REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 213 OF 2017

HARUN KIPROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court

at Kabarnet Criminal Case no. 40 of 2017 delivered on the 19th day of August, 2017

by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant was on 18/8/2017 sentenced to imprisonment for 10 years for the offence of rape contrary to section 3 (1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006 for which he was convicted on 28/7/17.

2. In convicting the appellant the trial Court considered and determined the issues before it as follows:

> "*Upon hearing the entire suit the issues for determination were:*
>
> *1. Whether the prosecution had proved their case beyond reasonable doubt.*
>
> *2. Whether it was safe for the Court to find the accused guilty where the complainant did not testify.*
>
> *3. Whether the defence tendered contradicted the prosecution's evidence.*
>
> *As per the evidence tendered by Pw1, Pw2 and Pw3 who were relatives and neighbor to the complainant it was clear that the complainant could not talk or move.*
>
> *That was corroborated by the Clinical Officer who stated that the complainant had stroke and epilepsy and that was why she could not talk.*
>
> ***The Court had the opportunity to see the complainant in the presence of the accused and Court Prosecutor and it was clear that she could not even raise her head up as she just stared without any movement.***
>
> *I had then found it safe to declare the complainant vulnerable and her evidence was tendered by all the other prosecution witnesses Pw1, Pw2, Pw3 and Pw4.*
>
> *I thus find that it was in order that the Court proceeded with the case without the complainant signing anything as she could not talk.*
>
> *As per evidence of Pw1 she had found the accused in the complainant's house and her pant was on the floor with 1 used condom and the accused had escaped through the widow and she had screamed for help. Pw2 and Pw3 stated that they had responded to the distress call and Pw2 had seen the accused get out of the complainant's house through the widow and he had arrested him with the help of Pw3 with the compound behind the complainant's house.*

That evidence was never contradicted by the accused as he chose not to ask them any questions.

Pw1, Pw2 and Pw3 stated that the recovered condoms were handed to the police and indeed the Investigation Officer produced the same as exhibits for the Court and it was clear that one had been used out of the three that were in the packet that was produced as an exhibit.

The Clinical Officer stated that when he examined the complainant's private parts her minora was swollen and painful which meant that indeed there was penetration and thus she had been raped as she could not talk to give consent to the accused who was not her known husband or friend.

The accused's defence was mere denial as he did not state when he had a chance to cross examine the witnesses over his alleged stolen money or phone.

He only confirmed that he was indeed arrested on the fateful date by two boys that is Pw2 and Pw3 save that he was arrested within the complainant's compound and not the road as he stated.

I find the evidence of Pw1, Pw2 and Pw3 save that he was arrested within the complainant's compound and not the road as he stated.

I find the evidence of Pw1, Pw2 and Pw3 truthful as there was no reason why they could all conspire to have the accused arrested as there was no known grudge.

I thus find that the prosecution had proved their case as required beyond any reasonable doubt that indeed the complainant was raped on 12.1.17 by the accused herein.

I thus find it safe the accused guilty and connect him for the offence of rape contrary to section 3 (1) a b 3 of the Sexual Offences Act as charged."

3. In his Petition of Appeal, the appellant raised the following grounds of Appeal, namely:

1. That the learned magistrate faulted in misdirected by basing conviction and sentence on contradicted skewed, slanted.

2. That the vital witness was not summoned.

3. That the medical evidence was of dubious profession.

4. That the complainant statement was engineered to pin me down innocently"

The appeal is essentially on sufficiency of evidence to prove the offence against the appellant.

4. The appellant filed detailed written submissions in his appeal which he relied on at the hearing as follows:

"***WRITTEN SUBMISSIONS***

INTRODUCTION

Your lord

Having received and perused through the trial court original copies of my proceedings and their respective judgment, I do hereby beg to outline and expound on my amended grounds of appeal with salient palatable subtitles.

Background

It was the prosecution's case that on the 12th day of January 2017 at around 1300hrs at Kabasis Location in Baringo Central Sub-county within Baringo County willingly and intentionally the appellant herein named above caused his penis to penetrate the vagina of MS without her consent.

And that alternatively on the same date and time he willingly and intentionally caused his penis to touch the vagina of MS without her consent. These charges were read to the appellant on the 16th of January 2017 who in turn pleaded not guilty and consistently pleaded not guilty to date. The prosecution on its side called on five witnesses to prove its case. The appellant was convicted and sentenced to serve 10 years imprisonment for an offence of Rape contrary to section 3 (1) a, b of the SOA no. 3 of 2006. A conviction and sentence to which the appellant, appeals against basing on the following grounds:

GROUND ONE AND TWO COMBINED

That your lordship,

1. The charge sheet was defective. (Page 16 line 15-16) the court prosecutor states "I wish to amend the charge sheet to have the true names of the accused reflected as they are on the identity card". This clearly implicated that the accused person who was before court at such time while the case was not the right person. It therefore required the charge sheet to be amended to reflect the right accused person as it stated (page 17 line 1-2) that "substance of the charge are read to the accused who replies", however, according to the charge sheet, nothing was changed to that effect for the name of accused person remained the same HARUN KIPROTICH contrary to the names of the appellant who was before court as it appears on the identity card as WILBERT HARON KIPROTICH. Who was this Harun Kiprotich that was not produced to appear before the honourable court so as to produce another person on his behalf? Will our honourable courts of law continue convicting innocent Kenyans even when it appears clearly that a mistaken identity has been proved. This amounts to a miscarriage of justice as it contravenes the provisions of Article 27 (1) (2) and 28 of the Constitution of Kenya. This is as well contrary to section 214 of the CPC Laws of Kenya.

2. It is clear from the charge sheet (page 3 of the proceedings that the OB no. 24/12/1/2017 was documented at the time when the alleged offence was reported to the police, the medical treatment notes (page 25 of the proceedings)indicate a documented OB no. 01191/16. The P3 form (page 26 of the proceedings) does not however, record any OB Number to the effect of this case. How then was these matter proven by the prosecution to the effect of convicting the appellant when it clearly appeared that the evidence which was used here in this matter was being manufactured? Indeed this contravened the provisions of section 124 of the evidence Act hence the charge sheet was rendered defective. Should cheating be taken as evidence in matters of law?

3. Your lordship, this matter was denied the provisions of fair trial as stipulated by Article 50 (1) (2) of the Constitution of Kenya.

That when a witness is recalled to testify before a court of honour, those items recovered from the scene of offence are supposed to be identified by the same witness at the time of adducing evidence. This was not the case in this instance as the court prosecutor states (page 13 lines 16-17) that "I wish to recall Pw1 to identify some items that were recovered from the scene and handed over to police". Why were these items not recovered at the time of offence and the subsequent arrest so as to be recovered later and be handed over to police when the matter had already proceeded on? Why should we all not believe that evidence was searched for manufactured and fabricated to get the appellant fixed? The court prosecutor conspired with the complainant knowing well that the appellant was innocent a clear indication of a sinister motive in this matter.

4. It is also very clear from the original trial court proceedings that the prosecution side took advantage of the appellant being unable to defend himself from the face of law and hence continued to violate the constitutional rights to fair trial of the appellant. I want to quote some sentiments of the appellant during the proceedings, (page 9 lines 2-3) he states "I do not know this witness. that's all"(page 10 line 8)he states "I have no questions".(page 11 line 19) "I have no questions" and page 13 line 16-17 it required that the court prosecutor should have been fair to both sides and not take advantage of one person at the expense of another. In fact this calls for a retrial to allow the appellant access justice in matters of defence and allow me to rely on the authority of Opicho v. Republic (2009) KLR 369 COURT OF APPEAL AT NAKURU where it was held that "in general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence of the first trial. Even where conviction was viliated by mistakes of the first trial court for which the prosecution was not to blame it does not necessarily follow that the retrial should be ordered each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interest of justice is required.

On page 12 line 14-15 the accused person stated "I wish to have the case start a fresh. I was confused last time". The court replies and states "the accused application is allowed as the stakes are high". The prosecution however took advantage of the innocent appellant in matters of law to offset his prayer before court as it alleges (page 17 lines 9-10) that "I wish to adopt the evidence tendered and the matter to proceed from where it has reached". The prosecution did not give any sufficient reason for denial to the appellant's request before the honourable court. The court on its side continued to deny the appellant of his right to fair hearing and went on to convict him. This amount to a miscarriage of law hence calling for a retrial or even quashing the conviction and setting him free to liberty.

5. Page 23 line 13-14 the appellant states "I was sick and went and met the person I was working for and I asked for permission as I had syphilis" where such sentiments is made, it is the responsibility of the sitting court to direct for medication or any other course of action to be put in place. However, the trial court did not take any action to know the appellant's state of health at that time despite the fact that he had not been taken for HIV and Aids test or for the forensic or scientific testing by police as required by law as per the provisions of section 26 and 36 of the sexual offences act no. 3 of 2006. This was a miscarriage of law in violation of articles 27, 28 and 48 of the Constitution of Kenya thereby prioritizing the female gender to male gender calling for a biased judgment. I rely on the authority of ZAHIRA HABIBULLAH SHEIK &OTHERS VS STATE OF GUJARAT AND OTHERS where it was held that "it has to be unmistakenably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be a comprehensive or exhaustive definition of the concept fair trial and it may have to be determine in a seemingly infinite variety of actual situation with ultimate object in mind viz whether something that was said or done either before or the trial deprived the quality of fairness to a degree where miscarriage of justice has resulted. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is real one not a sham or mere force and pretense. The fair trial for criminal offence consist not only in technical observance of the frame and form of law, but also in recognition and just application of its principles in substance to find out the truth and prevent miscarriage of justice.

GROUND THREE

My lord,

The trial court erred in law and fact as it failed to hold that this matter was inconsistent and therefore failed to meet the requirements of the evidence act section 124.

1. That according to the charge sheet (page 3 of the proceedings) the offence is alleged to have been in commission at 1300hrs. Pw1 (page 8 line 2-3) states "on 12/1/017 at 3.00pm I had gone to collect water and when I went back to the complainant's house I met the accused there". This same time at 3.00pm is also reflected (page 9 line 9) by Pw2. These witnesses are alleged to be the ones who arrested and reported the appellant to police. How then could their time of commission of the alleged offence differ with that of the police charges. Indeed even to a layman suspicion of an abnormality must arise in this kind of occasion.

2. According to Pw1 (page 8 line 15) Pw2 (page 10 line 3) and Pw3 (page 11 line 8-9) the complainant was taken to hospital on 12/01/17. However, this is inconsistent with Pw4 (the medic) (page 17 line 15 and page 18 line 7) as he states that he received the complainant for treatment on the 13/01/17. Who then between the three witnesses and the medical practitioner beared true testimony before the honourable court? How did the trial court come to its conclusion that the offence had been committed?

3. According to Pw1 (page 8 line 8) and Pw6 (page 21 line 11-12) they stated that used condoms were found were found on the floor of the house at the scene of crime. This was however, contrary to Pw2 testimony (page 10 line 2) that the appellant's had condoms in his pocket. My lord, allow me to rely on MAINA VS REPUBLIC NAIROBI CR 955 OF 1969 where it was held that; "it has been said again again that in a case of alleged sexual offences, it is dangerous to convict on the evidence of a woman and a girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell on entire false which is easy to fabricate, but extremely difficult to refute. Such are fabricated for all sorts of reasons and sometimes for nor reason" and as such, from the evidence in record the defective issues in the charge sheet and the contradictory evidence is clear feature of a plotted and fabricated matter to fix the appellant for a reason not known.

<u>GROUND FOUR AND FIVE COMBINED</u>

That your lordship,

The trial learned magistrate erred in law and fact by not holding that this case was never proven beyond any reasonable doubt and that the burden of proof was hence shifted to the vulnerable appellant.

1. That it was Pw1's testimony before the honourable court (page 8 line 5-8) that "the complainant's pantie was on the floor. There was condom in the house at the floor. The condom had been used and had contents inside". The alleged pant was however, not produced at court as exhibit to prove this case true. It was however alleged that condoms were before court. The same condoms it is not stated whether they were now used. The condoms alleged to have found on the floor with contents was neither produced at Court as exhibit. It was neither described to the honourable Court what kind of contents in the condom those were. I believe and as a matter of law and fact that condom and its contents should have been taken for Forensic and Scientific tests to verify of their nature and whereabouts. No prove was therefore made to this effect.

2. (Pg 14 line 17) the honourable Court states "I pray that we go see her at the car park as she cannot walk, stand or talk." (Pg 15 line 3) it was alleged "she is lying on the back sent just staring at the Court." Your Lordship, allow me to first and foremost observe that her illness was not medically documented to proof it as evidence before Court. It may therefore may have been an episode in pretence of sickness to give this matter weight. Secondly, no evidence was produced to Court as to the status of the complainant at the time of commission of alleged offence and the effect the action may have caused to the sick person, comma state complaint. My Lord, even to layman, a sick person of the described nature subject to a forced sexual intercourse, will collapse and even die as a result of shock and pressure exerted at the time of such an incident. However, this was not the state of affairs in this matter hence a fabricated and plotted case. There must have been other personal differences between Pw1 and the appellant that was never disclosed before Court.

3. (Pg. 9 line 16) stated to the honourable Court that "Pw1 was saying that there was a person in the house as she screamed." (Pg. line 13) this witness alleged that "the accused had come out of the house through the window…."It is very clear from these sentiments that Pw2 did not see the appellant come out of the window because he did not state as to what action he had taken to apprehend and arrest the appellant. He only told Court about the screams and did not even state whether the assailant was caught running or otherwise. In this case if anything had happened as alleged it then means may be the assailant ran away and the appellant arrested as he passed by the scene of crime off-guard. It was neither stated to the honourable Court whether the same assailant had come in through the door or the same window. How the Court demanded that the case had been proved beyond doubt with such hanging questions is un-predictable.

4. It was further stated (Pg 10 line 14 -15) that Pw3 was rearing cattle at the complainant's home. Even if it was a thief who came to steal, how could he have imagined to enter into a house which he does not know how people live during day time as another person is outside the same house? It was not described how far Pw3 was from the house, whether it was bushy or clear, whether the door or windows to the house were open or not and how far the house was from the house were open or not and how far the house was from the road. To justify that this matter was a mere fabricant, (Pg. 10 line 18 – 19) Pw3 states "… I saw the accused running to got hold of the accused as Kabon was saying that he had raped M." Who was this accused chasing another accused? Indeed, let our Courts of justice judge the less vulnerable justly and not being biased basing on gender. Article 27 (1) of the Constitution of Kenya provides that "everybody is equal in the face of Law and must be equally be protected by the same Law.

5. Pw2 alleged in his evidence before the honourable Court (Pg 9 line 18 that "Many people came to the scene." The same many people, none of them was included among the witness list to testify before the honourable Court. I the appellant should have expected people from a far other than immediate neighbours to the complainant and Pw1 to come a bear witness. (Pg 11 line 6 – 7) Pw3 states "….and the chief had summoned the police who arrested the accused." ***<u>While (Pg. 21 line 14) Pw6 alleges "….was taken to the AP Post and later he was brought to the station." I the appellant do believe that these should have been the key witnesses to prove this case. Surprising enough, the same Chief and AP Officers were never witnesses in this matter. Who else did the Court expect to prove this case than these important government representatives?</u>*** *Allow me to rely on the authority of PETER GITAU MUCHENE VS. REPUBLIC HCCR 364 OF 2006 AT HIGH COURT NAIROBI where it was held that; "In the present case with the evidence on record, I make that adverse inference that if the witness who were mentioned by the complainant*

as having responded to her screams were called to testify, their testimony would have been adverse to the prosecution case. Therefore the conviction of the appellant cannot be safely sustained." And also in JOHN KENGA VS. REPUBLIC CR. APP. NO. 1126 OF 1984 OR CR. CASE NO. 1174 OF 1984 AT NAIROBI it was held that; "The appellant in this matter was acquitted for the fact that some of the mentioned witnesses were not summoned to clear down of his arrest especially those who arrested him." Such was also contrary to section 150 of the CPC. The same case above was portrayed in this matter.

6. (Pg. 14 line 17) The trial Court noted that the complainant could not talk, stand nor walk. The same was equally observed by Pw6 (Investigating Officer) on Page 21 line 6. The medic (Pg 17 line 17 – 18) he states "17. She stated that the perpetrator had used condoms at her home to rape her. 18. The patient was of good health." These was not evidence for penetration because the same used condoms used were not scientifically tested by the government laboratories and were not produced as exhibits before Court. And that the patient whom the medial officer met was in good health and talked on her behalf, while whatever the Court met as complainant was sick and could not talk, walk or stand. These were two different people serving a purpose of complaining at different places and different times. Who was genuine complainant in this case? It is very clear here that this matter was frame and the burden of proof shifted to the appellant.

7. The Court observed (Pg.15 line 1 – 4) that the complainant was vulnerable. It is simply meant that she could not do anything on her own. The Medical Officer however (Pg 18 line 3) states "….she had internal pains…" How did he detect that she had internal pains when she could not even move or stand? He continues to state (Pg. 18 line 12) that "Her private parts were swollen and that confirmed that she had been raped." Swelling according to I the appellant may have been attributed to an infection as a result of unhygienic conditions she may have been leaving in. assumptions and presumptions should not be used as basis for evidence as was in this case. Penetration was in this instance assumed and presumed like wise to identification, because nobody stood firm to say that indeed the appellant was found raping the complainant. Nothing was also produced to the effect of connecting the appellant to the alleged offence. The burden of proof was hence shifted to the appellant without proving the case beyond doubt. Penetration could have definitely caused more side effects to her continued illness. There was no evidence that the alleged rape had caused a worsened situation to her health as expected for persons of her condition.

8. The treatment notes on page 25 of the proceedings indicate "Tenderness of the vaginal opening with obvious redness and the perineum. Unable to communicate." I do believe and this Court will agree with me that the vaginal walls are never firm but tender in structure and texture. The colour of the vaginal walls obviously red. It cannot be green or black unless an abnormality. These therefore were not conclusive evidence of penetration. I want to rely on BEN MWANGI VS. REPUBLIC NAIROBI HCCR. APP. NO 471 OF 2001 where it was held that:

> *"At the end of the day the Doctor's findings were very important, were positive to the findings of defilement but fell short of connecting the findings to the appellant by failing to connect the injuries to the time of the offence. The Doctor's findings did not connect the date of the alleged defilement of complainant with the age of the injuries noted. It was worthless evidence for the purpose of this case. And indeed nowhere on the P3 form (Pg. 26, 27 & 2) it is indicated as to the exact age of the injuries in this particular case.*

9. The trial Court neglected the appellant's defence evidence and continued to shift the burden of proof unto him. (Pg 23 line 17) the appellant states "I left Nakuru in the morning and reached Kabasis at 4 pm" He continues to state (PG. 24 LINE 2, 3, 4,5 AND 8) that " 2 - 3 ….two boys had summoned me and I stopped.4. One boy stated I was the one and the other stated that I was not the one. 5.The boys had beaten me and they took Kshs.10,000/= and Mobile Phone." I had gone with the boys to the Chief's Officer and was put in cells…."Indeed these statements above do explain that the agreement between the alleged boys who were also not summoned to tender their evidence before Court meant that whoever was arrested was a mistaken identity. It also implies that the appellant was never arrested from the complainant's home as was alleged by the witnesses. Failure to recall these two boys was a sign of covering up crucial evidence required in determination of this matter. I rely on STEPHEN CHARO MAVUD VS. REPUBLIC [2015] eKLR where it was held that; "From the Judgment of the trial Magistrate I agree with the appellant's counsel that the trial Magistrate did not take into consideration the appellant's defence in line with the Prosecution's evidence to arrive at a conclusion. She did her analysis to the evidence on record which is quite scanty and wanting. From the decision in Judgment it is clear that she disregarded the appellant's defence but she did not give reason why she believed the Prosecution evidence. A trial Court is obligated to look at the case as a whole to see whether the Prosecution case is credible and evidence reasonably sufficient to discharge the burden squarely on it to prove a charge beyond reasonable doubt. In the case before me, the trial Magistrate failed to appreciate the inconsistences and anomalies in the Prosecution evidence vis a viz the defence case…."

The same case above was observed in this matter as the trial Magistrate did not give reason why he believed the Prosecution and failed to believe the appellant's evidence. This was contrary to section 169 of the CPC. See also Genesis 39:13-15 and 1st Kings 21:5-19 the Biblical examples of equivalent cases.

Relying on section 169 of the CPC I humbly submit that the evidence established by the Prosecution before Court were not true nor water tied to have secured a conviction hence the appellant's conviction was not safe. It is my prayer to this honorable Court to see the same and come up with a different verdict amounting to the acquittal of the appellant.

REASON WHEREFORE:

I humbly pray that may my appeal be allowed, conviction quashed, sentence set aside and set me free to liberty."

5. The DPP opposed the appeal in oral submissions made before the Court at hearing as follows:

"DPP

Appeal is opposed.

Appellant convicted of rape contrary to section 3 of the Sexual Offences Act and sentenced to serve 10 years on 18/8/17.

The appellant was an old woman of 60 years. She was suffering from stroke and also epilepsy. She was unable to walk or talk and the Court declared her a vulnerable witness.

Pw1 who used to stay with the complainant on the material day had gone to fetch water and when she came back she found the appellant outside complainant's house. The appellant was well known by Pw1.

The complainant's pantie was on the floor and the appellant was putting on his clothes when Pw1 entered. There was also a used condom on the floor of the house.

When the appellant saw Pw1, he ran and jumped out of the window and Pw1 screamed. Pw2 and Pw3 came to the scene when they heard the screams. They were able to arrest the appellant behind the house of the complainant.

Pw1, Pw2 and Pw3 testified that they knew the appellant well as he was their neighbor. He was found red-handed putting on his trousers by Pw1 in the complainant's house. He was arrested at the scene of crime behind the complainant's house when he had jumped out of the window.

Pw4, Clinical Officer who examined the complainant stated that the Labia Majora was swollen. She had internal pains and the private parts were swollen and he concluded that the complainant had been raped.

Appellant has produced an ID before the Court alleging that he was the one who went through the trial at Page 23 of the record line 10 when he was giving his defence, he said "my name is Harun Kiprotich. I am a casual worker. This is a proof that his name is Harun Kiprotich as he said so himself, and he did not challenge it at the time. it was an afterthought.

Sentence of 10 years is lenient in the circumstances considering the condition and age of the complainant. Appellant should serve the sentence for deterrence. Appeal should be dismissed",

Issues for Determination

6. The appeal before the Court falls to be determined on the twin issues whether rape of the complainant is proved and of identification of the appellant as the perpetrator of the offence.

Determination

7. The prosecution's case is set out in the evidence of Pw1, Pw2, Pw3 and Pw4 as follows:

"***PW1***

My name is KC I am a resident of Kabasis. I am a farmer. MS is my in-law's wife.

She is sickly. She cannot stand and she is carried in and out of the house.

The accused herein is my neighbor. On 12.1.17 at 3 pm I had gone to collect water and when I went back to the complainant's house I had met the accused there.

The complainant was asleep in the house. The complainant's pant was on the floor.

The accused was putting on his trouser when I entered into the house.

There was condom in the house, at the floor. The condom had been used and it had contents inside.

The accused had ran away through the widow. I went out and I screamed for help and David Kimosop, and mike had responded and they came.

We had managed to arrest the accused behind the house and we took him to Kabasis Chief's Office.

We had looked for motor vehicle and we took M to Kabarnet Police Station and we had taken her to Kabarnet County Hospital.

I had left MS alone when I went for water.

The condom was taken to the police station.

Accused is identified in Court.

CROSS-EXAMINED

- I do not know this witness.

- That is all."

PW2

My name is MK. I am a resident of [Particulars withheld]. I am a casual worker. I know MS is my grandmother.

The accused is known to me as he is my cousin. On 12.1.17 at about 3 pm I was passing on the road to [Particulars withheld] centre when I heard noise from MS's house.

I had entered into that home as it was near the road.

The accused had come out of the house through the widow and Pw1 had asked me to go round and get hold of him.

I had gone round and I got hold of the accused.

Pw1 was saying that there was a person in the house as she screamed.

Pw1 had stated that the accused had raped our grandmother.

The accused had raped the grandmother. Many people had come to the scene.

We had taken the accused to Kabasis Chief's Officer and the accused had condoms in his pockets. The accused was then arrested.

M was taken to Kabarnet Coutny Hospital.

Accused is identified in Court.

CROSS EXAMINED

- I do not know this man. He stays three kilometers away from my home.

- I have no question.

PW3

My name is David Kimosop. I am a herdsman. The complainant is my neighbor. The complainant is sick and she does not walk or talk. The accused is my village mate.

On 12.1.17 I was taking care of cattle at the complainants' home and I was taking the cattle home at about lunch hour.

I had heard noise from M's house. The person who was making noise is Kabon Pw1.

I had ran to see what was happening and I saw the accused running to get hold of the accused as Kabon was saying that he had raped M.

I had met mike also at the area and we arrested the accused within the compound.

Kabon stated that the accused had raped MS. We took the accused to Kabasis Chief's Officer.

I did not enter in the complainant's house.

We had left the accused at the Chief's Office and the chief had summoned the police who arrested the accused.

We had then taken the complainant to Kabarnet County hospital. I was at hospital when the complainant was treated.

The chits before Court were for treatment for the said MS.

P3 was also filled for MS.

The chits are marked as MFI P1 and P3 as MFI P2.

When we reached the Chief's office the accused was searched and he was found with condoms in his pockets.

Accused is identified in Court.

CROSS EXAMINED

- I do not know the witness who is before the Court.

- I have no question.

PW4

Prosecutor – I wish to amend the charges to have the true names of the accused reflected as they are on the identity card.

Court – application is allowed.

Substance of the charges are read to the accused who replies:

Kiswahili and English.

Count 1

Accused – it is not true.

Count 2

Accused – it is not true.

Court – plea of not guilty is entered.

Prosecutor – I wish to adopt the evidence tendered and the matter to proceed from where it has reached.

Accused – no objection.

Court – Pw4 to proceed with his evidence.

My name is Benjamin Kendagor Clinical Officer attached at Kaptimbor. On 13.1.17 I received a patient by the name of SM who alleged that she had been raped on 12.1.17.

She stated that the perpetrator had used condoms at her home to rape her.

The patient was of good health.

She was 60 years old.

Her private parts were normal but the labia majora was swollen and she had internal pain and swelling of the complainant's private part it was clear that the patient had been raped.

The patient was epileptic and she was treated for the pain and swelling.

I have treatment card for MSC.

She was treated on 12.1.17 and given number 01191/16.

She was brought to the hospital by relatives who stated that she had been found being raped by a known person.

She was not able to talk because she was sick with a stroke attack and epileptic.

From head to toe she has no injuries. Her private parts were swollen and that confirmed that she had been raped.

I wish to produce the treatment card as exhibit p1.

The p3 is produced as exhibit p2.

CROSS EXAMINED

- A person who is infected with sexually transmitted disease can still rape another one.

- I do not know how you were arrested.

Prosecutor – I pray for another date as the Investigating Officer is on leave.

8. The complainant was declared a vulnerable person upon being brought to Court and the trial Court, noting on the record of 19/4/17 that:

> *"The Court moved to car pack and notices that the complainant an elderly lady cannot talk nor seat. She is lying on the back first staring at the Court. The complainant is his declared a vulnerable witness and her evidence to be taken by her relatives who witnessed her incident".*

9. Although the complainant was not called as she was found to be unable to talk and walk and therefore declared a vulnerable witnesses and her evidence taken as that of the relatives, it was not fatal to the prosecution case. There is no requirement that the complainant must testify in the trial for crime against her.

10. To be sure the evidence of Pw1, Pw2, Pw3 and Pw4 was not as surmised by the trial court that of the complainant as that would make them intermediaries within the meaning of section 31 (6) of the Sexual Offences Act. The complainant did not testify. It was the evidence of witnesses of the defilement and surrounding circumstances of PW1, Pw2, Pw3 and Pw4 that was taken. Not the evidence of the complainant who would have required an intermediary. However, nothing turns on this misdirection because a fact may be proved by any one witness and not necessarily the complainant in criminal cases or the plaintiff in civil cases.

11. The appellant gave unsworn statement in defence as follows:

> *"My name is Haron Kiprotich. I am a resident of Kabasis. I a casual worker*
>
> *The charges are not true.*
>
> ***On the date of incident I was in Nakuru.***
>
> *I was sick and I went and I met the person I was working for and I asked for permission as I had syphilis.*
>
> *I had informed my children that I was going home to pay money to my brother who was at MTC Nairobi and money for preparing land.*
>
> ***I left Nakuru in the morning and I reached Kabasis at 4 pm.***
>
> *I had gone into one hotel where I ate and I went home. I had gone to one pharmacy and as I was about to reach there, two boys had summoned me and I stopped.*
>
> ***One boy stated I was the one and the other stated that I was not the one.***
>
> ***The boys had beaten me and they took Kshs.10,000/= and mobile phone.***
>
> *They left me with Nokia phone and Kshs.100/=. I had screamed for help and I was rescued.*
>
> *I had gone with the boys to the chiefs office and the boys had remained behind as I was pushed to the chief's office and I was put in the cells and I stayed for 20 minutes and GK Motor Vehicle had come and I was arrested and brought to the police station.*
>
> *The Kshs.10,000/= was for my brother's fare and preparation of land and personal use.*
>
> *That is all that happened that day."*

Analysis of evidence

12. In arriving at a decision of the facts, the Court has weighed the evidence of the prosecution witnesses against the defence unsworn statement which even though it is technically not evidence (see ***May v. R*** (1981) KLR 129 may raise a doubt as to the evidence led by the prosecution, (per Law JA., Miller and Potter, JJA. concurring) as follows:

> ***"An unsworn statement is not evidence as that expression is generally understood. It has not probative value but [it] should be taken into consideration in relation to the whole evidence."***

The appellant's statement was a mere alibi that he was on the date of incident at Nakuru, and had travelled home to Kabasis arriving at 4.00pmwhen on the way home he was confronted by two boys who after some disagreement between them as to his identification had taken him to the Chief's office from where he was arrested and taken to police station.

13. In evaluating the evidence the court is mindful of the counsel of the Court of Appeal in ***Ouma v. R*** 1986) KLR 619 to keep the accused's defence in mind when considering the evidence of the prosecution witnesses Pw1, Pw2, Pw3 and Pw4 that the appellant was arrested at the scene of crime after Pw1 came upon in complainant's home and found the complainant's pantie on the floor and the appellant put on his clothes, whereupon he ran off jumping through the window of the house and was arrested at the back of the house by Pw2 and Pw3 who responded to the screams for help by Pw1.

14. Why would the 3 witnesses conspire Pw1, Pw2 and Pw3 lie against the appellant or were the witnesses mistaken as to the identity of the person they had arrested? Did they lose custody of the person they had arrested and were the circumstances in which the purported identification such as to brook mistaken identity?

15. The answers to the above questions hold key as to whether the offence of rape is proved against the appellant, if medical evidence established sexual intercourse.

16. The appellant alleges mistaken identity because the charge remained in the name of Harun Kiprotich as shown on the charge sheet while his name was according to his identity card Wilbert Haron Rotich and the prosecutor had indicated that he wished to amend the charge to reflect the names of the accused as appearing on the ID card. However, as pointed by the DPP, the appellant does not contest that he is the one who went through the trial in the lower Court against and whom the witnesses testified and identified as the persons they arrested at the scene of crime.

17. On the question of amendment of charge sheet, an application by the prosecutor that *"I wish to amend the charges to have the true names of the accused reflected as they are on the identity card"* was granted, the Court minute reading:

> *"**Court***
>
> *Application is allowed".*

18. What this means is the charge was amended to read the names of the accused as appearing in his ID card. If no fresh charge sheet form was prepared, as it should have been, it does not affect the validity of the charge amended to read the full names of the appellant and no prejudice is shown within the meaning of section 382 of the Criminal Procedure Code as the appellant is the very person who pleaded afresh upon the Court allowing the amendment of the charge sheet to reflect the true names of the accused as on the identity card and upon fresh plea, the prosecutor, with no objection of the appellant, moved the court as follows:

> ***"Prosecutor:** I wish to adopt the evidence tendered and the matter to proceed from where it had reached.*
>
> ***Accused:** no objection.*
>
> ***Court***
>
> *Pw4 to proceed with his evidence".*

19. However, this court has perused the trial court file and established that there is a charged sheet dated 2/6/2017 with the names of the accused as **WILBERT HARUN ROTICH** but with the same particulars of the offence and it must be the charge to which the appellant said he was required to plead afresh as shown in the Record of proceedings. It may be that the court officials who prepared the Record of Proceedings neglected to include the Amended Charge Sheet in the Record, but it does exist, and, as noted by the DPP, the appellant in giving his unsworn statement gave his name as **Haron Rotich.**

20. There was, therefore, no defect in the charge sheet as submitted by the applicant.

21. On the question of recall of witnesses, the record of the trial court of 6/4/2017 indicates that although the court had granted the prayer for recall for cross-examination of the witnesses, the appellant had upon the plea on the fresh charge with his names corrected as set out in the national Identity card agreed to the application by the prosecutor that the court "***to adopt the evidence tendered and the matter to proceed from where it had reached"*** when he said he had "***no objection"*** whereupon the court then called "***PW4 to proceed with his evidence"*** as set out above.

Identification

22. The appellant's allegation of two boys who had taken him to the chief's office and who had disagreed as to whether *"he was the one and the other stated that I was the one",* was not put to test by cross-examination. It is not evidence. It is an unsworn statement made by the accused, untested by cross-examination and it does not support his allegation of mistaken identity. The appellant is using his unsworn statement to support his own allegation of alleged mistaken identity! The low value of unsworn statements by the accused is settled since ***May v. R***, supra. There is no merit in the objection and the same is rejected.

23. Pw1 said *"the accused is my neighbour".* Pw2 said *"the accused is known to me as he is my cousin"* and Pw3 that *"the accused is my village mate"*. In supplementary written submissions the appellant sought to challenge the evidence as to the witnesses stated knowledge of

the appellant as a ***neighbor, cousin*** and ***village mate.*** The appellant did not at the trial challenge the evidence led by the prosecution as regards his identification and having been recognized by PW1, Pw2 and Pw3. In cross-examination of Pw2 who had testified that he is his cousin the appellant is recorded as having said *"I do not know this man.* ***He stays three kilometres away from my home.*** *I have no question"*. The appellant did not also have a question for Pw1 the person who found him red-handed, he only said when it was his chance to cross-examine the witness, *"I do not know this witness. That's all"*. As regards Pw3 who testified that he was a village mate of the appellant, he at cross-examination said:

> *"I do not know the witness who is before the Court.* ***I have no question"****.*

24. There is nothing from the defence to contradict the consistent testimony as to the identification of the appellant by recognition by the three eye-witnesses Pw1, Pw2 and Pw3 despite opportunity at cross-examination to do so. The accused has a constitutional right under Article 50 (2) (k) of the Constitution *"to adduce and challenge evidence"*. The appellant in exercise of his fair trial right chose not cross-examination and challenge the testimony of the witnesses that they had arrested him at the scene of crime.

25. The witnesses Pw1, Pw2 and Pw3 who arrested the appellant at the scene of crime did not part with the custody of the appellant until they delivered him to chief's office.

> Pw1 said:
>
> ***"We had managed to arrest the accused behind the house and we took him to Kabasis chief's office".***
>
> Pw2 said:
>
> *"****We had taken the accused to Kabasis Chief's Office*** *and the accused had condoms in his pocket.* ***The accused was then arrested".***
>
> Pw3 said:
>
> *"I had met Mike [Michael Pw2] also at the area and we arrested the accused within the compound. Kabon (Pw1) stated that the accused had raped MS.* ***We took the accused to Kabasis Chief's Office…….***
>
> *We had left the Chief's Office and* ***the chief had summoned to police who arrested the accused".***

26. As regards time of the offence, Pw1, Pw2 said it was 3.00pm while the charge sheet states 13:00hrs. However, the consistent testimony of Pw1, 2, and 3 as to the discovery and arrest of the appellant must make the time of 3.00pm the correct one. No prejudice is shown as the appellant's defence in his unsworn statement indicated that he was away from the area until 4.00pm and both 1300hrs and 3.00pm are well before 4.00pm.

27. Pw2 and Pw3 corroborated each other's evidence as to identification of the appellant, as well as that of Pw1. Under section 143 of the Evidence Act, there is no requirement for a specific under for witnesses to prove a fact and the identification of a perpetrator of crime may be proved by evidence of even one witness and the only requirement is for caution convicting on such evidence of single identification witness without seeking corroboration. See ***Roria v R*** (1967) EA 583 (CA) that in that case *"while it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it not safe to do so."*

Evidence of penetration

28. Pw4 produced treatment notes and medical examination P3 on the examination of the complainant which found *"tenderness on the vaginal opening and obvious redness around the perineum"* with conclusion that *"sexual penetration evident"*.

29. The treatment notes indicated the history and physical examination of the Complainant that "*patient brought with* ***history of having been found by a neighbor/ caretaker while been raped by someone well known to the caretaker. Condoms were found on site and patient unable to communicate".***

30. It was clear from the treatment notes that the complainant had been seen at the Kabarnet District Hospital and given no. OP01191/16 on the 12/1/2017 the date of the alleged sexual attack before her Medical Examination Form P3 dated 13/1/2017 was filled on 13/1/2017, all which is consistent with the evidence of eyewitnesses Pw1 and Pw3; the Clinical Officer (PW4); and the Investigating Officer PW5.

31. Pw5, the investigating officer produced exhibit of recovered condoms as exhibit no. 3.

Conclusion

32. Having considered the evidence before the trial Court as a whole as required of evidential evaluation as held in ***Okethi Okale v. R*** (1965) EA 555 and ***Achieng v. R*** (1981) KLR 174, this Court finds that the sexual intercourse on the complainant was proved by the medical evidence of Clinical Officer Benjamin Kandagor of Kaptimbor Dispensary Pw4. From the state observed by the trial Court, and, which this Court must defer to in accordance with ***Okeno v. R*** (1972) EA 32 not having seen the complainant, she could not have given her consent, and the accused did not raise a defence of consent. The Court finds that the sexual intercourse was without consent. The appellant was identified

by Pw1, Pw2 and Pw3 who knew the appellant as their ***neighbor, relative*** and ***village mate,*** respectively, when he was caught red-handed at the scene of crime, and escorted without loss of custodial possession to the chief's Office and subsequently to the police station as testified by the Investigation Officer, Pw5.

33. The ***Bukenya and Others v. Uganda*** (1972) EA 549 on the presumption of adverse evidence in failure to call or lead certain evidence is only applicable where the evidence is scanty as follows:

> "*where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."*

34. In this case the evidence of the appellant's involvement in the matter was overwhelming by reason of his physical arrest at the back of the complainant's house and escort to the police station through the chief office leading to the charge before the court. The chief to whom the appellant was escorted upon arrest and his Administrative Police officer were redundant witnesses with the evidence of the citizens (Pw1, 2, & 3) who effected the initial arrest and the Investigating Officer (PW5) who confirmed that *"the accused had tried to escape through the window and as he ran away he was arrested and he was taken to the AP post and later he was brought to the station."*

35. No evidence or circumstances or defence statement could raise a reasonable doubt to the appellant's commission of the offence as established by the consistent evidence of the prosecution witnesses. There was no evidence of any grudge or other circumstances that puts doubt to the commission of the offence by the appellant and his alibi does not answer his physical arrest at the scene of crime.

36. I find that the prosecution had proved the charge of rape contrary to section 3 (1) (a) (b) of the Sexual Offences Act against the appellant.

Sentence

37. The commission of the offence of rape against a vulnerable 60-year old grandmother who is not able to talk or walk is revulsive against the good sense of the Court and if it was trying the case may have considered probably a higher sentence than that imposed by the trial Court, but that is no reason (see ***Omuse v. R*** (2009) KLR 214 CA) to interfere with the sentence by an appellate court.

38. On the principle of appellate interference with the trial Court's discretion in sentencing under ***Wanjema v. R (1971)*** EA 493, I do not find that the trial Court erred in the sentence of 10 years imposed for the offence.

Obiter

39. As I said in KBT HCCRA 51 of 2018, ***Moses Musa Cheptumo v. R,*** I do not consider that the principle of unconstitutionality of ***mandatory*** sentence with regard to the death sentence in the the Supreme Court decision in ***Muruatetu v. R*** (2017) eKLR applies ***minimum*** sentences which sets a lower limit of sanction that gives effect to the revulsion of the community to the crime but leaves unfettered discretion on the length of sentence over and above the minimum.

40. The Court may in the future, or the higher Courts may authoritatively determine the applicability of the principle of unconstitutionality to ***minimum*** sentences as contra-distinguished from ***mandatory*** sentences.

Orders

41. For now, and for the reasons set out above, I find no ground for interfering with the finding of the trial Court in the conviction and or sentence for the offence of rape contrary to section 3 (1) (a) (b) and (3) of the Sexual Offences Act, and the appeal is pursuant to section 354 (3) of the Criminal Procedure Code dismissed.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF NOVEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.