REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 115 OF 2012

DANIEL KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence of the Chief Magistrates Court at Eldoret (Hon. D.Alego, SRM) delivered on the 22nd day of June 2012 in Eldoret Chief Magistrate's Court Criminal Case No.5259 of 2009)

JUDGMENT

[1] This is an appeal that was lodged herein on **4 July 2012** by the Appellant, **Daniel Kimani**, against the Judgment of the Learned Senior Resident Magistrate, **Hon. D. Alego**, in Eldoret Chief Magistrate's **Criminal Case No. 5259 of 2009**. The Appellant had been charged before the lower court with the offence of Rape contrary to **Section 3(1)(c)** of the **Sexual Offences Act**, **No. 3 of 2006**. In the alternative, he was charged with Indecent Act with a Woman, contrary to **Section 11(1)** of the **Sexual Offences Act**. The offences were alleged to have occurred on **23 August 2009** at [particulars withheld] Farm in Uasin Gishu District.

[2] The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a Judgment was subsequently rendered by the Learned Trial Magistrate on **22 June 2012.** The Appellant was found guilty of the offence of Rape, was convicted thereof and sentenced to serve 12 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal on the following grounds:

> **[a]** That the Trial Magistrate erred in both law and fact by failing to note that the Prosecution side had not proved its case beyond any reasonable doubt;
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> **[b]** That the Trial Magistrate erred in both law and fact by sentencing him on insufficient medical evidence;
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> **[c]** That the Trial Magistrate erred in law and fact by sentensing him based on shoddy investigations; in that the Investigating Officer failed to order for DNA test; essential witnesses were not availed to testify in court; and the Investigating Officer did not visit the scene of crime;
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> **[d]** That the Trial Magistrate erred in law and in fact by disregarding his defence without cogent reasons;

[3] Accordingly, the Appellant prayed that the Judgment delivered by the trial court be set aside and the conviction quashed. He filed Amended Grounds of Appeal along with his written submissions; and although he did not seek or obtain leave prior thereto, **Section 350(2)(v)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** recognizes that an application for amendment of the Grounds of Appeal can be made at the hearing of the appeal. The Supplementary Grounds were duly served on the Office of the Director of Public Prosecutions and an appropriate response made thereto by **Ms. Kagali** on **12 July 2018**. Accordingly, by dint of **Article 159(2)(d)** of the **Constitution**, the Supplementary Grounds are deemed to have been properly filed.

[4] In his written submissions, the Appellant submitted that whereas a **DNA** test ought to have been conducted pursuant to **Section 36** of the Sexual Offences Act to verify whether indeed he was involved in the crime alleged, no such **DNA** test was conducted; and that this was a serious omission on the part of the Prosecution, as this should have been the main evidence linking him with the offence in question. He further submitted that failure by the Prosecution to call vital witnesses before the lower court ought to have been weighed against the Prosecution. He singled out the members of the public who were alleged by **PW5** to have arrested him and taken him to the Police Station and the two people who were with him at the house of **PW1**, as people whose evidence ought to have been given before the lower court; but who were not called as witnesses.

[5] The Appellant also urged the Court to pay attention to the contradictory nature of the evidence adduced before the lower court in connection with the testimony of **PW1, PW2** and **PW5** as to whether he was known to the Complainant before the date of the offence; as to whether the Complainant screamed to attract attention for help; and as to whether there was actual rape or an attempted rape. In support of this contention, the Appellant relied on the case of **Ramkrishna Pandya vs. Republic [1957] EACA** in urging the Court to find that the lower court ought not to have relied on such contradictory evidence to base the conviction that was recorded against him.

[6] Another argument proffered by the Appellant in his written submissions is his contention that, before sentencing him to 12 years' imprisonment, the Learned Trial Magistrate ought to have taken into account the period he was in remand awaiting his trial as mandated by **Section 333** of the **Criminal Procedure Code**; which was not done. He also complained that his rights as expressed in **Section 72(3)** of the retired Constitution were violated in that he was not arraigned in court within 24 hours of his arrest on **23 August 2009**; the effect of which was that he was detained at **Kamuyu Police Station** cells for four days. According to him, the Learned Trial Magistrate was obliged to seek for an explanation for that delay; and if none was forthcoming, ought to have ruled that the violation was fatal to the Prosecution case. The Appellant relied on the case of **Emmoni Chelakam vs. Republic: Criminal Appeal No. 345 of 2007** in support of this submission.

[7] The appeal was opposed by **Ms. Kagali** for the State. Her contention was that the Prosecution had called 5 witnesses before the lower court whose evidence was consistent and well-corroborated; and that the ingredients of the Charge of Rape were well proved. She submitted that evidence was adduced by **PW1** that she did not consent to the act of sexual intercourse; but that force was used by the Appellant. She further submitted that the Prosecution adduced credible evidence before the lower court, through **PW1,** to prove that there was penetration; which evidence was corroborated by the evidence of **PW4,** a Clinical Officer at Burnt Forest Sub-District Hospital. **PW4** confirmed that the Complainant had been raped as alleged, going his observation that she had bruises in her genitalia and spermatozoa in her vagina.

[8] It was further the submission of **Ms. Kagali** that the Appellant was properly identified by **PW1** as the offender, and therefore that his defence before the lower court was a sham and was correctly rejected by the trial court. On sentence, **Ms. Kagali** urged the Court to find that the same was lenient, granted that **Section 3(3)** of the **Sexual Offences Act** carries up to life imprisonment. She according prayed that the appeal be dismissed.

[9] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[10] The Appellant had been charged with **Rape contrary to Section 3(1)(c)** of the **Sexual Offences Act**; and the particulars thereof were that on 23 August 2009, at [particulars withheld] Farm in Uasin Gishu District within the Rift Valley Province, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **J W** without her consent. In the alternative, the Appellant was charged with Indecent Act with a Woman contrary to **Section 11(1)** of the **Sexual Offences Act**; in that on the **23 August 2009** at [particulars withheld] IDP Camp in Wareng District within Rift Valley Province, the Appellant intentionally and unlawfully indecently touched the private parts namely vagina of J W, a woman aged 19 years. As **Section 11(1)** provides for indecent acts with children, the Alternative Charge ought to have been laid under **Section 11A** of **the Sexual Offences Act.**

[11] Be that as it may, the Prosecution called a total of 5 witnesses before the lower court in proof the particulars of the charges, the first of whom was the Complainant **PW1.** Her evidence was that, on the **23 August 2009** at 6.00 p.m., she was at home alone when some three people who included the Appellant, went to her house to seek shelter from the rain. She testified that after the rain subsided, the Appellant ushered out his companions and told them it was time to leave. He however turned back and locked the door behind him. He then got hold of her and forcefully placed her on the bed; stripped her of her clothes and raped her, threatening to kill her if she screamed for help. As he was leaving, the Appellant met the Complainant's husband who on sensing mischief, confronted the Appellant and tied him with a rope as the Complainant ran to **Kamuyu Police Post** to report the ordeal.

[12] It was further the evidence of **PW1** that she was issued with a P3 Form and referred to hospital for treatment. She was treated and the P3 Form was filled. She also mentioned that she was 7 months pregnant when the Appellant raped her; and that whereas she knew the other two people by their physical appearance, she did not know the Appellant before the incident. She identified the clothes she was wearing at the material time and they were duly marked for identification before the lower court.

[13] PW2, John Ndungu Kagai, testified and told the lower court that he was playing football on the **23 August 2009** when he heard some noise from the direction of his house, which was not far from the football pitch. He went home to find out what the matter was and on calling the name of his wife, she did not respond. Instead it was the Appellant who came out and pushed him away from the door. He saw his wife and inquired from her what the problem was and was told by her the Appellant had tried to rape her.

[14] Samuel Keri (PW3) told the lower court that he was at home with the Complainant who is his sister in law, and was outdoors within the compound when he heard his brother, **PW2,** raise a distress call. He stated that he responded immediately, and on arrival at the scene, he found **PW2** trying to pin down the Appellant. He got to learn what had happened to his sister in law and helped **PW2** to subdue the Appellant and had him escorted to the Police Station.

[15] The Clinical Officer, **Patrick Kiptoo (PW4),** told the lower court that on the **24 August 2009** the Complainant, **J W**, a 19 year old female, presented herself to him for examination under the escort of a Police Officer from Kamuyu Police Post. She complained of having

been raped by persons known to her. On examining her, he found her with bruises on the right side of the vulva; and there was a white discharge from her private parts. He also noted the presence of spermatozoa in her vagina. HIV test was conducted and the result was negative. He accordingly filled and signed the P3 Form which he produced before the lower court as the Prosecution's **Exhibit No. 1.** His conclusion was that the Complainant had indeed been raped.

[16] It was further the testimony of **PW4** that the Appellant was also presented to him for purposes of medical examination. He had been assaulted by members of the public on allegations that he had committed adultery with somebody's wife. He noted that the Appellant had a swelling on his face. HIV and other tests conducted returned a negative result.

[17] PW5 before the lower court was **Cpl. Charles Muhindi**, the Investigating Officer in the case. He testified that he was on duty at Kamuyu Police Post on **23 August 2009** when the Appellant was taken to the Post on allegations of rape. He had been beaten by members of the public and was therefore taken to hospital immediately for treatment. It was further the evidence of **PW5** that the Appellant was handed over along with the clothes that the Complainant was wearing at the material time. He produced the same before the lower court and were marked **Prosecution Exhibit 2 and 3**, respectively. He then issued the Complainant with the P3 Form and advised her to go to the doctor for examination.

[18] In his defence, the Appellant told the lower court that he was arrested on **23 August 2009** while on his way from home to the Centre. His version was that he found two people standing next to the road; and that they asked him if he had met anyone on the way, which was not the case. He was then taken to the Police Station and placed in custody. He was thereafter taken to hospital in the company of a lady who he later got to know was the Complainant. He was then charged with the offence of rape which he denied.

[19] From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal as well as the Supplementary Grounds are:

> **[a]** Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of Rape to the requisite standard;
>
> **[b]** Whether the evidence adduced before the lower court proved beyond reasonable doubt that the Appellant was the perpetrator of the offence;
>
> **[c]** Whether there were any procedural infractions by the Police or the Learned Trial Magistrate that would vitiate the conviction that was recorded against the Appellant.

[a] <u>On whether the Ingredients of the Offence of Rape were proved</u>:

> **[20] Section 3** of the **Sexual Offences Act** provides for the offence of Rape in the following terms:
>
> **"(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."**

[21] Hence, the Prosecution was under obligation to prove its allegations that there was penetration of the Complainant's genital organ and that consent for such penetration was procured by force. In this respect, the Prosecution adduced uncontroverted evidence that the Complainant was alone in her house when the Appellant and two other people went there to seek shelter from the rain; that after the rain subsided the Appellant told his companions that it was time to leave; but that instead of leaving with them, the Appellant locked the door and forcefully raped her. She promptly reported the occurrence to her husband **PW2** and his brother **PW3;** and thereafter made a report to the Police, as was confirmed by **PW5**.

[22] More importantly, the Clinical Officer who examined her and filled the P3 Form in her case, confirmed that the Complainant had been raped. She was found with bruises on the side of her vulva and motile spermatozoa in her vagina. That evidence is therefore corroborative of the Complainant's evidence that she was subjected to penetration in the manner envisaged by **Section 3(1)(a)** as read with the definition thereof set out in **Section 2** of the **Sexual Offences Act**. That evidence was entirely uncontroverted, the Appellant's defence before the lower court being an *alibi*; namely, that he was not at the scene at the time of the incident. There was therefore credible evidence before the lower court to prove penetration beyond reasonable doubt.

[b] <u>On whether the Penetration was Perpetrated by the Appellant:</u>

[23] In her evidence before the lower court, the Complainant testified that the incident occurred at about 6.00 p.m. or thereabouts. Although she did not specifically say so, there appears to have been sufficient light to enable her see the three people who sought shelter in her house;

and it is a matter of local notoriety of which the Court is entitled to take judicial notice that ordinarily, nightfall occurs at around 7.00 p.m., and I so find. Accordingly, the Complainant was in a position to see the three people well. She identified the Appellant as having been among the 3 people and as the one who remained behind, locked the door and forcefully subjected her to sexual intercourse.

[24] The Prosecution further demonstrated that the Appellant was arrested at the scene by the Complainant's husband, **PW2**, with the assistance of his brother **PW3**. The accused has been caught red-handed, as it were, by **PW2**; as indeed it was the evidence of **PW1** that he had no time to zip up his trousers. He was immediately handed over to the Police, a fact confirmed before the lower court by **PW5**. It was therefore futile for the Appellant to contend that **PW1** contradicted herself when she said she knew one of the attackers and yet conceded that she had not known the Appellant before. The evidence shows that the key witnesses did not, at any time lose sight of the Appellant; and therefore there was no space and time for mistaken identity. In any case, the Record of Appeal shows that **PW1** only told the lower court that she knew one of the three people; she did not say that that person was the Appellant. Similarly, whether or not the Complainant screamed to attract attention is an immaterial discrepancy, granted the credible and uncontroverted evidence that he was confronted by the Complainant's husband at the door of their house as he was coming out of their house, in haste.

[25] I do note that in his Grounds of Appeal and written submissions, the Appellant faulted the Trial Magistrate for convicting him yet he was not subjected to DNA profiling pursuant to **Section 36** of the **Sexual Offences Act.** It is however instructive that whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."**

[26] Similarly, it was unnecessary for DNA to be conducted in this case where the Appellant was arrested at the scene of crime. Indeed, in **AML vs. Republic [2012] eKLR** the Court expressed the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

I therefore find no merit in that ground.

[c] On whether there were infractions of the Constitution and the applicable law:

[27] In Grounds One and Two of his Supplementary Grounds of Appeal, the Appellant contended that his rights under **Section 72(3)** of the repealed Constitution had been violated, in that he was not taken to Court within 24 hours of his arrest or soon thereafter as was reasonably practicable. He further submitted that the Learned Trial Magistrate failed to make any inquiry to find out why that was the case. According to him, such inquiry was necessary, as failure to provide a satisfactory explanation would vitiate the entire proceedings before the lower court.

[28] It is indeed the case that in **Section 72(3)** of the repealed Constitution, which was in force at the time of the Appellant's arrest, provided that:

> **"A person who is arrested or detained-**
>
> **(a) for the purpose of bringing him before a court in execution of the order of a court; or**
>
> **(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention. or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."**

[29] It is indubitable that the Appellant was not taken to court until **27 August 2009,** after a period of about 4 days; and that the Learned Trial Magistrate did not make an inquiry as to why the delay in the Appellant's arraignment. It is however well settled now that such violations, if any have no effect whatsoever on the ensuing criminal trial itself. In **Dominic Mutie Mwalimu vs. Republic [2008] eKLR** the Court of Appeal held that:

> ***"...where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above***

provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity".

[30] I have perused the lower court record and there appears to be no indication that the Appellant brought the matter of delay in his arraignment to the attention of the Trial Magistrate. Had he done so, an opportunity would have been given to the Prosecution to furnish the court with an explanation to enable a determination as to whether the apparent infraction was explicable. As it is, the matter was belatedly raised on appeal. In any event, the remedy for such violations would be in the civil realm and therefore beyond the scope of a criminal trial. Indeed the role of the trial court in such a scenario was aptly set out thus in **Julius Kamau Mbugua vs. Rep CRA No. 50/2008:**

"a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is invoked and affect the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial or where an accused has trial related prejudice as a result of death of an important witness in the meantime and the witness has lost memory, in which cases the trial court could give appropriate protection like an acquittal.Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though Constitutional in nature, which is beyond the statutory duty of a criminal trial court and which is by Section 72 (6) expressly compensable by damages".

Clearly therefore, the delay in the arraignment of the Appellant before the lower court cannot vitiate the trial process that was conducted subsequent thereto by the lower court.

[31] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Rape contrary to **Section 3(1**) was based on sound evidence. **Section 3(3)** of the **Sexual Offences Act** provides for a sentence of not less than 10 years, which can be enhanced to life imprisonment. The Appellant was sentenced to 12 years' imprisonment. I would therefore agree with **Ms. Kagali** for the State that that sentence was lenient, considering the evidence of **PW1** that she was 7 months pregnant when she was subjected to the ordeal by the Appellant. No prejudice can be said to arise from the fact that the Learned Trial Magistrate may not have expressly stated that she took into account the period the Appellant was in remand awaiting trial. I have no doubt that his conviction and sentence was bases on sound evidence and that the sentence, if anything, is lenient.

[32] One last thing is in connection with the finding of the Learned Trial Magistrate that **"...the alternative charge fails..."** Having made a finding on the Main Count, she was not obliged to make any findings in respect of the alternative charge. This has been repeatedly explicated in a chain of decisions. For instance, in **Robinson Mwangi Maina vs. Republic [2006] eKLR**, the Court of Appeal restated the correct position thus:

"The trial court found that the alternative charge was part of the robbery and therefore acquitted them of the same charge of handling stolen property. That was not really correct. Where an accused person is convicted on the main charge, the usual practice is to make no findings on the alternative charge so that if on appeal the court thinks that the main charge was not proved but the alternative one was, the court can substitute a conviction on the alternative charge which would still be available on the record..."

[33] I Otherwise no merit in the Appellant's appeal. The same is hereby dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF AUGUST, 2018

OLGA SEWE

JUDGE