REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 76 OF 2019

FRANCIS MASILA MUNENE...APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an appeal from the judgment of Hon. C.A Mayamba (PM)

in Kilungu Principal Magistrate's Court Criminal Case No. 25 of 2019

delivered on 2nd May, 2019.)

JUDGMENT

1. **Francis Masila Munene** the Appellant herein was charged with the offence of rape contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 23rd day of March 2019 at Sultan Hamud township in Mukaa sub-county within Makueni county intentionally and unlawfully caused his penis to penetrate the vagina of **M.N.K** by use of force.

2. He faced an alternative count of committing and indecent act with an adult contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 23rd day of March, 2019 at Sultan Hamud in Mukaa sub-county within Makueni county, intentionally touched the vagina of **M.N.K** and adult using his penis against her will.

3. The case was heard with the prosecution presenting three (3) witnesses while the Appellant made an unsworn statement of defence without calling any witness. After the full hearing the learned trial Magistrate found the Appellant guilty, convicted him and sentenced him to ten (10) years imprisonment.

4. Being aggrieved the Appellant filed this appeal against both conviction and sentence on the following grounds:

a) **That,** the subordinate court erred him in law and fact s when he based his conviction and sentence by relying on a defective charge sheet.

b) **That,** the subordinate court erred him in law and facts when he conducted a defect in trial and pronounced by sentence.

c) **That,** the subordinate court erred him in law and facts when conducted an unfair trial in breach of section 50(2)(c) of the Kenya constitution.

d) **That,** the subordinate court erred him in law and facts when he failed to note that, the prosecution did not prove its case beyond reasonable doubt.

e) **That,** the subordinate court erred him in laws and facts when he shifted the onus of proof to the defence, the burden bestowed to the shoulders of the prosecution and failed to note that the medical officer's evidence had exonerated him from the crime perpetration.

f) **That,** the subordinate court erred him in law and facts when he drew and applied the doctrine of his guilty without observing that the same wasn't affirmatively proved.

5. A summary of the case before the trial court is that the complainant (Pw1) and the Appellant worked for the same employer, (Pw2). Pw1

was her house help, while the Appellant who rides a boda boda used to run errands for Pw3.

6. On 23rd March, 2019 7:30 am Pw2 called the Appellant and sent him to collect a tent for her. At 8:00 am, Pw1 who had gone out to empty ash from the jiko saw the Appellant passing by. She was bending downwards, and she thought he was heading to the farm.

7. The Appellant took her behind the water tank, made her lie on the ground, removed her clothes plus inner wear and raped her. She tried to scream but he covered her mouth. He thereafter, he went for the tent. After the incident, she called Pw2 but she did not receive her call. She then called Pw2's mother who relayed the information to Pw2's father.

8. Pw2's father took her to Sultan Hamud police station on a boda boda and a report was made. She was escorted to the hospital where she was treated. She was able to identify her treatment notes, P3 form and PRC form (EXB1-3)

9. **Pw2 Lydia Wavinya Musyoka** confirmed having sent the Appellant to her home. **Pw3 James Nyale** is the clinical officer who examined Pw1 after her treatment. He confirmed that Pw1 had been raped and she was aged 20 years. He produced EXB1-3.

10. The Appellant in his unsworn evidence stated that he is a boda boda rider and he went to work on that day. He was called by Pw2 who sent him to go and pick a tent from her house. After collecting it he went back to the stage. He was later arrested by police officers from Sultan Hamud.

11. In his written submissions he states that the charge sheet was defective, because Pw1's age was never stated. He further argues that there was no interpreter in court during plea taking. He reckons that he did not understand the language used in court.

12. He contends that he had no time to prepare for his trial since the trial took place within 29 days of plea taking. This to him was not a fair trial.

13. He argues that the prosecution witnesses were coached and crucial witnesses like the arresting officer were never called to testify. The Appellant finally submits that the evidence adduced was not sufficient to found a conviction.

14. Mrs. Owenga counsel for the Respondent opposed the appeal on the ground that the evidence adduced was sufficient and was not challenged through cross examination. She contends that Pw1 well maintained her evidence on the act and the identification of the Appellant.

15. Counsel submitted how Pw1 immediately reported the incident to the employer and employer's mother. That the medical report confirmed pw1's evidence. She opposed any interference with the sentence which was arrived at after everything was taken into account.

Analysis and determination

16. This is a first appeal and this court has a duty to re-evaluate and consider the evidence afresh and arrive at its own conclusion. The court must also bear in mind that it did not have the advantage of hearing and/or seeing the witnesses and should give an allowance for that. See **Okeno –vs- R 1972 E.A 32, Simiyu & Anor –vs- R (2005) 1KLR 192.**

17. I have accordingly considered the evidence on record, grounds of appeal and submissions and I find the following to be the issues falling for determination:

i. Whether the Appellant's trial was fair and in line with the provisions of the constitution.

ii. Whether there was penetration of the complainant's female organ by a male organ.

iii. *Whether the Appellant was identified as the perpetrator*.

Issue no. (i) Whether the Appellant's trial was fair and in line with the provisions of the constitution.

18. The Appellant claims that the court used a language unknown to him and there was no interpretation. Secondly, that the charge sheet was defective. A look at the court record confirms that at every sitting there was a court assistant who is a court clerk. The work of the court assistant is to do interpretation even if the word interpreter/interpretation is not shown.

19. The record also shows that Pw1-Pw3 gave their evidence in Kiswahili language and they were cross examined by the Appellant. He did not express any difficulty in understanding the language. The court assistant throughout the full hearing on 29th April 2019 was Lydiah. I therefore find no merit in this ground.

20. On the charge sheet his complaint is that the complainant's age is not stated. There is no provision for the age of the complainant to be stated in the charge sheet in a case of rape. The basis of the charge of rape is that the complainant is an adult i.e 18 years and above. There is nothing to show that Pw1 was below the age of 18years. That claim also fails.

21. The only defect I have noted is on the arrangement of the provisions. The charge should have read; as follows:

"Rape contrary to section 3(1) (a) and (b) as read with section 3(3) of the Sexual Offences Act"

This separates the provision forming the offence and that forming the penalty.

22. I find this to be a curable defect under section 382 Criminal Procedure Code which provides:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

In support of this finding, I rely on the case of **Fappyton Mutuku Ngui –vs- R (2014) eKLR.**

Issue no. (ii) Whether there was penetration of the complainant's female organ by a male organ.

23. Pw1 well explained her experience, and she was treated at Sultan Hamud district hospital. Pw3 a clinical officer stated the findings as per EXB1-3 from the said hospital. It is true that a clinical officer is not a medical officer, but these are the officers who examine and treat the patients even when the doctors are there. There is therefore nothing stopping them from presenting to court their findings in such cases, as they have studied clinical medicine. I therefore find the Appellant's dismissal of Pw3's examination to be without any basis.

24. Pw3 made the following findings on M.N (Pw1)

- Broken hymen

- No tear/bruises

- Whitish vaginal discharge

- Urinary tract infection

- Presence of spermatozoa. 0 to 3 per field I find that Pw1 was sexually penetrated.

Issue no. (iii) Whether the Appellant was identified as the perpetrator.

25. The time of incident was 8:00 am which was broad daylight. The rapist was not a stranger to Pw1 as he used to run errands for her employer (Pw2). Pw2 also confirmed having sent the Appellant to her house that morning. Apparently Pw2 was not at her house at that time.

26. The Appellant submits that witnesses were coached to come and lie, but he has not given any such instance. He also says crucial witnesses like the investigating officer and arresting officer were not called. The Appellant does not deny having been arrested. Secondly the investigating officer did not carry out any special investigation which would have required him to personally come and testify. All he compiled is what Pw1 – Pw3 stated. Even if he came he could have just repeated the evidence of Pw1 – Pw3.

27. On preparedness of his case, the record shows that the matter first came for hearing on 17/04/2019 when the Appellant was not ready. It was then fixed for hearing on 23/04/2019. On the said date the record shows that both the prosecution and Appellant were ready and the case proceeded with two witnesses being heard. On 29th April 2019 both parties were ready. Even after the court ruled that the Appellant had a case to answer he said he was ready with his defence. There was no force applied on him. I therefore find no merit in this complaint.

28. An evaluation of the evidence shows that M.N (Pw1) was raped. She promptly reported the matter to her employer's mother when she missed her employer. The employer's mother notified her husband who rushed Pw1 to Sultan Hamud police station where a report was made and she was taken to hospital the same day. The medical evidence confirms Pw1's complaint.

29. Pw2 confirmed to the court that she indeed sent the Appellant to her house that morning. Pw1 was Pw2's househelp in that house. I am satisfied that the Appellant was properly convicted for the offence of rape.

30. Coming to sentence section 3(3) of the Sexual Offences Act provides:

> ***"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 sentence of ten (10) years meted out to the Appellant is a mandatory minimum sentence. Following the Supreme Court decision in **Francis Karioko Muruatetu and Another –vs-Republic (2017) eKLR** the trial court now exercise discretion even where a mandatory minimum sentence is given depending on the circumstances prevailing.

31. From the record and the mitigation given, I note that the Appellant was a first offender. He told the court that he had been involved in an accident and was injured. He is married with a child, which is the more reason why he should have restrained from doing what he did.

32. Though I find the Appellant to be down playing the seriousness of the offence I will reduce the sentence for him.

33. The upshot is that the appeal partially succeeds and I make the following orders:

i. Conviction is upheld.

ii. Sentence of ten (10) years is set aside and substituted with one of seven (7) years from date of conviction.

Orders accordingly.

Delivered, signed & dated this 17th day of December 2019, in open court at Makueni.

H. I. Ong'udi

Judge