REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 189 OF 2013

BERNARD KARIUKI MUTHONI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant Bernard Kariuki Muthoni was convicted of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve fifteen (15) years imprisonment. He was charged before the Principal Magistrate's court at Gichugu, Sexual offence Case No. 24 of 2012. The appellant was dissatisfied with the conviction and sentence and filed this appeal raising the following grounds:

1. That the learned trial Magistrate erred in both law and fact while convicting me on the purported visual identification by recognition allegations by PWI which the same remained to be doubtful and having being made under hectic prevailing circumstances.

2. That the learned trial magistrate erred in both law and fact while being impressed with my mode of arrest whilst the advanced evidence in support of the same remained to be totally doubtful and at a suspense.

3. That the learned trial Magistrate erred in both law and fact while convicting me on charges that weren't proved when the D.N.A results is duly noted.

4. That the learned trial Magistrate erred in law while convicting me without considering that I wasn't accorded a fair trial pursuant to article 25 (c) of the Constitution.

5. That the trial Magistrate erred in law while further rejecting my sworn defence by shifting burden of prove on my shoulders which this was a misdirection for her to had held so.

These were amended grounds and the appellant did not seek leave to amend the ground. The respondent has filed a response to the amended grounds. I will deem the grounds as properly filed as the state will not suffer any prejudice as they have filed a response to the amended grounds. This is a first appeal and in line with the holding in ***Okeno –vs- Republic (1972) E. A, 32*** this court has a duty to analyse the evidence, evaluate it and come up with its own independent finding but bearing in mind that unlike the trial magistrate, this court had no opportunity to see the witnesses and assess their demeanor and leave room for that.

The prosecution called nine witnesses. The facts of the case are that the complainant P W Nhad gone to visit her friend who sells in a bar called [particulars withheld]. It was on 15/12/12 at 9.00 Pm. Her friend was not there. As she was leaving the bar she met four people. The appellant who was among the four and who she had known as Sondo held her hand. When she told him to release her, the four lifted her up and when she screamed they covered her mouth with a lesso. They took her to [particulars withheld] where they laid her down, tore her biker and removed her pant. The men argued as to who would start raping her. The appellant raped her first followed by those other who raped her in turns. The men carried her and dumped her at the back side of [particulars withheld]. She slept there as she could not walk. In the morning some women and two men found her and she narrated what happened. They took her to the police station. Police took her to hospital where she was admitted for one month. The appellant who the complainant had recognized was arrested and charged with this offence.

The state opposed the appeal and submits that the nine witnesses who testified gave overwhelming evidence which resulted in the conviction and sentence. The state prays that the appeal be dismissed.

ANALYSIS OF THE EVIDENCE.

Having considered the evidence which was adduced before the trial Magistrate I am of the view that it was cogent and overwhelming. The

appellant was placed at the scene of the offence by the complainant who knew him before by the name Sodo. PW-I- testified that she was able to identify/recognize the appellant with the help of the light from the security light on the corridor of [particulars withheld] Bar where she met the appellant and had a brief interaction before the appellant carried her to the scene of crime. PW-1- testified that the appellant was the first one to rape her and she had ample time to recognize him. The PW-1- informed the people who found her the next morning that she had identified one of the rapists. This was confirmed by PW-2- Jerusha Wairimu Njoka who testified that the complainant told her she was raped by Sodo, the appellant. She also confirmed that the appellant is known by the name Sodo. The fact of rape was corroborated by the medical evidence adduced by doctor Karomo Ndirangu PW-5- who confirmed the complainant had bruises on the virginal walls. He concluded that the complainant had forceful penetration. The P3 form was produced as **exhibit 1(a).** I find that the evidence which was presented before the trial court was cogent and overwhelming and proved the charge against the appellant beyond any reasonable doubts.

I will now deal with the issues raised by the appellant in the grounds of appeal.

1. **Identification.**

According to the appellant, the complainant was drunk and could not recognize anybody or tell how many people raped her. That she had heard people mentioning Ciundu and so implicated the guessed name to be the rapist.

The complainant stated that she had gone to [particulars withheld]at 4.00Pm and left at 9.00 Pm and had drunk about 5 glasses of Keg. However, she was able to recognize the appellant who she referred to as Sondo whom she used to see selling breads in shops. She recognized him using the security bulb at the veranda outside the bar. She was also able to inform the people who found her the next morning that she had identified one of the rapist.

In Peter Kerera –vs- Republic (2014)KLR;

The court of Appeal in dismissing the appeal stated;

Recognition is more reliable than identification of a stranger. As this Court stated in case of *ANJOKONI –vs- R, KLR 1(1976-1980)* at 1566 to 1568 this is because:

"…… recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

Although the conviction was based on the evidence of a single witness, we are satisfied that both the trial court and the High Court properly directed themselves on the question of identification of the appellant. Both courts made concurrent findings of fact that the appellant was known to PWI for several years before the day of the attack.

The appellant was well known to the complainant. There was light from a bulb. The light from the bulb was sufficient to facilitate a positive identification. The source of light was given. The circumstances favoured a positive identification and recognition of the appellant. This also confirmed by the fact that all the witnesses who went to the scene testified that the complainant gave the name of appellant, that is Sodo as the one who raped her. This shows that there was no mistake. The appellant was recognized and placed at the scene of the crime. It is the appellant who led the police to the scene where the complainant's pant was recovered. I am of the opinion that the evidence proves beyond any reasonable doubts that the appellant was identified as one of the person who gang raped the complainant.

2. Complainant's evidence cannot be relied upon.

The appellant stated that the complainant lied to court about her age, how long she was admitted in hospital and payment made to the hospital therefore her testimony was not to be trusted.

According to the complainant she indicated her age as 23 years old but did not know her birth date. She also stated that she was admitted in hospital for 1 month because her father could not raise the hospital fees of Kshs 18,000/-.

PW5 indicated the estimated age of the complainant as 32 years old. He also noted that she had been admitted at ACG Mt. Kenya hospital for 4 days.

The discrepancy noted is on the days the complainant was admitted at the hospital. This is a minor discrepancy which does not negate the fact that the complainant was gang raped and she identified the appellant as one of the rapist.

In Erick Onyango Ondeng –vs- Republic (2014) Eklr;

The Court of Appeal held;

Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at *"about 7 Pm"* in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in *TWEHANGANE ALFRED –VS- UGANDA, Crim. App No. 139 of 2001, (2003) UGCA, 6* it is not very contradiction that warrants rejection of evidence. As the court put it:

"with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

The minor contractions pointed out by the appellant do not shake the evidence of the complainant. Such contradiction's must be ignored and the court to consider the relevant evidence in support of the charge.

3. <u>Medical Examination:</u>

The appellant also raised the issue that the DNA was done and nobody among the ones tested was implicated to have been involved in the rape. In addition, the Magistrate accepted medical report from private hospital and not a Government one whose results can be doctored.

PW5 confirmed that the complainant complained of pain on her upper limbs, there were bruises on vaginal walls and she had creamy vaginal discharge. That as per the summary report, she was being treated for gang rape therefore the appellant's evidence was therefore corroborated by the medical report.

In regard to PW9, the DNA tests did not connect the appellant with the complainant.

4. <u>Fair Trial:</u>

The appellant was arrested on 16/12/2012 and took his plea on 17/12/2012 therefore there was no delay.

In addition, he states that there was delay in finalizing the matter with no plausible reason given. However, looking at the records the DNA report took sometime to be availed and there were instance where the witnesses were not present since they were not bonded. All in all the delay was caused by unavoidable circumstances and reasons were duly given as to why the matter was being adjourned.

5. <u>Burden of proof:</u>

And it is trite that the burden of proof always lie with the prosecution to prove their case.

<u>Section 10 of the Sexual Offences Act No. 3 of 2006.</u>

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

<u>In Dominic Ochieng Odoyo & Another –vs- Republic (2015) eKLR:</u>

The appellant was convicted of gang rape and the court stated;

The key ingredients of the offence of Gang Rape include the following:

a. Proof of rape or defilement;

b. Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committee the offence.

Whether this case satisfies the ingredients of gang rape;

1. Proof of rape or defilement;

The medical documents confirmed that the complainant was raped.

2. Proof that the assailant was in association with another or other persons.

The appellant was in the company of other 4 people who raped the complainant.

Looking at the whole evidence adduced, the prosecution has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant together with 4 others raped the complainant in the manner described. Furthermore, the appellant was able to show PW7 the scene of the offence where there were struggles on the ground and he was able to recover the complainant's inner wear.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record and the appeal is without merits. I dismiss it.

Dated and delivered at Kerugoya this 13th day of April 2018

L. W. GITARI

JUDGE

13/4/18

Read out in open court,

Appellant – Present,

D. Sitati for the State,

C/A – Kinyua

L. W. GITARI

JUDGE

13/4/18.