REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 72 OF 2017

VINCENT MANYONGE.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

(***appeal from the original conviction and sentence by B.S. Khapoya ,SRM, in Kakamega CMC's S.O. Case No. 103 of 2016 delivered on 13/7/17***)

J U D G E M E N T

1. The appellant herein, Vincent Manyonge, was convicted of the offence of gang rape contrary to section 10 of the Sexual Offences Act 2006 and sentenced to serve 20 years imprisonment. He was aggrieved by the judgment of the lower court and filed this appeal. He attacks the judgment of the learned trial magistrate on the grounds that there was no proper evidence on identification; that there was no conclusive medical evidence to support the charge; that the prosecution did not call material witnesses in the case; that the evidence was doubtful and lacked corroboration; that the trial court failed to consider his defence and lastly that the trial did not meet the threshold of article 50 of the constitution in that the trial magistrate failed to inform him of his rights .

2. The appeal was opposed by the state.

3. The particulars of the offence against the appellant were that on the 12th September, 2016 in Bukhungu location within Kakamega County in association with others not before court, he intentionally and unlawfully caused his penis to penetrate the vagina of CSM (herein referred to as the complainant) without her consent.

The prosecution case

4. The case for the prosecution was that the complainant was a student at [particulars withheld] college in Kakamega . That on the evening of the material day she had visited a policeman friend called R at KARI area next to Kakamega Provincial General Hospital. That at 9.30 pm the said R was escorting her back to college. On the way they met with three men. One of them talked in Kalenjin accent and asked them where they were coming from. The men ordered them to sit down. One of them produced a panga. R took off in a run. He was chased by two of the men. The complainant was left with the one who was talking in Kalenjin accent.

5. The person demanded for her phone. She gave it to him. He then started touching her vagina. The other two who had chased R went back. The two took her to the bush and left behind the one who was talking in Kalenjin accent. One of the two raped her. The two of them then took her across the road. The second man who had not raped her said that he was going to pick a cargo. He went away. The one who had raped her did so for a second time. The one who had said that he was going for cargo went back. The two of them took her to an incomplete brick house. The one who had raped her twice disappeared. She was left with the one who had gone for cargo. He inserted a condom and raped her. The one who was talking in Kalenjin accent came back. They went out of the house. The other two disappeared and she was left with the one who was talking in Kalenjin accent.

6. The man talking in Kalenjin accent warmed up to her and started talking to her. He forgot to ape the Kalenjin accent and talked normally. He asked her whether she knew the area well. She said she did not. He asked her whether the other two had raped her and whether they had used protection. She told him that she feared that she had been infected. He took her to an abandoned compound and told her that he was a caretaker there. He demanded for sex. She told him that she had been injured. He ordered her to lie down. He put on a condom and raped her. After he was through he told her that he wanted to escort her to her house. He returned her phone to her. They walked while talking. They reached Green Mount Academy where there was security light and she was able to observe him. She noted that he was walking with a limp on the right leg. The man told her that he loved her and that they could even live together as man and wife. He escorted her upto National Housing Corporation Houses. When they reached the senator's office at Amelmba, she told him that she was safe from there. She thanked him and he went back. She went to her house.

7. On the following day the complainant went to Kakamega Police Station and reported the incident. She went to Kakamega County

Hospital. She was examined by Dr. Akhonya PW3 and tests were done. The doctor found her with a small laceration on the inner lips of the vagina. She went to the Ap camp where she gave the description of the man who had escorted her. On the 14/9/16 she was called by an Ap Corporal who told her that they had arrested 3 young men. She took them to the abandoned compound where the rapist had said that he was a caretaker but there was no one there. They showed him 3 young men but she could not identify any of them. As they walked, a man appeared. When he saw policemen, he took off. He was chased and arrested. He had a panga and a sack of maize cobs. The police flashed a touch on him. The complainant recognized him as the rapist who had escorted her. He was wearing the same clothes that he was wearing on the day he raped her. He was taken to Kakamega Police Station.

8. The case was investigated by P.C Sarah Adenga PW2. She issued the complainant with a P3 form. It was completed by Dr. Akhonya PW3. The appellant was charged with the offence. He denied the charge. During the hearing Dr. Akhonya produced the P3 form in court as exhibit.

9. During the hearing, the trial court confirmed that the appellant was walking with a limp of the right leg. The investigating officer stated in her evidence that the man who was in the company of the complainant was living in fear and feared to testify in the case.

10. When placed to his defence, the appellant gave sworn evidence and started that on the night of 12th /13th September, 2016 he was at his home. That on the evening of 14/9/16 at 7 pm he met with policemen. He was carrying maize cobs, 2 fencing posts and a panga. The complainant was with them. She said that he, the appellant, looked like the person she had seen. He was arrested. The policeman broke his teeth. He was taken to Kakamega Police Station. On the 18th the investigating officer removed him from the cells and took him to the report office. He found the complainant there. The investigating officer asked the complainant whether he was the one. He was returned to cells.

11. That after about 15 minutes, the investigating officer removed him from the cells. An identification parade was organized. The complainant identified him by touching him. He was taken back to the cells. On the following day he was arraigned in court with a charge of rape. He denied that he committed the offence.

Submissions

12. The appellant tendered written submissions. He submitted that he was convicted on the evidence of a single identifying witness. That the complainant in her evidence did not specify the intensely of the security light at the Green Mount Academy or the distance the light was that enabled her to identify him.

13. He submitted that the policemen who arrested him did not testify nor did the man who was said to have been in the company of the complainant. He further submitted that the trial magistrate shifted the burden of proof to him.

14. The state did not make any submissions. The prosecution counsel **Mr. Ng'etich** said that he was relying on the decision of the lower court.

Analysis and determination

15. This is a first appeal. It is the duty of a first appellate court to look at the evidence presented before the trial court afresh, revaluate and re-examine the same and reach its own conclusions. The court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant – See ***Kinyanjui Vs Republic*** (2004) 2KLR 364.

16. The question that was before the lower court was whether the complainant had identified the appellant as one of the people who had raped her.

17. The incident is said to have taken place at night. The complainant did not know the appellant before. She says that the appellant escorted her from the scene of the rape up to the National Housing Corporation houses. That they passed by Green Mount Academy where there were security lights that enabled her to see the appellant clearly. That she noted that he was walking with a limp. That she was there on the day he was arrested and identified him as the person who had raped her and escorted her.

18. There was nobody else who corroborated the evidence of the complainant that the appellant is the person who raped her. The appellant was therefore convicted on the evidence of a single identifying witness. It is trite law that before the court convicts on the evidence of a single identifying witness, the court has to warn itself of the dangers of convicting in reliance of such evidence. The evidence has to be thoroughly examined and be ruled to be free from the possibility of error. This was well set out in the case of **Kiilu Vs Republic (2005) 1KLR 174** where the court of Appeal held that :-

> *' subject to certain well known exceptions , it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."* See also **Abdalla Wendo & Another Vs Republic (1953) 20 EACA(166) KLR 198.**

In **Maitanyi Vs Republic (1986) KLR 198** the same court held that :-

> '1. *Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing*

with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.

The court continued and held that:

'That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves''.

19. The trial magistrate in this case did not warn himself of the dangers of convicting on the evidence of a single identifying witness. Though the complainant stated in her evidence that she clearly saw the appellant when they reached Green Mount Academy she did not explain which part of his body she saw that would have enabled her to identify him thereafter. She did not explain whether she saw his face or the type of clothes that he was wearing or whether he was wearing anything on the head. She did not tell the court the intensity of the security light at the school neither did she state the distance at which the light was from them. When she saw the person after two days she did not explain whether she identified him by anything else other than the limp.

20. The complainant reported the matter at Kakamega Police Station. PC Adenga PW2 who investigated the case did not state whether the complainant gave the description of the rapist when she made her report. She never stated that the complainant mentioned that the rapist was walking with a limp. There was no reference of the complainant's first report to ascertain whether or not she stated that she could identify any of the rapists. These were crucial details that would have gone to show whether the complainant identified the rapist or not.

21. The administration policemen who arrested the appellant did not testify in the case. There was no reason given why they did not testify. These were crucial witnesses to tell the court how the complainant identified the appellant. Where some material witnesses in a case are not called the inference is that their evidence was adverse to the prosecution case-see **Bukenya & 2 Others Vs Republic (1973) EACA 549**. This appears to be the case by the failure to call the Police officers who arrested the appellant. The appellant might have been arrested simply because he was walking with a limp like the alleged rapist.

22. In the foregoing, it is my finding that it was not safe to rely on the evidence of identification from a single witness to convict the appellant. The evidence of identification at night was not tested to the required standard to ascertain that it was free from the possibility of error. The appellant might have been convicted on mistaken identity. The case was therefore not proved beyond all reasonable doubt.

The appeal is merited. The conviction on the appellant is quashed and the sentence set aside. I order the appellant to be set at liberty forthwith unless lawfully held.

Delivered, dated and signed at Kakamega in open court this 25th day of July, 2018

J. NJAGI

JUDGE

In the presence of :

Appellant …….….present in person

Juma ……..…….……for respondent/state

George ..…….……..court assistant .

14 days Right of appeal.