REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HCCRA NO. 07 OF 2016

MIKE ONYANCHA MORARA...APPELLANT

=VRS=

REPUBLIC...RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. J. Were – Senior Resident Magistrate delivered on the 19th day of December 2014 in Nyamira CM CR No. 800 of 2014]

JUDGEMENT

The Appellant was charged, tried, found guilty, convicted and sentenced to fifteen years imprisonment for rape contrary to Section 3 (1) (a) as read with Section 3 of the Sexual Offences Act.

Being aggrieved he preferred he this appeal which initially was premised on 8 grounds. However on 30th May 2018 and just before his appeal was heard he sought and obtained leave of this Court to amend his petition. The appeal is therefore premised on the following amended grounds:-

"GROUND ONE

That my lord the trial learned magistrate faulted both in law and fact when erroneously based the conviction on the purported recognition yet the same was precarious and extremely unsafe given to the fact that the recognition was obtained at night in a fleeting spam and in folded manner in the darkness where the condition of identification or positive recognition was unfavourable for positive recognition free from error.

GROUND TWO

That my lord the trial magistrate faulted both in law and fact when malicious based the conviction on emotional and mistaken identity at night without circumspect given to the fact that there was nothing tangible was brought forth which firmly connected me to the crime in question there was no forensic finding or carried out to prove the allegation purported by the prosecution side in the court the whole allegation are questionable and inconclusive.

GROUND THREE

That my lord the trial learned magistrate faulted both in law and fact when miserable based the conviction on the incapacitated and loose and evidence demonstrated in court the purported phone spotlight was not produced in court as exhibit and the capacity of the alleged phone spotlight further to the investigation to prove before the court neighten the court visited the alleged scene to affirm the purported hole in the roof alleged by Pw1.

GROUND FOUR

That my lord the trial learned magistrate faulted both in and fact when seemingly over looked and then objected the comprehensive defence without cogent reasons yet the same was strong enough to cast considerable doubts to the strength of the prosecution case the defence was not given due consideration thus the burden of proof was shifted to the appellant yet the same & solely lies on the side of the prosecution side."

At the hearing of the appeal, the Appellant relied on written submissions annexed to the amended grounds. He also submitted orally as did Mr. Ochieng, the Principal Prosecution Counsel in conduct of the appeal.

I have considered the written and oral submissions alongside the evidence adduced at the trial and I am satisfied that the charge against the Appellant was proved beyond reasonable doubt. Whereas it is not lost to me that I did not have the benefit of seeing and hearing the witnesses give evidence, I am satisfied that the complainant told the truth. I am convinced beyond reasonable doubt that she positively identified the Appellant as the person who after breaking into her house and getting into her bedroom through the roof forced her to have sexual intercourse with him. She identified him with the flash light of her cell phone which she lit when she heard someone in the house. Obviously she wanted to see who it is that had got into her house so late in the night. She knew him prior to that so it was evidence of recognition. Indeed she disclosed his identity to the village elders who went to answer her distress call and there is evidence to that effect from those witnesses. The prosecution need not have called everybody who went to the complainant's house that night to prove the offence. The two witnesses who were called gave evidence that proved that the complainant was indeed attacked that night and that she gave the identity of her assailant to those who went to the scene that night.

Pw2 – Thomas Nyangwono told the Court that they indeed saw that a window had been broken. This corroborated the complainant's evidence that the attacker gained entry through the window and then entered her bedroom through the roof.

The evidence of Clinical Officer Pius Moseti Maangi (Pw5) that the complainant had injuries on her neck also corroborated her evidence that the Appellant strangled her during the rape and coerced her into the act. The law does not require corroboration in sexual offences and the fact of there being so much corroboration in this case convinced me that the complainant was telling the truth.

The assailant stayed with the complainant for more than two hours which can by no means be described as a fleeting **"spam"** as alleged by the Appellant. Although it was at night the complainant had seen the Appellant with the light of her phone when he entered the house and as they were just the two of them I am satisfied that he was the one who raped her. I am not convinced that this was a case of mistaken identity. This is because the complainant knew the Appellant before and as I have stated she saw him with the help of her phone's flashlight and recognized him. This is confirmed by the fact that she immediately mentioned his name when people came to her rescue. She did the same at the Police Station and it was not long before the Appellant was arrested. The Court need not have visited the scene to believe the complainant.

Pw2 testified that he saw the broken window hence corroborating the complainant's evidence that the assailant broke into her house and in my view that was sufficient.

The Trial Magistrate considered the Appellant's defence and I too have considered it and come to the conclusion that it was weak. The doctor confirmed there was penetration and that is what was material to the charge. It does not matter that there were no injuries in her genitalia. Nowhere in her evidence did the complainant state that the assailant left his trousers in her house and as for the submission that she opened for the assailant it was her evidence that she only opened for him to leave the house. This was after he had raped her. Going in he broke into the house though a window. There was therefore no contradiction in her testimony.

It is my finding that the evidence adduced by the prosecution proved beyond reasonable doubt that the Appellant broke into the complainant's house and coerced her into having sexual intercourse with him. Penetration was proved beyond reasonable doubt.

In the premises I find no merit in the appeal either against the conviction or the sentence and the same is dismissed.

Dated, signed and Delivered at Nyamira this 26th day of July, 2018.

E. N. MAINA

JUDGE