REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 165 of 2017

DAVID MAINA MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 4539 of 2014 delivered by Hon. S. Jalango, SRM on 22nd September, 2017).

JUDGMENT

Background

1. The Appellant herein was charged with the offence of rape contrary to Section 3(1)(a)(c)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 2nd September, 2014 in Nairobi within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of JWM by using force. He was alternatively accused of committing an indecent act with a girl contrary to section 11(1) of the Sexual Offence No. 3 of 2006. It was alleged he intentionally touched the vagina of JWM, a girl aged 22 years with his penis. The Appellant was arraigned in count and at the conclusion of the trial found guilty of the main charge. He was consequently sentenced to serve 20 years imprisonment. Being dissatisfied with both the conviction and sentence he preferred the instant appeal.

2. His amended grounds of appeal filed contemporaneously with the written submissions on filed on 11th June, 2018 were that his defence was not considered, that the evidence of PW1 was contradictory and inconsistent, that crucial witnesses did not testify, and that the sentence was harsh and excessive in the circumstances.

Evidence.

3. **PW1,** JWM the complainant then aged 23 was a resident of [particulars withheld]. She recalled that on 2nd September, 2014 she was from work when she was dropped off at Muthaiga at around 8.00 p.m. Her brother used to wait for her at that point but on this day he was not there. As she walked home she was accosted by an unknown person, held on the neck and threated with a knife. She was pulled into a small bush next to a tunnel where she was undressed then raped. During the struggle she got hit on the head. She testified that she was able to identify the attacker using the security light mounted at the location. She then went home and was taken to MSF hospital. On the following day she went to Nairobi Women's Hospital. She made a report at Muthaiga Police Station and after two weeks the police called her and informed her they had arrested a suspect. She went and was able to identify the Appellant whom she had not known before. She recalled that she was also given a P3 Form which was filled by a Government doctor. In cross examination, she testified that the Appellant asked for her phone and then gave it back and on the following day she received a strange call prompting her to inform the police.

4. **PW2, Peninah Agwenyi** was a clinical officer at MSF clinic in Mathare who produced a medical certificate in respect of the examination of PW1. It showed that PW1 was examined on 3rd September, 2014 at 12.36 a.m. in the clinic. The outer genitalia was found to be moist but had no abnormal discharge. The hymen had bruises at 7.00 o'clock with irregular margin. Anal examination was normal. The vaginal swab and urine tests disclosed presence of spermatozoa. Pregnancy test was negative. She was given medication to prevent pregnancy and sexually transmitted diseases and booked for counseling. A Post Rape Care Form was filled and adduced in evidence as well as the medical certificate.

5. **PW3, Corpl. Virginia Murage** of Muthaiga police station investigated the case Her evidence was that a similar case as the instant one had been reported at Muthaiga police Station in which a suspect was arrested. That is when PW1 went to the station and identified the Appellant. She confirmed that PW1 was treated both at the Nairobi Women's Hospital and MSF Clinic on Juja Road.

6. After the prosecution closed its case the court ruled that a prima facie case had been established and the Appellant had a case to answer.

He opted to give a sworn statement of defence. His defence was that he and PW1 knew each other as he had ferried her severally as a motor cyclist (Boda boda rider). He stated that on the material date 2nd September, 2014, PW1 requested that she wanted to know his home where they went and both had consensual sex. That she spent the night in the house and in the morning after breakfast requested him to give her Kshs. 2000/-. He only had Kshs. 800 which he handed to her and she left. He promised to send the balance. He did not come to hear from her until after three days when she called expressing her anger that the balance of money had not been sent. He continued that that is what prompted her to report the incident to the police to whom she gave his mobile number. Three weeks down the line, PW1 called him requesting that they meet at a particular joint. On arrival, he was arrested by two police officers.

Determination.

7. After critically analyzing the evidence, I have deduced that the following issues arise for determination;

a) Whether the charge sheet was fatally defective.

b) Whether the offence was proved beyond a reasonable doubt.

c) Whether the sentence was harsh and excessive in the circumstances.

Defective charge sheet

8. This issue arises from the Appellant's submission that the charge sheet did not indicate the Occurrence Book (OB) number and that it showed the wrong date he was taken to court. His submission was that he first appeared in court on 26th September, 2014 and not 27th September, 2014. He also faulted the charge sheet on account of the fact that it indicated only one witness would be called for the prosecution yet three witnesses testified. Learned counsel for the Respondent, Mr. Momanyi while conceding that the charge sheet had those issues, stated that they were minor defects that could be cured under Section 382 of the Criminal Procedure Code.

9. Section 134 of the Criminal Procedure Code specifies what constitutes a properly drafted charge or information. The same reads:

> ***"Every charge or information should contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

10. This provision speaks to the fact that a charge or information must be drafted in such an unambiguous manner that an accused person is made aware of the offence he is charged with. With respect to the form, a standard charge sheet provides that the number and names of prosecution witnesses as well as the occurrence book number should be indicated. These are not legal requirements for drafting of a charge under Section 134 above. Instead, the requirements in the standard form are just but surplus information to the statutory requirements under the provision. Their absence in the circumstances does not impact on the suitability of a charge sheet unless where they impact on the legal requirements. It does not therefore render a charge sheet defective. Accordingly, even if the requirements referred to by the Appellant should ordinarily be contained in a charge sheet, they are a mere conformity with the form but not a legal requirement. Those defects are curable under Section 382 of the Criminal Procedure Code. I will address myself hereafter with respect to the date that the plea was taken.

Proof of the case

11. The Appellant submitted that the case was not proved beyond a reasonable doubt. He took issue with the fact that the learned trial magistrate failed to consider his defence, more particularly that the sexual intercourse between himself and PW1 was consensual. He found refuge in this submission whilst alluding that PW1 did not make a report to the police on the date of the incident. He faulted the learned magistrate's finding that the offence was committed on account that PW1 was treated on the same night of the incident. According to the Appellant, he could not have raped PW1 and thereafter called her knowing too well that he was likely to be arrested. He also questioned the failure by the investing officer to visit the scene. Given these circumstances, he submitted that the court ought to have upheld his defence that the sexual intercourse was consensual.

12. The Appellant further submitted that the court failed to take into account contradictory prosecution evidence. He pointed to the fact that he was arrested more than two weeks after the incident and also faulted the learned magistrate's failure to consider the fact that whilst PW1 testified that she did not know him prior to the incident, the other two prosecution witnesses testified that she told them that she knew him.

13. His other submission was that the prosecution failed to call crucial witness namely; a brother to PW1 who was supposed to have been waiting for her after she alighted from the matatu but on this date failed to turn up. That would have led to a conclusion that the brother failed to wait for her because she was not going home on that particular date. He also poked holes in the failure of the prosecution to call the actual maker of the medical report.

14. Mr. Momanyi on the other hand submitted that the prosecution adduced consistent evidence that the Appellant was properly identified by PW1, that the medical evidence demonstrated the use of force during the intercourse evidenced by bruises on PW1's genitalia and head and that the prosecution was not required to call any additional evidence other than what was sufficient to prove their case beyond a reasonable doubt. Finally, he submitted that under Section 77 of the Evidence Act expert document could be adduced by other persons other than their maker.

15. I have carefully evaluated the rival submissions and I take the following view under this head. There is no doubt that there was sexual intercourse between PW1 and Appellant. I state this because the Appellant in his sworn defence confirmed that both spent the night together when this happened. But an interesting twist is evidenced by the presence of bruises in PW1's genitalia suggestive of use of force during the

intercourse. It then calls on this court to critically re-evaluate the circumstances under which both parties met. This is because on one hand PW1 testified that she was accosted by an unknown person as she dropped off from a matatu to go home. She also testified that she was called to the police station to identify the person who had raped her. This part of evidence on its own raises more questions than answers. It casts doubts on how the police could have called her to identify the culprit if she had not informed them that she knew him.

16. Her evidence in chief is also self-conflicting as, whilst she had testified she did not know her assailants, she later appeared to renege on this stating that she was able to identify the person who raped her. She testified as follows:

> ***"I reported the matter at Muthaiga police station on 4.9.14. after two weeks police officer called and informed me that they had arrested the person. I went and was able to identify the accused as the person who raped me."***

17. Suffice it to state, if she knew the person who raped her, it ought to have been clearly discernible that she knew this person prior to the incident or identified him at the time of the incident. If the latter were the case, and more so taking into the account that the incident took place at night, the circumstances under which the identification took place ought to have been disclosed. In her main testimony, she would have disclosed the general physical appearance of the assailant. She would also have indicated the intensity of the light at the scene and the distance she was from it that would have enabled her to identify her attacker. Short of this means that a positive identification of the Appellant was questionable.

18. A clear look of PW1's evidence attests that this was not the case. In fact, both PW2 and 3 contradicted her evidence that she did not know her assailant. The medical examination documents produced in court categorically reflect that she was raped by a person known to her. PW3 on the other hand testified that they arrested the Appellant pursuant to a different similar incident following which they summoned PW1 to try and identify the suspect. PW1 consequently implicated the Appellant. I cannot belabor to emphasize that in the circumstances, if the Appellant was identified by PW1 as testified by PW3 an identification parade ought to have been conducted. The general rule necessitating an identification parade is in circumstances where an incident takes place in conditions difficult for positive identification. One of those conditions is if it is at night. Another is where an offence takes place in haste. Therefore, when the Appellant was first arrested for having committed another sexual offence, bearing in mind that the instant incident took place at night when the circumstances for a positive identification were difficult and was by single witness, the Appellant ought to have been subjected to an identification parade. See **Maitanyi *v.* Republic[1986] eKLR,** that:

> ***"The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did?***
>
> ***It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. 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 ...***
>
> ***There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or the police... If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."***

19. An identification parade having not taken place, and having regard that the Appellant's identification was of a single witness in difficult circumstances, there is no doubt that the identification was not full proof. I find it difficult to conclude that even if PW1was found to have bruises in her genitalia they probably were not occasioned by the Appellant.

20. There is also no doubt that spermatozoa were found in her genitalia but with the foregoing finding on identification, it was necessary that scientific evidence linked the spermatozoa to the Appellant. Unfortunately, no DNA examination was done for this purpose, casting doubt in the mind of the court whether the Appellant raped PW1.

21. The other issue that calls for interrogation is the Appellant's submission that the incident was reported late, about three weeks after the incident. Far from the truth, it was clear from the evidence of PW2 that she was treated on the night of the incident and PW3 testified that the report was made on 4th September, 2014 two days after the incident. From this submission, and further giving regard to my earlier finding on identification, my honest view is that although PW1 may have been raped on the same night, it was an incident that most likely took place after the encounter with the Appellant. And even if the Appellant was the culprit, the law demands that the prosecution must prove the case beyond a reasonable doubt. Lord Denning in **Miller vs Minister of Pensions [1947] 2 All ER 3372** defined what reasonable doubt is as follows:

> ***"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt but nothing short of that will suffice."***

22. As Lord Denning delivered himself, it is not '*fanciful possibilities*' that would attract the court that meet the qualification of what constitutes proof beyond a reasonable doubt but the concrete strong evidence placed before a court not in the least probable but beyond any reasonable doubt that an offence has been committed that suffices to warrant a conviction. In the present case, the court is not bound by the

mere fact that there was use of force during an intercourse that should attract the finding that it is the Appellant who occasioned and caused the rape. He must be linked by strong evidence to that use of force. Unfortunately, the prosecution was unable to convince the court that he was culpable. I hold in the circumstances that the conviction was not safe.

Sentence

23. The Appellant submitted that twenty years of imprisonment imposed was harsh and excessive. Although I have absorbed him from the commission of the offence. It suffices to state that under Section 3(3) of the Sexual Offences Act No. 3 of 2006, the offence of rape is punishable by imprisonment of a term not less than 10 years but which may be enhanced to imprisonment for life. Therefore, depending on the circumstances, the court may enhance the minimum penalty provided. As at this point, I can only note that the sentence was legal. As to its propriety, I will not comment having found that the conviction was not safe.

24. From the foregoing, I find that the prosecution did not prove their case beyond a reasonable doubt. I allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and **DELIVERED** this **26th** day of **September, 2018**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Atina for the Respondent