REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIM. APPEAL NO. 18 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JARED KOITA MUNYANYA.....APPELLANT

(Being an Appeal from the conviction and sentence by Honourable R. Amwayi - Resident Magistrate, delivered on 13th February, 2017 in Molo Chief Magistrate's Court Criminal Case No. 1225 of 2016)

JUDGMENT

1. The Appellant, Jared Koita Munyanya, was presented before the Molo Chief Magistrate's Court charged with a single count of rape contrary to section 3(1)(c) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 19/01/2014 at [particulars withheld] area in Molo within Nakuru County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of SB, a woman aged 80 years old without her consent.

2. In the alternative, the Appellant was charged with committing an indecent act on an adult contrary to section 11(a) of the Sexual Offences Act.

3. The evidence adduced at trial was quite straightforward. SB was 80 years old at the time of the incident. She lived alone – although one of her daughters, AK, lived about two hundred metres away. SB testified that in the night of 19/01/2014, she was alone in her house at around 9:00pm. An assailant barged in forcing the door to her house open using a large rock. SB says as soon as the assailant came into her house, her phone rang. It was her daughter calling. The assailant warned her not to pick up the phone. However, as the phone rang, it light up and illuminated the face of the assailant. SB says that he immediately recognized who it was: it was the Appellant who was a neighbour for many years. When the assailant spoke, SB says that he was able to confirm it was the Appellant from his voice.

4. SB testified that the Appellant proceeded to forcefull remove her clothes; and then repeatedly raped her both in her vagina and anus. At some point, SB testified that the Appellant applied pepper in her anus which caused her much anguish.

5. SB's testimony was that her ordeal went on from 10:00pm to around 2:00am at night. It was raining heavily so her initial cries were drowned out by the rain. Thereafter, the Appellant threatened her with dire consequences if she continued screaming. The ordeal was so bad given her age, that at some point SB testified that she lost control of her ability to hold on to her long call. She presumably defecated in the process.

6. After the ordeal, SB says her attacker left and she was able to call her daughter on the phone. The daughter, AK, arrived immediately after. She testified as PW2. She said she found the door wide open and SB in bad shape: her blood pressure was really high; she was almost unconscious lying helplessly in bed, and even had trouble walking. Immediately, AK says her mother told her that it was "Jared wa Munyanya" who had assailed her and raped her.

7. Together with a neighbour and her sister, AK took SB to report at the Molo Police Station. This was early morning by this time. At the Police Station, they reported that it was the Appellant, Jared Munyanya, who had committed the dastardly act. There, they met PC Joel Kipngetich Koskei. PC Koskei testified as PW3. He confirmed how the report was made and that he referred them to the Molo Sub-County Hospital for examination and treatment. He also entered the incident on the Occurrence Book. PC Koskei was also categorical that upon report the SB said that it was the Appellant who had raped her; and that the Appellant was a neighbour.

8. The evidence by Dr. Bernard Busuni rounded off the Prosecution case. Dr. Busuni did not treat SB. Dr. Bitutu did. However, Dr. Bitutu was away on study leave at the time of the trial. Dr. Busuni was familiar with his handwriting and was permitted by the Court to produce the P3 Form on his behalf.

9. The P3 Form showed that there was lacerations on the anal area of SB. Dr. Bitutu concluded that there was rape.

10. When placed on his defence, the Appellant gave a sworn statement but did not call any witnesses. He denied committing the offence and offered an alibi defence: that on the material day he had travelled to Bungoma where he was working for one Samwel. He stated that he had travelled to Bungoma on 17/01/2014 and came back on 03/01/2016.

11. The Learned Trial Magistrate identified the three elements the Prosecution was required to prove beyond reasonable doubt in order to prevail in obtaining a guilty verdict:

a. That there was penetration of the Complainant's genitalia by a male genitalia;

b. That the penetration was without her consent; and

c. That it was the Appellant who caused the penetration (i.e. identification of the Appellant as the assailant).

12. The Learned Trial Magistrate had no doubt that the Prosecution proved each of the three elements beyond reasonable doubt and proceeded to convict the Appellant. He then sentenced him to twenty years imprisonment.

13. The Appellant is dissatisfied and filed the present appeal.

14. The Appeal was opposed by the State. Mr. Motende appeared for the State and made oral submissions in support of the conviction and sentence. The Appellant filed written submissions and indicated to the Court during the hearing of the appeal that he had nothing to add orally.

15. This being the first appeal, this court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R [1972] EA 32*** and ***Kariuki Karanja v R [1986] KLR 190***.

16. The Appellant has pivoted his appeal on four main grounds

a. That the charge sheet was defective because it did not contain the word "unlawful";

b. That the medical evidence was insufficient to prove the offence;

c. That the identification evidence was of doubtful quality; and

d. That the Learned Trial Magistrate was wrong in not taking into consideration section 333 of the Criminal Procedure Code in sentencing.

17. Turning to the first ground of appeal, the complaint seems to be that the Appellant thinks that the charge sheet should have contained the words "intentionally and unlawfully".

18. The Court of Appeal had occasion to deal with this question in ***JMA vs Republic [2009] KLR 671*** in the analogous context of defilement under the same Act. The High Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge because the charge sheet did not contain the words "intentionally and unlawfully" making the main charge fatally defective. On that question, the Court of Appeal held that:

> *This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor.*

19. The same applies here. In any event, looking at the wording of the various sub-sections in section 3(1) of the Sexual Offences Act, I am not persuaded that the words "unlawfully and intentionally" are necessary. The section is quite clear that any penetration without consent, without more is a violation of the Act; it is *per se*, unlawful.

20. Next, the Appellant complains that the medical evidence was insufficient because the examining doctor did not find any "masculine discharge" to prove "masculine intervention". There is no requirement in our law that rape or defilement can only be proved beyond reasonable doubt when medical evidence shows positively that semen or seminal fluids of an Accused Person was found in the genitalia of the victim. Indeed, the position in our law is that the Prosecution does not have to prove by medical evidence that any fluids found in the Complainant's genitalia was the Appellant's spermatozoa as the Appellant argues on appeal. As our decisional law has established many times, rape or defilement is proved by evidence, not by way of DNA test. See ***AML v Republic [2012] eKLR***. In the present case, medical evidence established there was rape; and oral testimony of the Prosecution witnesses connected the Appellant to the rape.

21. Finally, there is the issue of identification. Is there sufficient evidence pointing to the fact that it was the Appellant who forcefully raped the Complainant's genitalia? I have considered this question in light of our decisional law on the question. The position was succinctly stated by the Court of Appeal in ***Kariuki Njiru and 7 others –vs-R (2001) eKLR,*** thus:-

> *The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See* ***R. vs. Turnbull (1976) 63 Civil Appeal***

R.132). *Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.*

22. In the present case, after considering all the factors, I am persuaded that the identification evidence was solid, and that even after exercising due caution, it was free from error.

23. First, I begin by pointing out that the identification evidence here was that of recognition: the Appellant was a neighbour to the Complainant and she had known him for some time. She even knew he was the son of Munyanya. Second, the lighting conditions were quite favourable. The Complainant testified about her phone ringing twice and illuminating the face of her assailant. Third, the Complainant recognized the Appellant through his voice as well. She had heard his voice before and when he spoke to her on that fateful night, she was able to match the voice to the face. Fourth, the ordeal took a long time – more than four hours during which time the Appellant repeatedly raped the Complainant both anally and vaginally. Both the length of time it took and the physical proximity made the conditions ideal for positive identification. Lastly, the Complainant immediately announced to the first responder – PW2 – that it was the Appellant who had raped her. She then repeated both the description and the name to the Police in her first report. All these factors leave no doubt that the identification was positive and free from any error.

24. Before I consider the Appellant's complaint on sentence, I should point out that I have re-considered, as I am required to do, the sworn testimony of the Appellant whose main tenet was alibi defence. The Learned Trial Magistrate simply did not believe him. She found, instead, the Prosecution narrative believable and the Complainant to be telling the truth. Looking at the totality of circumstances, I am in agreement with the Learned Trial Magistrate that the Appellant's narrative has no inherent possibility that it is might be true. This means that it is not capable of raising any reasonable doubts in the mind of a reasonable Tribunal. The Appellant did not place enough credible evidence before the Court to trigger the Prosecution duty to displace the alibi defence. Under those circumstances, the Learned Trial Magistrate was correct to dismiss the alibi defence as improbable.

25. The Court of Appeal had this to say about a finding on credibility of a witness by a Trial Court:

> *Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not.*

26. This was in ***Keter v Republic [2007] 1 EA 135***. There is nothing in this case to suggest that it was an abuse of discretion for the Learned Trial Magistrate to disbelieve the Appellant; and, on the other hand, believe the Prosecution witnesses. Indeed, there is enough on the record to affirm that Learned Trial Magistrate's finding of incredulity of the Appellant's narrative: consistency of the Prosecution witnesses' narratives even under scrutiny in cross examination; their points of convergence; evidence of first report naming the Appellant; and lack of motive to lie and/or frame the Appellant.

27. Consequently, after all is said and done, there is no ounce of reasonable doubt that the Appellant committed the offence of rape against the Complainant. The conviction was safe and free from errors.

28. Turning to the sentence, the Appellant complains that under section 333 of the Penal Code, the Learned Trial Magistrate should have deducted the period he was in custody in computing the time he would spent in prison. The Appellant does not complain against the sentence itself. He was sentenced to twenty years imprisonment – and it was justified in my view: the age of the Complainant (80 years old); the duration of the rape (four hours of repeated sexual assault); and the gratuitous violence (putting pepper in the Complainant's anus) – called for a stiff penalty.

29.The Appellant was arraigned on 21/04/2016. He remained in custody until 13/02/2017 when he was sentenced. It is true that section 333 of the Criminal Procedure Code provides that in sentencing a Judicial Officer shall take into consideration the period an Accused Person has been in custody. That does not always amount to deducting the period served in custody from the prison term. In this case, however, there is no reason why that should not be the case. Consequently, I will allow the appeal only to the extent that the prison term imposed will begin running from 21/04/2016.

30. For avoidance of doubt, both the appeal against conviction and that against conviction are hereby dismissed as without merit.

Dated and delivered at Nakuru this 8th day of August, 2018.

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JOEL NGUGI

JUDGE