the appellant has faulted the trial court for failing to frame the points for determination and the findings thereon. In this regard, the trial court framed the issue for determination in the following terms: "*The duty of this Honourable Court is to weigh the evidence and determine whether or not the charges have been proved beyond any reasonable doubt.*" After doing so, the court found that the complainant was raped. I find that the points for determination should have been framed. These points include proof that there was penetration of the vagina of the complainant by the penis of the appellant. The other point for determination was proof that the complainant did not consent to the sexual intercourse. There is ample evidence that vagina of the complainant was penetrated by the penis of the appellant. This is clear from the report of the examination in respect of the complainant. The report shows that there was a deposit of male spermatozoa in the vagina. There was also a whitish and smelly discharge which was noted in the vagina. There is equally ample evidence that the complainant and her husband were attacked at 2.00 am and she was then dragged outside her house. She was then forcefully and sexually assaulted. Additionally, she was cut with a sharp object in the right leg to the extent that she was unable to stand. It is therefore clear that she did not consent to the sexual intercourse.

11. It is clear from the foregoing that the failure to frame the points for determination by the trial court was a curable defect in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

12. After re-assessing the entire evidence as I am required to do as a first appeal court, I find that the appellant was convicted on sound evidence. I therefore confirm his conviction.

13. In the final ground 4 the appellant has faulted the trial court for imposing a manifestly excessive sentence. In sentencing the appellant to life imprisonment, the trial court took into account that the appellant was a first offender and a middle aged man. The trial court found these to be mitigating factors.

14. The court found the following to be the major aggravating factors. The offence was planned. The appellant armed himself with a panga with which he inflicted a deep cut wound in the victim's right leg. The appellant is unrepentant. And finally, the court then imposed an enhanced sentence after noting that his victim was pregnant when the offence was committed.

15. Before an appeal court interferes with the discretion of the trial court in respect of the sentence imposed, it must be shown that that court took into account irrelevant considerations or that it failed to take into account relevant factors. The sentence imposed may also be interfered with if it is manifestly inadequate or manifestly excessive as to amount to a miscarriage of justice.

16. The sentence prescribed by the penalty statute is a minimum of ten years imprisonment or a sentence which may be enhanced to imprisonment for life. The court imposed the enhanced sentence of life imprisonment, which is the maximum penalty permitted by that law.

17. In arriving at the enhanced sentence, the trial court in law committed two errors. First, it erred in law in taking the minimum sentence as the starting point. The Court of Appeal in ***Njuguna v. R (1972) EA 492***, held that it was incorrect to treat the minimum as the starting point. Instead that court was of the decided view that before imposing a minimum sentence, the court is bound to assess the sentence in the ordinary way and, if that sentence is less than the minimum, the minimum must be imposed. This view has now been overruled by the Supreme Court in ***Francis Karioko Muruatetu & Another v R (2017) eklr,*** by giving the court a discretion to impose an appropriate sentence, notwithstanding the statutory requirement to impose the prescribed minimum sentence. Second, the trial court in imposing the minimum enhanced sentence did not take into account the period the appellant had been in custody, both the remand and imprisonment custody. The appellant had been in custody since 14th July 2014. Section 333 (2) of the Criminal Procedure Code [Cap. 75] Laws of Kenya mandatorily requires the court to take into account the period an accused has been in custody before imposing the sentence.

18. Due to the commission of the foregoing errors of law, this court is entitled to interfere with the sentence imposed by the trial court. I therefore quash the sentence imposed by the trial court. In its place, I hereby impose a sentence of thirteen years imprisonment after taking into account that the appellant has been in custody since 14th July 2014 in addition to accepting what the trial court found in its notes on sentence excluding the errors, which I have corrected. The appellant now has to serve 13 years imprisonment.

Judgement dated, signed and delivered in open court at Narok this 17th day of July, of 2019 in the presence of appellant and Mr. Omwega for the state.

J. M. Bwonwonga

Judge

17/07/2019