REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 28 OF 2016

(From original conviction and sentence in Criminal Case No. 24 of 2016 of the Principal Magistrate's Court at Wangu'ru - P. M. KIAMA - PM).

DANIEL MUREITHI KABIRANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant Daniel Mureithi Kabiranga was convicted of rape contrary to ***Section 3(1) as read with Section 3(3) of the Sexual Offences Act No. -3- of 2006*** and sentenced to serve Ten (10) years Imprisonment.

2. The appellant was dissatisfied with both the conviction and sentence and filed this appeal. It is based on the following grounds:-

a) That my constitutional rights were violated as per Chapter 4 Article 49(1)(f) of the Kenya Constitution.

b) That the learned trial Magistrate erred in law and facts in convicting me while relying on the evidence of identification where as the circumstances favouring a positive identification were in existence.

c) That the learned trial Magistrate erred in law and facts in returning a finding of culpability on the part of the appellant in case wholly depended on circumstantial evidence without corroboration.

d) That the learned trial Magistrate erred in law and facts when he refused, failed or ignored to deal with the contradictions and the conflicts in the evidence adduced by the prosecution.

e) That the learned trial Magistrate erred in law and facts by failing to note that the PW-3- did not proof of sexual assault.

f) That the learned trial Magistrate erred in law and facts by introducing extraneous matters not canvassed during trial.

g) That the learned trial Magistrate erred in law and facts by relying on the evidence of a single witness.

h) That the learned trial Magistrate erred in law by rejecting the appellants defence without assigning any good reason for so doing.

3. He prays that the appeal be allowed, conviction be quashed and the sentence be set aside.

4. The appeal was canvassed by way of written submissions. The brief facts of the case are that the appellant was a motor cycle rider. On 10/1/16 at about 10.00 Pm the complainant CWM (PW-1-) boarded the motor bike of the appellant so that he could take her to Ngurubani. The appellant charged her Kshs 50/-. On the way the appellant stopped the motor bike and told her to alright. It was at a bush near the highway. The appellant suddenly grabbed the complainant and started beating her. He then knocked her down and removed her trouser and underpants. The appellant then had sex with the complainant after which he attempted to run away.

5. The complainant raised an alarm. She chased the appellant and managed to pull on him down from the motor cycle. Some people who were passing by assisted her and held the appellant.

6. A police vehicle then came and the complainant reported what happened to the police officers. Police recovered the complainants phone from the appellant's pocket. Police also recovered a jacket and a cap of the appellant which he dropped while trying to run away. The

complainant called her cousin to the scene and took her to Kimbimbi sub-county Hospital. The complainant was treated and a P3 form was filled.

7. Doctor Munene (PW-3-) who examined the complainant found that her clothes were soiled and buttons from the shirt were broken. She had bruises on her back caused by human bites. It showed the complainant was involved in a struggle. There were bloodstains on the virginal canal but no tears noted. On examination of high virginal swab no spermatozoa were seen. The Doctor found that sexual assault could not be ruled. He filled treatment notes, exhibit -5-, P3 form and the lab request and report. The appellant was then charged. The appellant gave unsworn defence and denied the charge.

8. I have considered the evidence adduced before the trial court. This being the 1st appellate court, I have to consider the evidence tendered before the trial court, analyse it, evaluate it then come up with my own finding. This in line with the holding in **Okeno –v- R (1972) E.A 32**.

I will proceed to consider the grounds of appeal.

9. Identification:-

The appellant submits that the trial Magistrate erred by convicting the appellant without considering that the perpetrator was not positively identified.

10. In his Judgment, the trial Magistrate found that he had no reason to doubt the complainant. He further found that Margaret Muthoni Gachihi (PW-2-) happened to pass by when she heard a commotion on the side of the road. She went to the scene and found the accused struggling with the complainant. Together with her brother they overpowered the accused and handed him to the police officers who happened to be nearby. The trial Magistrate found that there was no doubt that the accused is the one found struggling with the complainant in an attempt to escape. The trial Magistrate further went on to state that the accused was caught red handed in the commission of the offence.

11. The trial Magistrate did not rely on the evidence of a single identifying witness. He found that the accused was identified by PW-2- and there was corroboration due to the fact that the motor cycle which appellant was riding, his jacket and cap were also found at the scene and identified by all the witnesses.

12. The appellant did not deny that the cap and the jacket were his. His defence was that it was a case of mistaken identity.

13. The law does not prohibit the reliance of a single identity witness. It requires that the trial Magistrate warns himself on reliance of the evidence and treat it with caution before relying on the evidence to convict. In the case of **Charles O. Maihanyi –v- Republic 1986 KLR, Court of Appeal**, it was held:

> ***"Although it is trite law that a fact maybe proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification."***

However in a case of this nature which involves a sexual offence, the proviso to **Section 124 of the Evidence Act** applies – It provides;-

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

14. Having considered the evidence tendered, the question is whether this is a case of mistaken identity. The evidence by the complainant, (PW-1-) is that the appellant was the rider of the motor cycle which carried her. After the appellant raped her, she managed to hold him until other people came and held him. Police then came and arrested him. Though it was not indicated whether there was light at the stage. The evidence that the person who was riding the motor bike is the appellant who she held until PW-2- came and found the complainant and the attacker. Police then came and arrested the appellant. PW-3- Simon Kiura Kabengi testified that he found the appellant had been arrested. PW-4- Corporal Peter Okero of Wanguru Police Station testified that at Murubara area they found the appellant was arrested by members of the public who were also beating. He rescued the appellant and the complainant alleged that the appellant had raped her. He took the appellant to the police station where he was charged.

15. PW-3- was Doctor Munene who examined the complainant and found sexual assault could not be ruled out.

16. The evidence which was adduced before the trial Magistrate placed the appellant at the scene of the crime and he was identified as the perpetrator. The evidence which the trial Magistrate relied on to convict was well corroborated. The evidence was not adduced by a single identifying witness. The circumstance of the case and the evidence tendered rules out any possibility of mistaken identity. The witnesses testified that the scene was at Mumbara Area and not at a Petrol Station.

17. As submitted for the State, the appellant was placed at the scene, he had spent sometime with the complainant and she had an opportunity to see him when they negotiated the fare. At the scene, the complainant struggled with appellant before help came.

18. The appellant was identified as the perpetrator by the complainant and other witnesses. There was no possibility of mistaken identity. The identification was not by a single witness. The trial Magistrate was right in relying on the evidence tendered to convict. The evidence tendered before the trial Magistrate was overwhelming and placed the appellant at the scene of crime. This ground of appeal is without merits.

19. The appellant submits that the trial Magistrate relied on circumstantial evidence which was not corroborated. In view of what I have stated above, this contention is far from the truth. The evidence adduced by PW-1- who the complainant is direct evidence which proves beyond any reasonable doubts that the appellant is the one who raped her. It was corroborated by the medical evidence which was tendered by Doctor Munene (PW-3-). The evidence tendered by PW-2-, 3 ie Simon Maina Kabengi (N.B there are two witnesses indicated as PW-3-) and PW-4- the Police Officer gave well corroborated evidence which in turn corroborates the evidence of PW-1- that the appellant is the one who was arrested at the scene for having committed this offence. I find that the evidence tendered was not circumstancing. The evidence was well corroborated. The trial Magistrate cannot be faulted for rely on the evidence to convict. The ground is without merits.

20. The appellant alleges that there were crucial witnesses who were not mentioned during the trial and called to testify. I have considered this ground. The prosecution called a total of Five (5) witnesses to support their case. I must point out that no particular number of witnesses are necessary to prove a case not is the prosecution duty bound to call a particular number of witnesses to support their case. ***Section 143 of the Evidence Act (cap 80 Laws of Kenya)*** provides that:-

> "***No particular number of witnesses shall in the absence of any provision of law to the contrary be required for prove of any fact."***

21. The Court of Appeal in the case of **Julius Kalewa Mutunga –v- Republic Criminal Appeal No. 31/2005 (UR)** held that:-

> ***"As a general Principal 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."***

22. Failure to call witnesses will only be fatal if the evidence tendered is barely adequate. It may also be fatal if the prosecution failed to call the witnesses for some ulterior motives. If this be the case the court will conclude that if the witnesses were called, they would have given adverse evidence to the prosecution case.

23. Having considered the evidence tendered, failure to call the two witnesses who were at the stage when the complainant boarded the motor cycle is not fatal to the prosecution case. There is overwhelming evidence by the witnesses who testified that the motor cycle of the appellant was the one at the scene and was recovered by the police. The appellant claimed the motor cycle and the court ordered the motor cycle was returned to him. The issue before court was whether the appellant raped the complainant. As I have already pointed out, the prosecution adduced overwhelming evidence to prove that fact. The evidence by the two people mentioned by the appellant was of no probative value and the prosecution had no reason to call them as they never witnessed when this offence was committed. The ground is without merits.

24. The appellant submits that the ingredients of the offence of rape were not proved. ***Section 3(1) as read with Section 3(3) of the Sexual Offences Act*** provides:-

> ***"(1) A person commits the offence termed rape if -***
>
> ***(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."***

The ingredients of rape are –

> **a) Penetrator**
>
> **b) The penetration is intentional and unlawful.**
>
> **c) Absence of consent to the penetration.**
>
> **d) Identity of the penetrator.**

25. The complainant adduced evidence that the appellant knocked her down, undressed her and had sexual intercourse with her after hitting her on the back. The evidence of PW-1- is detailed. She is an adult and was able to tell the court that the appellant had sex with her. Medical evidence proved that there was penetration.

26. The appellant had an intention of unlawfully penetrating the complainant. He tricked her that he was looking for a bag. He led her to a bush and she even assisted him with a phone to light the area while looking for the bag. It is while in the bush that the appellant revealed his true motive. It shows that he had an evil design which he executed by intentionally and unlawfully penetrating the genital organ of the complainant.

27. The penetration was unlawful as the appellant used force and violence. The complainant had not consented to the sexual act. The appellant used brutal force by beating up the complainant in order to subdue her. He proceeded to press her throat and pin her down with his knee. He then used force to remove his trouser and biting her. These facts demonstrate clearly that there was no consent and then forced the complainant to have sex without her consent. The appellant was positively identified as the perpetrator.

28. The trial Magistrate saw the complainant when she testified and held that he had no reason to doubt her.

29. I find that the prosecution proved all the ingredients of the offence of rape beyond any reasonable doubts.

30. Having looked at these ingredients, it was immaterial that the appellant was not examined by the Doctor. The trial Magistrate considered the defence of the appellant and found that it had no merit in view of the evidence which was tendered. It is therefore far from the truth that his defence was not considered.

31. Having evaluated the evidence before the trial Magistrate I find that the evidence was overwhelming and proved the charge against the appellant beyond any reasonable doubt. The conviction was supported by the evidence on record.

32. For the reasons I have stated above, I find that the appeal lacks merits. I dismiss the appeal.

Dated at Kerugoya this 29th day of November 2019.

L. W. GITARI

JUDGE