REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 51 OF 2017

BETWEEN

PETER MUGENDI M'ITIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence by the Resident Magistrate's Court at Nkubu Law Courts in Criminal Case number 962 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. On 30th June, 2014, the appellant appeared before the Resident Magistrate's Court at Nkubu Law Courts to answer to a number of charges. In count I he was charged with ***rape contrary to section 8(1)(a)(c) [and 8](3) of the Sexual Offences Act, number 3 of 2006***. The particulars thereof being, that on the 22nd day of June 2014 in Imenti South Sub-County within Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of D K, by use of force. In Count II, he was charged with committing ***an indecent act with an adult contrary to section 11(b) of the Sexual Offences Act, number 3 of 2006***. The particulars thereof being that on the 22nd day of June 2014 in Imenti South Sub-County within Meru County, the appellant intentionally touched the vagina of D K with his penis against her will.

2. In count III, the appellant was charged with ***grievous harm contrary to section 334 of the Penal Code,*** the particulars being that on the 22nd day of June 2014 in Imenti South Sub-County within Meru County, the appellant unlawfully did grievous harm to D K.

3. The appellant pleaded not guilty to all the three counts. The prosecution called three witnesses in its endeavor to prove the allegations against the appellant. Those who testified were the complainant D K, as PW1, her mother G N as PW2 and the Clinical Officer at Kanyakine Sub-district hospital one Severina Kaimatheri as PW3.

4. The appellant testified as the only witness for the defence and denied the charges.

Judgment of the Trial Court

5. After carefully analyzing the evidence placed before the court the learned trial magistrate was satisfied that the prosecution had proved the case against the appellant on all the three counts. The appellant was thus found guilty as charged and convicted. The appellant was sentenced to 10 years imprisonment on each of the three counts but the trial court ruled that the sentence on count I was sufficient to cover both counts I and III because the latter offence was committed during the sexual assault which formed the basis of the offence in Count I.

The Appeal

6. The appellant did not take the judgment of the learned trial magistrate kindly. He therefore exercised his right of appeal by filing the Petition of Appeal on the 23rd May, 2017 upon the following homemade amended Grounds of Appeal:-

1. That, the learned trial magistrate erred in both law and facts by failing to note that the appellant was charged with the

wrong sections of the Sexual Offences Act.

2. That the learned trial magistrate erred in law and facts by failing to note that the evidence tendered by the prosecution did not prove that the appellant was the perpetrator of the alleged ordeal.

3. That the learned trial magistrate erred in law and facts by failing to note that the exhibits produced during the trial did not link the appellant with the alleged ordeal.

4. That the learned trial magistrate erred in both law and facts by failing to note that the evidence tendered by the medical expert was inconclusive.

7. On the basis of the above grounds, the appellant prayed that his appeal be allowed, conviction quashed and sentence set aside so that he may be set free.

8. As this is a first appeal, this court is under a duty to carefully re-examine the evidence and evaluate it afresh with a view of reaching its own conclusions in the matter, the only caution here being that this court will not have the privilege of seeing and hearing the witnesses who testified during the trial. This then means that where the trial court made a finding based on the demeanor of a witness, this court will be slow in interfering with such a finding. On these propositions see ***OKENO – VERSUS – REPUBLIC [1972] EA 32.*** Apart from the above stated caution the appellant herein expects this court to rehear his case.

The Prosecution Case

9. The case for the prosecution is that at about 7.30pm on 22nd June 2014, D K was walking home from Nkubu Market. She was all alone. Along the way, at a bend in the road, somebody grabbed her on the neck, and when she turned to see who it was, she saw it was the appellant whom she knew well. The appellant is a neighbor and lives only 400 metres from D K's house. D K called out the appellant's name "**Mugendi**" as she sought to know what the appellant was up. Instead of answering, the appellant pulled D K into a nearby thicket some 50 metres off the road, gagging her in the process so that she was not able to scream for help. A struggle ensued nonetheless and during the struggle, the appellant beat D K so badly she thought she would faint. The appellant undressed her by removing her brazier (PMFI-1), grey sweater (PMFI – 3) and black trouser (PMFI-4) which got torn during the struggle. The appellant also unzipped his trouser and lowered it to the [knees] before inserting his penis in DK's vagina. After the intercourse, the appellant continued assaulting D K on the mouth and nose. He beat her for about an hour. D K passed out and only regained consciousness at around 2am. The same night.

10. On regaining consciousness, D K went home and called to her mother, G N who opened the door for her. G N noticed that DK's face was swollen and her clothes were mud stained. D K also did not have any shoes on her feet. D K told G N that it was Mugendi who had assaulted and raped her. G N cleaned D K's mouth and at day break both D K and G N went and reported the matter to Nkubu Police Station and from there they were referred to Kanyakine Hospital for treatment.

11. During cross examination both D K and G N confirmed that the appellant's home was only 400 metres away from their own home. D K denied a suggestion by the defence that on the night in question, she was drunk.

12. At Nkubu Police Station D K, was issued with a P3 form which was filled for her by Severina Kaimatheri who testified s PW3. Severina was clinical officer at Kanyakine Sub-District Hospital. Her testimony was that D K presented herself for examination on 26th June, 2014. On examination D K's eyes were both swollen and tender with dark parts. She (D K) also had sores in the mouth and there was tender swelling on the occipital side of the head, with swelling on the right side of the chest, lower zone as well as tenderness on both upper arms. She also had swelling and tenderness on both thighs.

13. D K was given anti-tetanus jab, antibiotics and analgesics, steroid and PEP. Examination of D K's genital organs revealed inflammation and redness, bruises on the vaginal walls as well as a whitish –brown discharge from her vagina. A high vaginal swab revealed presence of pus cells but no spermatozoa. VDLR test was negative. Urinalysis showed some protein and blood cells. The conclusion by Severina was that the injury to the genital canal was caused by sexual activity. The duly filled and signed P3 form was produced as Pexhibit 5.

14. The prosecution was unable to call the investigating officer and accordingly closed its case after PW3 testified.

The Defence Case

15. At the close of the prosecution case, the appellant was found to have a case to answer. He elected to give sworn evidence and told the court that D K had been his girlfriend for about six months before they disagreed and she decided to go and find employment. When D K returned, she found the appellant having a relationship with another girl and that on the material day, there was a fight between D K and the other lady when D K found the appellant and the other girl relaxing at a bar. According to the appellant, D K's clothes got torn during the fracas. The appellant also stated that the reason why he was apprehended is because the lady who had fought with D K could not be found. The appellant did not call any witnesses.

Submissions

16. The appellant filed his written submissions in which he urged the court to make a finding that the prosecution did not prove the case against him to the required standard, namely proof beyond any reasonable doubt. In addition the appellant told the court that the case against him had been withdrawn before the trial court. He asked the court to allow the whole appeal and to set him free.

17. On his part, prosecution counsel Mr. P Namiti conceded the appeal on grounds that the appellant and D K were lovers and that D K was

thus not keen to pursue the case against the appellant. There is also on record a letter dated 20.3.2017 by D K to the ODPP to which is attached an affidavit sworn by DK on 20th march, 2017 in which she depones, inter alia, as follows:-

> **1) "……..**
>
> **2) ……**
>
> **3) That in the year 2014 or thereabout, I informed court of my decision to withdraw the complaint against the accused person.**
>
> **4) That my decision was informed by the fact that the issue between me and the accused person had been settled amicably and I did not wish to pursue it further.**
>
> **5) That I confirm that I still maintain the position that I have reconciled with the accused person and is desirous of having the charges facing him dropped unconditionally.**
>
> **6) That I have not arrived at this decision due to any form of duress or threats or undue influence or promise of any financial gain."**

Issues, Analysis and Determination

18. The issue that arises for determination is whether on the basis of the submissions herein, this appeal should be allowed. To answer this question, I shall go back to the record of the trial court with a view to determining whether indeed the case against the appellant was either withdrawn or the intention to do so was made known to the trial court.

19. On 20th July, 2015, the appellant informed the court that he had discussed the matter with the complainant and that they had agreed to reconcile. The court then said,

> ***"COURT: if the parties wish to reconcile, there is a procedure to do so under this Sexual Offences Act. A court cannot on the application of the complainant withdraw a charge under section 204 in Sexual Offences. Mention on 25.8.2015 to confirm if the parties have complied with the procedure."***

20. When the matter next came up on 25th August, 2015, the court prosecutor asked for 2 weeks to avail an authority from the DPP on whether or not withdrawal was possible. The case was then fixed for further mention on 10th September, 2015. On this latter date, no progress was recorded, so the court fixed the case for further hearing on 7th December, 2015 and on the said date, the prosecutor who told the court that he did not have the file from Nkubu Police Station applied for another adjournment. The request for adjournment was refused thereby forcing the prosecution to close its case. The issue of whether or not the charge against the appellant could be withdrawn was thus left unresolved.

21. Section 204 of the Criminal Procedure Code, which allows withdrawal of complaints provides as follows:-

> ***"204. If a complainant, at any time before a final order is passed in a case under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."***

22. The above section which deals with the withdrawal of ordinary criminal cases has its equivalent in ***section 40 of the Sexual Offences Act*** which provides:-

> ***"40. The decision as to whether the prosecution or investigation by the police officer of a complaint that a Sexual Offence Act has been committed should be discontinued shall rest with Attorney General."***

23. Although ***section 40 of the Sexual Offences Act*** talks about the Attorney General, I take judicial notice of the fact that the ***Constitution of Kenya 2010,*** under ***Article 157*** thereof establishes the office of the Director of Public Prosecutions and also sets out the functions of the said office. In a nutshell, it is the Director of Public Prosecution who has the mandate, under the Sexual Offences Act, to either continue with or discontinue any case.

24. In the instant case, it was the appellant who first brought up the idea of reconciliation between himself and D K and the possible withdrawal of the case against him. Then D K filed the affidavit and wrote a letter to the Director of Public Prosecutions asking that the case against the appellant be terminated. The truth of the matter is that neither the appellant nor D K had any authority to withdraw or force the withdrawal of the case against the appellant. In any event, and contrary to the appellant's contention the case against him was never withdrawn at any stage of the proceedings. There was only a wish that the case be withdrawn. Further, even if such an order had been made the same was a proper candidate for being overturned.

25. I now return to the grounds of appeal and the submissions made by both parties. My finding is that the evidence clearly connects the appellant to the commission of the offence, although both D K and the appellant would have wanted the case withdrawn. I have no reason to doubt D K's testimony which was not shaken in any way by the defence case. The medical evidence also confirmed that D K was raped and also assaulted. She went home with a swollen face, bleeding from the mouth and nose as well as tenderness on the arms and swelling on the

anterior aspects of both thighs. There was also tenderness and inflammation and bruises of the vaginal walls. There is therefore no cause for interfering with the conviction. D K did not consent to the act.

26. As regards sentence, the learned trial magistrate sentenced the appellant to 10 years imprisonment. A conviction for rape attracts imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. The general principles applicable by appellate courts in deciding whether or not to alter the sentence on appeal have been the subject of many decisions by the superior courts. In ***Griffin versus Republic [1981] KLR 121*** the court held that an appellate court cannot interfere with the sentence solely on the ground that it was heavy, unless it was also manifestly excessive. In passing sentence, the court must exercise its discretion depending on the circumstances of the cases "In ***Kyalo versus Republic [2009] KLR 325***, the court held, *inter alia*, that:-

> ***1. "An appellate court would only interfere with the exercise of discretion of sentencing where it was shown that the court whose exercise of discretion was "impugned", had either not taken into account a relevant factor or had taken into account an irrelevant factor, or that short of those two, the exercise of discretion was plainly wrong.***
>
> ***2. ……..***
>
> ***3. The sentence was essentially a discretionary matter for the High court but again in law, in exercising that discretion a trial judge had a duty to take into account all the relevant factors and leave out all irrelevant ones."***

27. Now I move back to the issue of sentence in this appeal. But first was the appellant charged under the correct section of the law. The correct section of the ***Sexual Offences Act*** for the offence of ***rape is 3 and not 8 of the Sexual Offences Act***. Though I see nowhere throughout the record where an amendment was made, the judgment by the learned trial magistrate referred to ***section 3(1)(a) and (c) of the Sexual Offences Act***. In my considered view no prejudice accrued to the appellant by the fact of citing 8 instead of (3) in the charge sheet. Since the complainant D K was a female adult whom the appellant knew, there was no way the appellant could have been mistaken about the case facing him, and that is why efforts were even made by the appellant to have the case withdrawn.

28. Having resolved the above auxiliary issue, ***Section 3(3) of the Sexual Offences Act*** provides that upon conviction under section 3, a person is liable to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. On the other hand, ***section 234 of the Penal Code*** provides that "***any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."***

29. In passing sentence, the learned trial court stated the following: - ***"Mitigation considered. Accused person is sentenced to serve 10 years imprisonment. Since Count II of grievous harm was committed at the same time of sexual assault the sentence to serve both counts.***" It is my considered view that the above stated reasoning by the learned trial magistrate was not sound. If such a reasoning were to be extended to offences under ***section 296(2)*** for example, the situation would be quite disturbing. The right thing to do would have been to consider the evidence in support of the charge under ***section 234 of the Penal Code.***

30. I have myself reconsidered Severina's evidence in which she stated in part of her evidence in chief "**She [D K] had presented herself for treatment on 23.6.2014. Her face was massively swollen and the right eyebrow was bruised. Both eyes were swollen and tender with dark parts. She had sours in the mouth and tender swelling on the occipital side of the tender swelling on the side of the chest, lower zone, tenderness on both upper limbs. She had swelling and tenderness on both thighs…….The probable type of [weapon] that caused the physical injuries was blunt. ……. I assessed the degree of injury as grievous harm."**

31. Under ***section 4 of the of the Penal Code***, "**grievous harm**" is defined to mean "***any harm which amounts to a main or dangerous harm, or seriously or permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."***

32. In the instant case, the injuries sustained by D K during the sexual assault on her by the appellant seriously injured her health. The trial court should have so found; and the fact of these serious injuries may explain the appellant's desperate attempts to get out of the trap. It is my finding that since the offence of grievous harm was proved beyond any reasonable doubt, the correct sentence that ought to have been meted out was life imprisonment as by law provided. In this regard, I find part of the holding in ***Bwayo versus Republic [2009] KLR*** relevant. The court stated, *inter alia*,

> ***"2. The terms of section 8(2) of the Sexual Offences Act 2006 were mandatory and therefore provided for life imprisonment as the minimum sentence. It must logically be so since the succeeding sub-sections (3) and (4) which provided for punishment for defiling much older children of between the age of twelve and fifteen years and between the age of sixteen and eighteen years respectively provided for minimum sentences of imprisonment for a term of not less than twenty years and not less than fifteen years, respectively. The provisions would be consonant with the prime objective of the Act which was prevention and protection of all persons from harm from sexual acts."***

33. In the case of the offence of grievous harm, I am unable to accept a sentence of 10 years imprisonment, whether the offence was committed in the course of committing another offence or not. This therefore means that this court must interfere with trial court's sentence in respect of Count III (Not count II as recorded by the trial magistrate). The sentence of 10 years is set aside and in lieu thereof, I sentence the appellant for life imprisonment. The sentences shall run concurrently.

34. For the above stated reasons, the appellant's appeal both on conviction and sentence fails. The appellant has a right of appeal to the court of appeal within 14 days from the date of this judgment.

It is so ordered.

Judgment written and signed at Kapenguria

R. N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Meru on this 25th day of September, 2018.

ALFRED MABEYA

JUDGE