REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.9 OF 2017

ROBERT SIGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the judgment in CM Cr. No. 64 of 2015

(Hon. J. R. Ndururi (PM) dated 27th January 2017)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3 (1) (a) and (b) and section 3 (3) of the Sexual Offences Act. The particulars of the offence are that on the 25th day of December 2015, at around 1900 hours at [particulars withheld] in Kericho East District, Kericho County, within Rift Valley region, he intentionally and unlawfully caused his penis to penetrate the vagina of M K without her consent. He was tried and found guilty by the court (Hon. Ndururi, PM), and was convicted and sentenced to serve ten (10) years imprisonment.

2. Dissatisfied with both his conviction and sentence, he filed the present appeal in which he raises the following grounds:

> ***1. That the learned trial magistrate erred in law and in fact in convicting the appellant whereas the evidence on record were not conclusive and does not support the charge of rape.***
>
> ***2. That the learned trial magistrate erred in law and in fact in convicting the accused person based on uncorroborated evidence of PW2 who was not an eye witness.***
>
> ***3. That the learned trial magistrate erred in law and in fact in reaching his own conclusion without appreciating the evidence of PW5 and deviating from the same.***
>
> ***4. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant without taking into consideration of the mitigation by the appellant.***
>
> ***5. The learned judge erred in law and holding that the charge against the appellant had been proved beyond reasonable doubt whereas the evidence was to the contrary.***
>
> ***6. That the learned trial magistrate erred in law and in fact by convicting and sentencing the***

appellant which sentence was harsh, unlawful, unsafe and excessive to the circumstances hence both be set aside.

3. As the first appellant court, I am under a duty to re-evaluate the evidence before the trial court and reach my own conclusion, bearing in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing – **see Okeno vs R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others vs Republic, Criminal Appeal No. 223 of 2002**.

4. The evidence of the complainant (PW1), M K, was that she had attended a wedding on 25th December 2015 at Kapsoit. She then looked for a boda boda (motor cycle) to take her home. She saw the appellant riding as a pillion passenger on a motor cycle, and he invited her to ride with him, which she did. The time was about 6.30 p.m.

5. The appellant alighted before her, about 2 km from her home. She alighted from the motor cycle and started walking home. The appellant came running from behind her, and when she tried to scream, he held her throat and threatened to strangle her to death. He tore away the t-shirt and vest she was wearing, removed her skirt and bikers, removed his own trousers and raped her. He then picked up his trousers and ran away.

6. The complainant then got up and also tried to ran, wearing only a petticoat. She ran into PW2, W K, whom she told what had happened. When she got home, she was beaten by her husband for arriving home in her state, and she did not tell him what had happened then. She told him the next morning, and went with him to the scene and picked up her clothes which she had left at the scene. She identified her vest (which the court noted was extensively torn and muddy), and her bikers. The incident was reported at Kapsoit Police Post and PW1 was examined at Kericho District Hospital.

7. The evidence of PW2, W K, was that he was going home around 7.00-8.00 p.m though a short cut in [particulars withheld], listening to music on his phone. It was drizzling. The appellant, whom PW2 recognized, came running towards him. He was holding his trousers with his hands. PW2 called the appellant by name, "Robert", and asked him what was happening but the appellant ran to his home.

8. PW2 continued on his way, and met the complainant, who appeared shaken, wearing only a petticoat and top. He asked her what had happened and she informed him that Robert had raped her. She was speaking with difficulty as if she had been strangled. She informed PW2 that Robert had caught her from behind and raped her while strangling her. They went back to the scene where PW2 noted signs of a struggle and mud at the scene. The complainant's clothes were at the scene. PW2 identified the appellant, whom he knew well as he was a neighbour.

9. PW3, C K, was the complaint's husband. His evidence was that PW1 had arrived home on 25th December 2015 at around 8.00 p.m while half-naked. PW3 had reported the matter to village elders as PW1 had told him that she had been raped by the appellant. He had gone to the scene with his wife and village elders and they had found her clothes there, then had reported the matter to Kapsoit Police Post.

10. PW4 was No. 2346371 PC Jonathan Lekachuma, to whom the complainant and her husband had reported the rape incident. They had also brought to him the complainant's soiled clothes, which he produced as exhibits. He had issued the complainant with a P3 form and had also charged the appellant with the offence.

11. PW5, Joseph Koros, was a clinical officer based at Fort Ternan Hospital. He had examined the complainant at the Kericho District Hospital on 26th December 2015. He noted that her inner clothing were torn and soiled, and she had bruises on the alterior neck. He noted further that she had no bruises on the vulva region, but she was on her menses. A urinalysis could not be done as she was on her menses and would have shown a significant presence of red blood cells; and that the presence of pus cells with blood cells and cysts, which are present when there is an infection, cannot be sufficiently manifested if one is in her menses so as to form any meaningful conclusion. He concluded from his observations and the patient's history that she had been raped. He also noted that evidence of penetration could not be

deduced from the examination of the genitalia because of the presence of menses.

12. The accused was placed on his defence after the court ruled he had a case to answer. In his defence, the appellant denied committing the offence he was charged with. He stated that he was arrested on 29th December 2015 and told that he would be informed in court of the offence he was charged with.

13. In his grounds of appeal and in submissions made on his behalf by his Counsel, Mr. Kirui, the appellant raises five main issues. The first relates to the evidence adduced, which he argues was not conclusive and did not support the charge of rape. The second issue relates to the evidence of PW2, arguing that he was convicted on the uncorroborated evidence of PW2 who was not an eye witness. The appellant further raises an issue with regard to the evidence of PW5, which in his view the court deviated from. He is also aggrieved by the sentence meted out, which he terms harsh and excessive.

14. I believe that I am called upon to consider the evidence against the appellant, and whether that evidence was sufficient to support the charge of rape against him.

15. The evidence before the trial court, which I have set out above, shows that the appellant and the complainant rode home on the same motor cycle. The appellant was known to the complainant, as they were neighbours. The complainant recognised the appellant when he ran after her after she alighted from the motor cycle and started walking home. He held her throat and threatened to strangle her, and he tore her clothes off and raped her. PW2 met the appellant running, his trousers in his hand. He called him by name, Robert, but the appellant kept running. PW2 then met the complainant, running, agitated, half dressed, speaking with difficulty as though she had been strangled. There was no doubt about the identity of the appellant as the person who had attacked the complainant.

16. The medical evidence adduced by PW5 showed that the complainant had bruises on the alterior neck, which supported her evidence that the appellant had held her neck and threatened to strangle her. The medical evidence was further that the examination of the complainant for signs of penetration, and of her urine for pus cells for signs of infection could not be conclusive as the complainant was on her menses at the time of the alleged rape. Taken together, however, the evidence of the complainant, PW2, and of the clinical officer, PW5, was sufficient, in my view, to support the charge of rape against the appellant. I can therefore find no basis for interfering with the conclusion by the trial court that the appellant was guilty of the offence of rape.

17. The appellant has complained about the sentence meted out upon him, and that the trial court did not consider his mitigation. I have considered the record of the trial court and note that the court did consider the mitigation. However, section 3 of the **Sexual Offences Act** did not give the trial court the option of imposing a lesser sentence on the appellant. It provides as follows:

> ***(1) A person commits the offence termed rape if—***
>
> > ***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***
> >
> > ***(b) the other person does not consent to the penetration; or***
> >
> > ***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***
>
> ***(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.***
>
> ***(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life***. (Emphasis added)

18. The appellant was sentenced to the minimum term permissible under the section, and accordingly, I

find that his complaint with regard to the sentence meted out is without basis.

19. The upshot of my findings above is that the appeal has no merit, and it is therefore dismissed and both the conviction and sentence upheld.

Dated, Delivered and Signed at Kericho this 31st day of January 2018.

MUMBI NGUGI

JUDGE