REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 124 OF 2010

CHARO CHANGAWA KARISA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 995 of 2006

of the Chief Magistrate's Court at Malindi – D.W. Nyambu, PM)

JUDGEMENT

This is an appeal against conviction on the charge of rape contrary to Section of 140 of the Penal Code and on the second count of stealing contrary to Section 275 of the Penal Code for which the Appellant, Charo Changawa Karisa was sentenced to serve 15 years and 3 years imprisonment respectively.

2. The Appellant put forth grounds of appeal and also grounds in mitigation. In summary the grounds of appeal are that the Appellant's rights under Article 49(1)(f) of the Constitution were violated due to his long stay in police custody; that no DNA test was carried out on his person to prove sexual assault; that the trial court's decision was based on contradictory and inconsistent evidence; that the trial court failed to note that there was no visual identification; that there was failure to call mentioned witnesses to clear doubt of the allegation as required by Section 144 (1) of the Criminal Procedure Code; and that the court unreasonably rejected his defence which was firm enough to cast doubts on the prosecution's case.

3. On the sentence, the Appellant submitted that the sentence was not safe as it denied him the opportunity to turn a new leaf and called for its setting aside. He asserted that he was young, remorseful, reformed and ready to be assimilated back to the society. In his view, since the victim was treated for injuries and discharged and further considering the circumstances of the case, then the period already served was sufficient. He urged this court to consider the decision of **Said Athman Hamisi & 2 others v Republic [2016] eKLR; Criminal Appeal No. 61 of 2012** where the court found the sentence harsh and reduced the sentences of the appellants to ten years taking into consideration the period already served.

4. On its part, the State submitted that the conviction and the sentence were safe and that the prosecution proved its case beyond reasonable doubt. The Respondent's case was that the trial court had the opportunity to hear and believe the evidence of the alleged victim as per Section 124 of the Evidence Act and holding by the Court of Appeal in **Denis Osoro Obiro v R [2014] eKLR**. Reliance was also placed on the decision in **Maitanyi v Republic [1986] eKLR**.

5. Further, in the opinion of the State, the prosecution had no need for additional witnesses as it had proved its case as per Section 143 of the Evidence Act. The case of **Peter Mote Obero & another v Republic [2011] eKLR** was cited in support of this submission. This court was urged to therefore disregard the Appellant's assertion that the prosecution failed to call all credible and crucial witnesses. Also, that the Appellant did not name the witnesses who had not testified but ought to have been summoned to testify. It is in addition submitted that the trial court considered the defence and found it to be a bare denial.

6. The State pointed out that the Appellant did not raise the issue of prolonged incarceration beyond the legal period. Further, that the remedy for a violation of a fundamental right guaranteed under Article 49(1)(h) of the Constitution lies in a civil suit as was stated in the case of Julius Kamau Mbugua v Republic [2010] eKLR.

7. This being a first appeal, the onus of this court is to look into the evidence afresh, reconsider and re-evaluate it in order to reach its own conclusion while keeping in mind that the trial court had an opportunity to observe the demeanour of the witnesses-see Okeno v Republic

[1972] EA 32. The court is also to be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles-s *ee C**hemagong v Republic [1984] KLR 611,** and **Gunga Baya & another v Republic [2015] eKLR.***

8. *The Appellant was charged with two counts. The first count was of rape contrary to Section 140 of the Penal Code particulars of which were that on 31st May, 2006 at (particulars withheld) within Malindi District of the Coast Province, he unlawfully had carnal knowledge of C.S.K. without her consent.*

9. *On count two the Appellant was charged with stealing contrary to Section 275 of the Penal Code the particulars being that on the same date and at the same place mentioned in count one the Appellant stole a Motorola C115 mobile phone valued at Kshs. 4,000 the property of C.S.K.*

10. *The offence of rape is now legislated under the Sexual Offences Act, 2006 which came into force on 21st July, 2006 shortly after the Appellant had been charged.*

11. *The record indicates that the victim testified twice. The proceedings on 16th April, 2007 were conducted before Hon. D. Ogembo, SRM (as he then was) when the complainant testified as PW1. On that day despite being invited to cross-examine the witness and being advised by the court on the importance of cross-examination, the Appellant declined to cross-examine the complainant. Prior to this date, on 20th February, 2007, the court took note, in allowing an application for adjournment by the defence, that the Appellant had a new advocate representing him. It is not, however, clear whether the said advocate was present when the matter proceeded on 16th April, 2007.*

12. *On 17th July, 2007 a different magistrate took over and the matter commenced de novo. Hence PW1 was once again called upon to testify. This second magistrate heard four prosecution witnesses. The other prosecution witnesses namely PW5 to PW8 were heard by the third magistrate who also heard the defence case. It is this final magistrate who wrote the judgment. In the judgment it is clear that the convicting magistrate used the evidence that had been adduced before the first magistrate instead of that recorded by the second magistrate who had deemed it fit to have the matter start de novo.*

13. *In the circumstances of this case I will proceed guided by the Court of Appeal decision in **Mary Njoki v John Kinyanjui Mutheru [1985] eKLR*** where it was held that:

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide."**

14. *In **Gunga Baya & another** (supra) the Court of Appeal held that a first appellate court ought not to interfere with a finding of fact by the trial court **"unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles."***

15. *In the circumstances of this case, I will consider the evidence adduced by PW1 after the second magistrate ordered for the case to start afresh.* The evidence of PW1 C.S.K was as follows. On the material day at about 5.00 p.m. she was walking home from work using a path that led to her homestead. On the way she met and greeted Lengo, a boy she knew, and went on her way. At the junction that would lead her home, she met the Appellant who greeted her and she responded. He suddenly grabbed her by the neck, pressed her down and dragged her 10 meters into a nearby thicket. The hold on the neck stopped her from screaming. The Appellant then threatened her with death but he was unarmed. He then demanded all her money but she told her she had none and so he ordered her to remove her clothes with the intention of raping her. The Appellant pulled her further into the forest, stripped her of her undergarments which he threw away. She remained with her blouse. He then pushed her down, removed his clothes and forced himself on her. In her estimation the ordeal lasted between 5.30 p.m. and 7.45 p.m.

16. It was the complainant's testimony that the Appellant had covered his head using his shirt. During the incident, the Appellant spoke to her in Giriama, asking about her HIV status among other questions. When the Appellant was through with his odious act, he wiped her with her brassiere, gave her clothes and wore his. PW1 begged for her life. The Appellant then opened the handbag she had carried, took her mobile phone and demanded that she show him how to operate it before he left disappearing with it. A dejected and hurt PW1 emerged from the scene unable to run due to pain. She met two young men to whom she narrated her ordeal and begged them to take her home which they did. On reaching home, the complainant told her mother and brothers about the incident. She also described the assailant's features to her brothers. PW1 was escorted to the police station and later to the hospital where she was admitted for two days. She later recorded her statement and also obtained a P3 form. The evidence of PW1 was that she had not known the Appellant before that fateful day.

17. According to PW1, the Appellant was arrested by members of public two days after the ordeal. Her father begged the people who arrested the Appellant not to beat him and he was escorted to the police station. The Appellant had told the members of the public where the complainant's phone was and one Gilbert went to the Appellant's house and retrieved it and the Appellant handed it over to the police. PW1 was able to identify the mobile phone, its purchase receipt and the P3 form in court.

18. At cross-examination PW1 explained that there were scattered homes, farms, grazing fields and thickets after the market center. She stated that she was dragged into the thicket from the busy road. It was her testimony that the distance from her work place to her home was manageable and that it would take 15-20 minutes. PW1 also indicated that her statement was written down by the police who did not read it

back to her. That her brothers found the Appellant already arrested by members of public who were neither her neighbours nor her brothers' friends. PW1 was categorical that the Appellant was not her boyfriend and that she knew Gilbert from their village but did not know if Gilbert knew the Appellant. She further explained that when she met the Appellant his head was covered and by the time they left the forest darkness had fallen. The Appellant never told her his names but she did hear his voice and since it was still early at about 5.30 p.m. she was able to see him. In addition, she stated that her mobile phone was bought for her by her boss and that his name does not appear on the purchase receipt.

19. Upon re-examination, the witness stated that she had made attempts to escape before the ordeal. She also testified that the shirt covering the Appellant's head came off during the ordeal exposing his face.

20. Garama Kahindi a village mate of PW1 testified as PW2. His evidence was that on the material date at about 8.00pm he was on his way home from a nearby shop when he met a crying PW1 carrying her clothes and shoes. At the time, PW2 was with his two brothers. Upon enquiry, she reported to them of the heinous incident and they escorted her home where they handed her over to her parents. PW2 later recorded his statement with the police.

21. During cross-examination PW2 testified that it would take almost three hours to walk from PW1's home to her place of work and that he did not meet her on the road to her place of work. On re-examination PW2 explained that PW1's home to her place of work was the distance from the court to the airport and that there were several routes one could use to get there. The court did not however estimate the distance from Malindi Airport to the Malindi Law Court.

22. The complainant's mother, M.N., testified as PW3. She told the court that at about 8.00 p.m. on the material day she received her injured and distressed daughter who was crying. She was under the escort of PW2 and others. Her daughter told her what had happened and she took action by escorting her to the police station and later to the hospital. She testified that the Appellant was arrested after three days by one Kihingi who took him to her home. The Appellant admitted the offence after interrogation and was escorted to the police station. Her testimony was that PW1's mobile phone was brought by another boy. She identified the mobile phone in court.

23. At cross-examination PW3's testimony was that her daughter normally arrived home from work at 5.00 p.m. She stated that on the material day PW1 came home at 8.00 p.m. walking with difficulty, her clothes were wet on some parts and she felt pain in the neck. PW3 confirmed that PW1 was admitted in hospital for two days and further that the Appellant was delivered to their place by members of public.

24. PW4 Lukas Kazungu Tumwa, a neighbour to PW1was called to PW1's home on 3rd March, 2006 at about 11.00 a.m. whereupon arrival he found the Appellant, whom he knew, tied with a rope. PW4 was informed that the Appellant had raped the complainant and he escorted him to the police station accompanied by PW1's parents.

25. The complainant's father J.K. testified as PW5 and stated that he got home at 8.30 p.m. on the date of the incident and found a crowd of people. PW1 told him what had transpired and they reported the matter to the police. They also took the complainant to hospital where she was admitted for two days.

26. On 3rd June, 2006 PW5 was at home when the Appellant was brought by a group of young men and PW1 was able to recognise him. PW5 summoned the village elder and they escorted the Appellant to the police station. His evidence was that he was meeting the Appellant for the first on the day of his arrest. In cross-examination he stated that PW1 had stated that she did not know the culpable person.

27. Kingi Kahindi Ngumbao testified as PW6. On 3rd June, 2006 at about 9.00 a.m. he entered a local hotel where he overheard people speaking of PW1's ordeal. His colleagues stated that the responsible person was the Appellant. He knew the Appellant as his description had been given to him. He also knew the complainant as a girl from the area. As he knew the Appellant since he worked with him in the same area he called him to enquire about the incident and told him that they should go to PW1's home to find out about the allegation. PW6 and other people escorted the Appellant to the home of the complainant. When PW1 saw him she broke down wailing that he was the culprit. The Appellant tried to escape but was apprehended. Together with PW1 and her father they escorted the Appellant to the police station and took the mobile phone with them. He identified the mobile phone in court. He likewise identified the Appellant in court and stated that they had never differed.

28. Upon cross-examination, PW6 stated that he had known the Appellant long before the incident as they worked together and that he knew PW1 but did not know if she knew the Appellant prior to the incident. PW6 confirmed that he overheard the conversation from persons unknown to him but it was those people who gave him the description of the person who had committed the atrocity. PW6 found the Appellant at Gilbert's house, a neighbour to the Appellant. The Appellant denied his culpability and they agreed that PW1 should be asked to identify the Appellant.

29. The evidence by the police was given by PW7 PC Bingwa Samuel. His evidence was that he received the complaint on 31st May, 2006 from PW1 and the report was booked in the Occurrence Book. PW1 was injured and was bleeding from her private parts. PW7 also received the stolen mobile phone. He escorted PW7 to hospital where she was admitted for two days and a P3 form filled. He identified the P3 form and the mobile phone stating that its purchase receipt got lost during the incident.

30. PW7 further stated that on 3rd June, 2006 the Appellant was taken to the police station by members of public. PW7 then commenced investigations and recorded statements. PW7 stated that he knew the Appellant from before as he used to see him in town.

31. In response to questions put to him during cross-examination PW7 stated that he did not have PW1's treatment notes. He could not recall the names of the people who arrested the Appellant. He told the court that he did not visit the scene of crime. Further, that he did not

record the Appellant's statement terming the same as unnecessary. The witness stated that he took both the Appellant and complainant to hospital for examination.

32. At re-examination PW7 stated he was the initial investigator in the matter. He further explained that it was not necessary to visit the scene of crime as the complainant who would have taken them there was admitted in hospital.

33. The medical evidence was given by PW8 Dr. Ibrahim Adullahi, a clinician at Malindi Hospital. He produced two P3 forms both dated 12th June, 2006 in respect of examinations carried upon PW1 and the Appellant. They were filled by Dr. Wobeyo whose handwriting PW8 was familiar with. In regard to the P3 form filled for the complainant the information therein was that she had bruised knees, broken hymen, numerous red-blood cells but no spermatozoa was seen. The conclusion was that there was probability of forceful penetration. The information regarding the Appellant was that he was 15 years at the time, had an abrasion to the right eye and left elbow region which was healing, injury to frontal region which had healed and the conclusion was that a blunt object had caused the harm.

34. Upon being placed on his defence the Appellant gave sworn testimony but was not cross-examined. He stated that on 3rd June, 2006 he was from fishing when a group of people came looking for someone like him. They informed him that he was needed at PW1's home as something bad had happened. He however did not know PW1. He was also informed that he and his friend would be taken to PW1 for identification. When they got there the said group of people fell on him with blows asking if he knew PW1 which he denied. PW1 was at the time crying. He was then taken to the police station and to hospital for treatment before being charged.

34. The question is whether the prosecution successfully discharged its burden of proof in light of the evidence that was adduced. The onus lay upon the prosecution to prove the offences charged beyond reasonable doubt.

35. The offence of rape as created by the repealed Section 139 of the Penal Code required the prosecution to prove unlawful carnal knowledge of a female without her consent or that the consent was obtained by means of threats or intimidation or false representation of the nature of the act or by personating the husband in the case of a married woman.

36. PW1 testified that her assailant threatened her with harm after the chokehold, dragged her to the bush and had carnal knowledge of her without her consent. PW8's evidence indeed indicated that there was forceful penetration corroborating PW1's evidence that someone had carnal knowledge of her. To this extent the prosecution had demonstrated beyond reasonable doubt that the complainant had been penetrated.

37. The identity of the perpetrator is the other issue. The trial court noted that the identification of the perpetrator was made by a single witness being PW1 and proceeded to caution itself as was expected of it. *It is the position in law that the court must act with caution where a single witness identifies the accused person-see* ***Abdallah Bin Wendo & another v Republic (1953) 20 EACA 166*** *and* ***Charles Maitanyi v Republic [1986] 1 KLR 198; [1986] eKLR.***

38. In Abdallah Bin Wendo (supra) it was stated that:

> **"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the 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 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 possibility of error."**

39. The questions to be asked by the court in order to establish if the evidence on identification is sufficient were posed by Lord Widgery CJ in R v Turnbull and others [1976] 3 All ER 549 as follows:

> "Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by the witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

40. *PW1's evidence was that she was with the Appellant from 5.30 p.m. to 7.45 p.m. and was able to identify his features as it was still early. She also gave his description to her brothers and the Appellant was found by members of the public. It is noted that the complainant* had not known or seen the Appellant before the ill-fated encounter. When cross-examined PW1 *explained that the Appellant had covered his head but she was able to see him and heard his voice. During re-examination she made it clear that the shirt the Appellant had used to cover himself fell off in the course of things thereby exposing his face.*

41. *PW6 filled* the gap as to the Appellant's arrest. He explained that he overheard a conversation by strangers and was able to pick from their conversation that the person that was being described as the complainant's assailant was the Appellant.

42. The courts have long held that that though recognition is the best form of identification it is not without error. In Cleophas Otieno Wamunga v Republic [1989] eKLR the Court of Appeal adopted with approval the statement in Turnbull (supra) that:

"Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

43. It is important to note that the identification in the instant case was not by way of recognition and is by a sole witness. It must therefore be treated with a lot of caution. Having said so, it is noted that the complainant met the Appellant when it was still daylight. Although he had initially concealed his face, the shirt which acted as a veil later fell off and so she found an opportunity to identify him. It is also noted that by its very nature a sexual encounter requires close contact. The complainant therefore had sufficient opportunity to identify the Appellant.

44. The evidence of PW6 shows that the identification by the complainant was not doubtful. Upon seeing the Appellant, the complainant cried out that he was her tormentor. She therefore clearly identified the Appellant a few days after the incident. The evidence of identification was also firmed by the fact that the complainant's mobile phone which had been taken from her during the ordeal was recovered from the Appellant.

45. The Appellant put forward a ground of appeal to the effect that DNA testing ought to have been conducted in order to connect him with the crime. The answer to this issue was provided by the Court of Appeal in **Evans Wamalwa Simiyu v Republic [2016] eKLR** where a similar issue was raised and the Court stated:

> **"[19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to Section 36 of the Sexual Offences Act which evidence could have exonerated him. In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that:**
>
> **"*The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.*"**
>
> **[20] This was further affirmed in Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported) where this Court stated that:**
>
> **"*The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.*"**
>
> **[21] Moreover, 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."**

46. As for the second count, the evidence of PW6 was to the effect that the mobile phone had been retrieved from the Appellant. This charge again was therefore also proved. The complainant positively identified her item.

47. Was the Appellant's defence considered? The trial magistrate held that the prosecution witnesses gave evidence that was consistent and had withstood rigorous cross-examination by the defence counsel. She concluded that the Appellant's defence was a bare denial and went ahead to dismiss it. The defence case was therefore considered and rejected in light of the evidence that had been adduced by the prosecution. It cannot therefore be said that the trial court failed to take into consideration the defence case.

48. On the alleged breach of constitutional rights owing to alleged delayed production in court, I find this ground of appeal without merit. The Appellant was arrested and taken to court during the old constitutional order where the police had a maximum of fourteen days before taking suspects to court. The record discloses that the Appellant was arrested on 3rd June, 2006 and taken to court on 13th June, 2006. This was well within the period allowed by the law at that time.

49. As for the sentence imposed, I note from the proceedings that the trial court did on several occasions make *suo moto* orders for assessment of the age of the Appellant although this was never done. The court had reason to ask for a report on the Appellant's age. The P3 form prepared for the Appellant and produced by PW8 indicated that his estimated age was 15 years. In the absence of evidence to the contrary, the trial court ought to have treated the estimated age in the favour of the Appellant for the purposes of sentencing. The trial magistrate ought to have applied the Children Act, 2001 in sentencing the Appellant who had committed the offence during his childhood.

50. In summary, the outcome of this matter is that the appeal on conviction has no merit and the same is dismissed.

51. On sentence, I find that the sentence of imprisonment imposed on the Appellant was contrary to sections 190(1) and 191 of the Children Act. The Appellant has served about eight years imprisonment and it would be unjust to think of imposing an alternative sentence. The period already served is more than enough punishment. In the circumstances I set aside the prison sentence imposed on the Appellant. The appeal on sentence succeeds. The Appellant is set free unless otherwise lawfully held.

Dated signed and delivered at Malindi this 25th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT