REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NOS. 58 OF 2017 AND 38 OF 2019

(From Original Conviction and Sentence in SO Case No. 105 of 2016

of Chief Magistrate's Court at Kakamega)

EVANS NAMUNYU.....1ST APPELLANT

NICKSON MUKHATIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellants were convicted by Hon. B. Ochieng, Chief Magistrate, of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006, and were accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge were that on 20th September 2016 at [*Particulars withheld*] Shibuye Location in Kakamega East District within Kakamega County, they, in association and with a common intention, unlawfully caused their penises to penetrate the vagina of MA without her consent. They had also faced alternative charges of committing indecent acts with an adult contrary to Section 11 (A) of the Sexual Offences Act, No. 3 of 2006. The particulars of the alternative charges were that on the same date and at the same place stated in the main count, they had intentionally caused their penises to touch the vagina of MA without her consent.

2. They pleaded not guilty to the charges before the trial court, and the primary court conducted a trial. The prosecution called four (4) witnesses. The complainant testified as PW1. She explained how the appellants burst into her room at night and forced her to have sex with them. PW2 was the mother-in-law of the PW1 to whom a report of the assault was immediately made, and who took PW1 to hospital at daybreak. Medical evidence was presented. No injuries were noted but there were traces of spermatozoa in her vagina. PW4 was the police officer who the investigated the matter, he visited the scene and did the arrests. The court found that the appellants had a case to answer and put them on their defence. They gave unsworn statements, where they denied committing the offence. The first appellant called his wife as a witness, her evidence centred on his arrest but not on his whereabouts on the day and time the offence was allegedly committed. After reviewing the evidence, the trial convicted both appellants of the main charges of gang rape contrary to section 10 of the Sexual Offences Act, and sentenced them to fifteen (15) years imprisonment as earlier indicated.

3. The appellants being dissatisfied with the convictions and sentences appealed to this court and raised several grounds of appeal. The first appellant averred that the trial court convicted on the basis of fabricated farfetched discredited and malicious evidence, that the charge sheet was defective that, no exhibits were produced to support the case, that he was not medically examined to confirm whether he committed the offence, that he was convicted on the basis of rumours and hearsay, that the doctor who prepared the P3 Form did not attend court for cross-examination, that the medical report produced exonerated him, that the report and statement made to the police by the complainant did not tally with her evidence in court and that his *alibi* evidence was rejected. The second appellant on his part raised grounds around the defectiveness of the charge, violation of his constitutional rights to a fair trial, the case not proved beyond reasonable doubt due to glaring contradictory evidence, the evidence being fabricated malicious uncorroborated and suspicious, there was no medical or forensic evidence to link him to the crime, burden of proof being shifted to him, and the conviction was against the weight of the evidence.

4. Being a first appeal, I have re-evaluated all the evidence on record and drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

> "*An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

5. The appeal was canvassed on 31st October, 2019. The appellants relied on written submissions that they had placed before me, whilst Ms. Omondi, Prosecution Counsel, stated that she relied on the record of the trial court. In his written submissions, the first appellant urged several matters. He submitted on the defectiveness of the charge, the unfairness of the trial, the doubtfulness of the identification, lack of medical evidence to link him to the crime, inconsistencies and contradictions and the shifting of the burden of proof to him. On his part, the second appellant submitted that the evidence was discredited fabricated and unreliable, the charge sheet did not indicate his name, there was no independent evidence to link him to the offence, the case was shoddily investigated, there was misapplication of facts to the law, his *alibi* defence was adequate and that the case was not proved beyond reasonable doubt.

6. On defectiveness of the charge, the submissions by the first appellant are not clear, but from those by the second appellant I understand them to be arguing that the charge as drawn did not adequately state the charge as against the two of them. I have gone through the record. Initially the two appellants faced a joint count on gang rape with two alternative counts of indecent acts with an adult. The charges were subsequently substituted, so that both appellants each faced a separate count of gang rape, with the alternatives of indecent acts with an adult. I have carefully scrutinized the charge sheet, I find nothing in there which suggests that the charges were defective. The two face separate counts of gang rape where it is alleged that they acted in association and with common intention. The separateness of the counts suggests that the sexual assaults occurred in turns. There is, therefore, no merit on this ground.

7. The other ground raised by both appellants is that the evidence tendered was fabricated discredited malicious farfetched suspicious uncorroborated and doubtful. They also argued that the same was inconsistent and contradictory. With regard to the suspiciousness or doubtfulness of the evidence the appellants appear to be pointing at the question of PW1 having been a single witness and the inadequacy of the light for identification purposes. PW1 was the victim of the sexual assault. Sexual assault, and sexual intercourse generally, happens in privacy or secrecy or away from the eyes of the public. It cannot, therefore, be the case that witnesses be expected to support the account of the complainant. That is why corroboration is required. PW1 was the single witness of the assault because she was the only one available when it happened. There was corroboration. She texted her husband, who in turn called PW2, who then went to where PW1 was and eventually took her to hospital. PW3 provided medical evidence, presence of spermatozoa was detected in her vagina, which was indicative of recent sexual activity. Her testimony was fairly straightforward and was not shaken on cross-examination. On identification, PW1 testified that her attackers had a spotlight, whose light they flashed around before they assaulted her and even as the assault was in progress. The two attackers sexually assaulted her for thirty minutes, and in the process their faces, no doubt, were literally on her face. She said that she knew them and had even met one of them earlier during daytime.

8. On the contradictions and inconsistencies, the appellant pointed at the time indicated by PW1 of the assault. I have looked at the record, PW1 and PW2 both talked about 4.40 AM as the time the events unfolded. They did not have to be exact as these were chance events and probably none of them even had the presence of mind to look at their clocks or watches. Whether the weapon they had was a slasher or *panga* is also neither here nor there, the two belong to the same class or genus of farm implements

9. The first appellant submitted that no exhibits were produced to support the prosecution's case. I am not sure what the appellant had in mind here, for PW3 produced medical records. I am not clear the sort of exhibits that the first appellant expected the prosecution to submit. Needless to say that it is trite law that sexual offences need not be proved by medical evidence, the testimony of the victim is usually adequate so long as the trial court finds it cogent and reliable. That should answer the ground raised by the appellants that they were not subjected to forensic tests to connect them to the offence. Section 36 of the Sexual Offences Act does make provision for such forensics, but the power given to the court under that provision is discretionary, the provision is not in mandatory terms. The court can order for that only where, in its absolute discretion, it finds it necessary.

10. It was submitted that the doctor who had prepared the medical report that was put in evidence by PW3 was not called to testify and, therefore, the appellants did not have a chance to cross-examine him. The trial record indicates that both appellants had no objection to the said medical report being produced by PW3. If they had intended to cross-examine the maker of that document then they ought to have objected to its production. They also argued that the medical report exonerated them. Firstly, the medical report was not of an examination on them, so in that respect it could not possibly have exonerated them. Secondly, according to the report, the doctor found spermatozoa in the vagina of PW1, which was corroboration to her testimony that some persons had caused their penises to penetrate it earlier that day.

11. There was submission that the report and statement of the complainant to the police did not tally with the testimony she gave in court. I have compared the testimonies of PW1 and PW4 and noted consistency in them. There is nothing in them suggesting that the report PW1 made to PW4 was not consistent with what she told the court. Again, from the record, there is no narration of what was in the report and the statement of PW1. The police occurrence book, the investigation diary and PW1's statement were not produced as exhibits, I have had no access to them and therefore, I have no basis of assessing whether what was reported to the police by PW1 and what was in her statement, recorded by the police, differed from what she testified in court.

12. Both appellants submitted that their *alibi* defences was not considered. I have looked at the testimony of the first appellant and that of his witness, DW3, his wife, both of them did not say where the first appellant was on 20th September 2016 between 4.00 AM and 4.40 AM when PW1 was allegedly sexually assaulted. The second appellant too did not testify on where he was in the morning of 20th September 2016 when PW1 alleged he had sexually assaulted her. He only talked about the events of the night of 21st September 2016 when he was arrested. It cannot, therefore, be said that there were any *alibi* defences to be taken into account by the trial court.

13. The second appellant submitted that the trial court convicted him on the basis of a case that was shoddily investigated. In criminal cases, a trial court is not to be concerned with the manner or standard of investigations into a case. The primary duty of the trial court should to consider the evidence tendered, for it is from that evidence that it should seek to establish whether there was adequate proof of commission or omission of the offence charged. Therefore, whether the investigations into the alleged crime were properly or shoddily done was an irrelevant consideration that the trial court was not expected to take.

14. The final ground related to failure to be supplied with the prosecution's evidence. The record reflects that on 6th October 2016 and 9th November 2016, before the oral hearing commenced, both appellants had asked to be supplied with witness statements, and the court granted their prayers. The record is, however, silent on whether or not the statements were eventually supplied. There is nothing on record to indicate whether or not the appellants raised the issue again. However, looking at their petitions of appeal, I note that there is a ground where they argue that the report PW1 made to the police and the statement the police recorded from her did not tally with her testimony in court. To me that is adequate to show that they were supplied with the persecution's evidence.

15. Overall, I am not persuaded that the trial court fell into any error in convicting the appellants. There was sufficient evidence upon which it could convict for gang rape. The assailants were two, they raped PW1 in turns, and they had carnal knowledge of her against her will after they threatened to harm her with the arms that they bore. There was penetration of her sexual organs for there was medical evidence to support the same. I am too persuaded that the conviction was not vitiated by violation of fair trial rights as no such violations were proved.

16. Finally is the question of sentence. The penalty prescribed is imprisonment for a term of not less than fifteen years. It is a mandatory sentence. In view of the recent developments on the law relating to minimum and mandatory sentences I need to consider whether I should intervene in this case. Both appellants pleaded leniency on grounds that they had families to take care of. The trial court gave them the minimum available. This is a case where two able-bodied and armed men attacked a defenceless woman in the dead of the night and sexually molested her after issuing threats to harm her. It would appear that they were intent of committing other offences. I believe that the circumstances were grave enough to warrant the sentence that the trial court awarded

17. Having considered all the issues raised in the appeal, I am of the considered view that the convictions of the appellants in Kakamega CMCCRC No. 102 of 2016 were safe. I shall accordingly confirm the said convictions and uphold the sentences imposed. The appeal herein is hereby dismissed. The appellants have a right to challenge this judgement at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE