REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 27 OF 2019

MICHAEL MUTISYA MWEU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case 2995 of 2009, Hon. G. O. Shikwe, RM on 18th February, 2016)

REPUBLIC.....PROSECUTOR

VERSUS

MICHAEL MUTISYA MWEU.....ACCUSED

JUDGEMENT

1. The appellant, **Michael Mutisya Mweu**, was charged before the Senior Resident Magistrate's Court at Kithimani in Criminal Case 2995 of 2009 with the offence of Rape of a Person with Mental Disability Contrary to Section 7 of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant on the 26th day of July 2014 in Yatta sub-county within Machakos County, intentionally caused his penis to penetrate the vagina of **VKM** without her consent within the view of **CMK**, a person with mental disability.

2. According to PW1, **CMK**, the complainant's daughter in law, the complainant was mentally disturbed and could neither talk nor understand anything for a period spanning 9 years and was under the care of PW1. On 26th July, 2014 at 2 am PW1 was asleep in her house when she heard dogs barking and upon going out with a torch, she heard the door to the house where the complainant was sleeping breaking. According to her she used to lock the complainant in her said house where the complainant was sleeping alone. PW1 then saw someone coming from the said house having broken the door. Upon flashing her torch, she realised that it was the appellant, known to her as **Mwau**, who was fully clothed. As the appellant ran passed her, the appellant knocked her down when she tried to hold him. PW1 tried to chase him for about 30 minutes before giving up the chase and returning to the house where she found the complainant with her clothes lifted up to her waist with wetness in her vagina. According to her the time was then 2.46am. She called her neighbour, **Agnes Nduku**, PW2 who went and examined the complainant after which they reported the incident to the village elder and to mamba Police Post where she was given a P3 form that was filled in at Matuu where the complainant was examined. PW1 stated that she had known the appellant for 12 years and clearly saw him using the torch. She denied that she had a vendetta against the appellant.

3. PW2, **Tereasia Nduku**, was at her home on the same day at 8am when PW1 went and requested her to accompany her to PW1's homestead where they found the door to PW1's mother in law broken into. It was her evidence that they found the complainant's clothes lifted up to her waist and her underpants were on the floor. Upon examining her, PW2 found that the complainant had been penetrated and she was informed by PW1 that she saw the appellant exiting from the house and gave a chase but after a while gave up fearing for her life. PW2 stated that the appellant was well known to her since the appellant was a casual worker in the neighbourhood. It was her evidence that they found the door to the complainant's door broken and its hinges had come off. She similarly denied that there was a vendetta between her and the appellant. The said witness disclosed that there was another time the appellant raped the complainant.

4. PW3, **Patrick Mwanza Munyao**, testified that he was a member of *Nyumba Kumi* Initiative. On the same day 26th July, 2014, he was called by the village elder who informed him that they were required to search for **Mwau Barndo**, the appellant on suspicion of rape. For two days they searched for him in his house twice eventually catching up with him on 28th July, 2014 after which they took him to Mamba Police Station.

5. PW4, **Philip Njaramba**, a clinical officer at Matuu Hospital filled in a P3 form for the complainant, a woman aged 70 years who was presented with a history of being raped by a person known to the relatives on 26th July, 2014.According to him the complainant's clothing had no tears or blood and the complainant appeared to be mentally challenged. Her lower lip had a cut and was bleeding though her genitalia was normal save for a creamish whitish discharge. According to him, urinalysis showed infection. Upon assessment he formed an opinion that the complainant had been raped.

6. PW5, **Dr Edgar Munga**, a psychiatrist at level 5 hospital on 16th July, 2015 assessed the complainant and found that she could have been having a condition due to her age that causes erratic behaviour. He prepared and produced a report to that effect.

7. PW6, **CIP Samuel Sitieenei**, of Yatta Police Station on 26th July, 2014 received a report of rape of a victim who was unable to speak due to sickness which report was made at mamba Police Patrol Base. He referred the matter to Yatta and the victim was escorted to Matuu for treatment and check-up after which he issued a P3 form. He also recorded the witness statements and because the appellant was seen at the victim's house, he charged him with the offences in question.

8. Upon being placed on his defence, the appellant, in his unsworn statement stated that on 28th July, 2014 he woke up took breakfast and went to his farm at 8am. Three men then went and informed him that he was required at the police stataion and he accompanied them. Upon his arrival at the police station, he found the charges levied against him. He was also asked a bribe of Kshs 25,000/- which he declined to pay hence these proceedings.

9. In his judgement the learned trial magistrate found that there was very strong circumstantial evidence linking the appellant to the offence and was satisfied that the offence of rape was proved to the required standards and convicted him therefor. He was then sentenced to 10 years imprisonment.

10. In this appeal the appellant submits that whereas the age of the complainant is not in issue, what is in issue is penetration. According to the appellant the preence of creamish whitish discharge could mean anything since women and girls in their onset of ovulation also produce that kind of discharge. It was therefore submitted that the prosecution ought to have led evidence suggestive of forceful penetration and to show that the alleged semen and infection were from the appellant. The appellant relied on Kennedy Shaveka Mwakio vs. R [2017] Eklr. It was further submitted that the prevailing circumstances were not condusive to proper identification of the appellant. In this respect the appelalnt relied on the case of Wanjiku vs. R [1990] KLR. As well as Abdullah Bin Wendo and Another vs. R [1953].

11. It was further submitted that there was inconsistent between the evidence of PW1 and PW2 as to the time when the incident occurred. Based on John Mutua Musyoki vs. R (2017) Croim. App. No. 11 of 2016, it was submitted that these were not minor contradictions. According to the appellant his defence was never considered by the court and that the burden was shifted to him. It was finally the appellant's case that his mitigation was never considered in meting out the sentence.

12. On the part of the Respondent it was submitted that though the incident occurred at night, PW1 was able to see the appellant with the help of the torch as he was a person who was known to her hence this was identification by recognition. It was submitted that the evidence was clear and consistent and without any contradictions as alleged and the same was corroborated and pointed to the appellant as the perpetrator of the offence. It was noted that the appellant did not deny the offence and only gave evidence with respect to his arrest without dealing with the events of the day of the incident. It was submitted that the sentence was sufficient considering the age of the victim, the seriousness of the offence nd the circumstances surrounding the commission of the offence.

Determination

13. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding 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, see Peters vs. Sunday Post [1958] E.A 424."**

14. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. 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 evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. 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 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.**

15. Section 7 of the ***Sexual Offences Act*** provides as follows:

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

16. In this case the appellant was charged with the offence of rape of a person with mental disability contrary to section 7 of the ***Sexual Offences Act, No. 3 of 2006***. The ingredients of the offence of rape include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. Again the offence of rape can only be committed against an adult.

17. In the case of **Republic vs. Oyier (1985) KLR pg 353**, the Court of Appeal held as follows:-

1. "The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

18. Therefore, in an offence such as the one with which the appellant was charged, it was necessary to prove the age of the victim, the fact of penetration, lack of consent, inability to consent or fraudulent or forceful consent and mental disability on the part of the victim and finally the identification of the perpetrator. From the evidence and as conceded by the appellant there was no dispute regarding the age of the victim. As regards consent, there was medical evidence that the complainant was suffering from a mental ailment hence was not capable of giving consent. As regards the issue of penetration, while the complainant's genitalia was normal, there was a creamish whitish discharge suggestive of semen and the urinalysis showed infection. The Court of Appeal in **Erick Onyango Odeng –vs- Republic (2014) e KLR** rendered that:

"We agree with the appellate court that to establish defilement, it is not necessary that the hymen must be broken, even partial penetration of the female genital by the male genital will suffice to constitute the offence."

19. The above evidence in my view proved that there was penetration as defined by the law.

20. As regards the identification of the perpetrator, the incident occurred at around 2 am and PW1 was awoken by the barking of the dogs. According to her when she went outside, she saw someone coming from the house who appeared to have broken the door. She then flashed the torch and saw that it was the appellant who was known to her. She however did not indicate the direction in which she flashed the torch, which part of the body of the appellant the torch was directed at and how bright was the torch. Whereas the case was that of recognition, in **Ali Mlako Mwero vs. Republic [2011] eKLR** the Court of Appeal expressed itself as follows:

"The identification of the appellant in this case lay not only on the visual features observed by Mesalim but also on his recognition by that witness. We agree with Mr. Oguk, that in either case, the evidence ought to be tested with utmost care because it is not unknown for a witness to be honest but mistaken.

21. In another case, **R vs. Turnbull (1976) 3 ALL E.R 549** the Court held:

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

22. In this case, the conditions prevailing were not favourable to a proper identification even by recognition. In the case of **Robert Gitau –vs- Republic Criminal Appeal No. 63 of 1990 (Nakuru)** the Court of Appeal stated as follows:-

"It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R (Criminal Appeal No. 20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant's face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was the only one from the cell."

23. From the evidence, it would seem that the intruder must have been very fast and swift for PW1. It is not indicated how long she was able to observe the said person. It would seem as PW2 stated that the appellant might have been suspected of the commission of the offence because he had committed a similar offence before. The learned trial magistrate appreciated that the evidence before the court was circumstantial. However, caution is called for when relying on circumstantial evidence. While recognizing the dangers in relying on circumstantial evidence without exercising this caution the Court in **Teper v. R [1952] AC at p. 489** had this to say:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence

to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

24. It is true that in his evidence the appellant did not mention anything about the events of the day of the offence. However as was held in **Boniface Okeyo vs. Republic [2001] eKLR:**

> **"Before we conclude this judgment however, there are two other matters which, though not raised by the appellant's counsel, have caused us considerable concern in this appeal. These arise from the judgment of the High Court on first appeal where it said as follows:**
>
> **"the appellant himself narrated how he was arrested. He did not raise any serious defence to the charge except to state that he was not guilty."**
>
> **In another part of the judgment the High Court further said as follows:**
>
> **"the appellant had full opportunity and did cross-examine the witnesses but no crucial evidence arose out of his cross-examination"**
>
> **We are satisfied that in the two passages, the High Court on first appeal seriously fell into error by appearing to shift the burden of proof to the appellant. It is trite law that in criminal cases the burden of proof rests throughout on the prosecution to establish the guilt of an accused person beyond reasonable doubt save in few exceptions of which this was not one. The appellant had no duty in law to raise a serious defence, nor did he have a duty to elicit crucial evidence by cross-examination of prosecution witnesses. We are satisfied that the burden of proof was, clearly, placed on the appellant and this is another reason to fortify the conclusion we have reached that the conviction was unsafe and cannot stand."**

25. Where however the wave of circumstantial evidence is very strongly against the accused, some explanation may well be expected from the accused. The Court of Appeal for East Africa in **Rafaeri Munya alias Rafaeri Kibuka vs. Reginam [1953] 20 EACA 226** observed that:

> **"The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.**

26. The principle applicable was well explained in the court of appeal case of **Ernest Abanga Alias Onyango vs. Republic CA No.32 of 1990**.

> **"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect". This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it`s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availably".**

27. In this case I am not satisfied that the wave of the circumstantial evidence was so strong against the appellant in order to require him to rebut the prosecution's case.

28. Apart from the foregoing, section 7 of the ***Sexual Offences Act*** categorises the victims as those who are raped or indecently assaulted within the view of a family member; a child or a person with mental disabilities. While the charge seems to have been that relating to the third category of victims, the facts of the case seems to have duplicated the victims by referring to mental disability and within the view of a family member.

29. Having considered this appeal, I find that the evidence adduced before the learned trial magistrate did not prove beyond reasonable doubt that it was in fact the appellant who committed the offence in question. There might have been very strong suspicion against him but as was held by the Court of Appeal in **Sawe –vs- Rep [2003] KLR 364**:

> **"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

30. In **Mary Wanjiku Gichira vs. Republic, Criminal Appeal No 17 of 1998,** the same court held that:

> **"suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."**

31. A similar view was expressed by the Tanzania Court of Appeal in **R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71** where

it was held by the Tanzania Court of Appeal that:

> **"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."**

32. It is therefore my view that the conviction of the appellant, based as it was on circumstantial evidence was unsatisfactory and is unsafe. It cannot be sustained or supported.

33. Consequently, I allow the appeal, set aside the appellant's conviction and quash the sentence. The appellant is at liberty unless otherwise lawfully held.

34. Orders accordingly.

Judgement read, signed and delivered in open court at Machakos this 29th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey