**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 5 OF 2016**

(From original conviction and sentence in Criminal Case No. 429 of 2014 of the Principal Magistrate's Court at Wang'uru).

**EZEKIEL NJOROGE MUKUA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant Ezekiel Njoroge Mukua was charged and convicted of the offence of rape contrary to ***Section 3 of the Sexual Offences Act*** and sentenced to serve ten years imprisonment. He was charged before the Principal Magistrate's Court at Wang'uru in **Criminal Case No. 429/2014**.

The appellant was aggrieved with the conviction and sentence and filed this appeal which raises the following grounds:-

**a. The witness lacked sufficient evidence because they belonged to one family member.**

**b. The scene of the crime had no sufficient evidence and no witness was available.**

**c. Complainant agreed to withdraw the case unconditionally knowing nothing happened in such particular case.**

**d. There was no medical checkup done to the accused person.**

**e. Complainant did not report immediately to the nearest police station.**

The state opposed the appeal and gave notice to the appellant that they would apply for the sentence to be enhanced if the appellant proceeded with the appeal. The State through the Prosecuting Counsel Mr. Geoffrey Obiri urged the court to find that there was overwhelming evidence to prove that the appellant committed the offence of rape and urged the Court not to disturb the finding of the trial court and proceed to dismiss the appeal.

The appellant acknowledge that he was served with the notice by the state that they would seek to have the sentence enhanced. The appellant stated that he wished to proceed with the appeal.

This is a 1st appeal which calls on this court to consider analyse and evaluate the evidence and reach its own independent finding while bearing in mind that it did not have the chance to see the witnesses and assess their demeanor and leave room for that. This was the holding in the case of **Okeno –v- R (1972) E. A 32** and reiterated by the Court of Appeal in the case of **Joseph Njuguna Mwaura & 2 Others –v- Republic (2013) eKLR** where the Court stated:-

**"It is common place that the first appellate court is mandated to re-consider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses before making a determination of its own."**

I will embark on the analysis of the evidence. The complainant H W K testified that…..

**1. Evidence**

The appellant who was her neighbour invited her for lunch at Tips restaurant. At the restaurant, they waited for half an hour with no service and as she was about to leave, the appellant told her to go wash her hands. While in the corridor, the appellant pushed the complainant to a room with a bed before proceeding to tear her clothes and rape her.

The complainant managed to leave the room. Later the same day she reported the matter at Wang'uru Police Station. She was issued with a P3 form and was treated at Kimbimbi sub-District Hospital. The P.3 form was filled together with treatment notes, exhibit 4 & 5.

The medical examination confirmed that the complainant had a swollen throat where the appellant had held her and her labia manjora and minora were reddish and swollen. There was also fluid discharge from her vagina and the swab test indicated presence of sperms.

PW -2- N W W who is the complainant's mother testified that the complainant called and informed her that she had been raped. She said she was going back to school as she wanted to vacate that plot PW-2- called the complainant's father. D K who went for her. They reported the matter to the police and the complainant was thereafter taken to Kimbimbi Sub-District Hospital.

The complainants father D K (PW -3-) testified that she received the report from his wife. The complainant was in a matatu. He followed it upto Makuyu and the complainant alighted and explained what had happened. She took her back to Wang'uru where the matter was reported and she was referred to hospital.

PW-4- P. C. Peter Njathi the Investigating Officer testified on how he received the report. He recovered a torn pant. Blouse and brassier which the complainant was wearing on that material day. The complainant's skirt was also torn. He concluded that the complainant was raped. He then charged the appellant after he was arrested by members of the public and taken to the police station.

PW-5- Doctor Kenneth Munyi a Medical Officer at Kimbimbi Sub-County Hospital produced a P3 form on behalf of Doctor Manyeki who examined the complainant and filled it. The observations made on the complainant were that she was depressed and in tears. She had bruises on the neck and swelling on back of head. There was strangling of the patient leaving blunt object trauma. On the genitalia, the labia majora was bruised and red in colour and was also swollen. There was fluid discharge from the rectal opening. Spermatozoa was present from High Vaginal Swab.

Having considered this evidence I find that it was cogent and well corroborated. Though no eye witness gave testimony to corroborate on the fact of rape it is noted that this is an offence which is rarely committed in the open for witnesses to see. The court considers the credibility of the victim and whether the allegation is corroborated by medical evidence. In this case medical evidence corroborates the allegation of rape. The evidence tendered by the prosecution proves beyond any reasonable doubts that the complainant was raped.

The appellant in a sworn statement denied that he committed the offence. This was a mere general denial. He claimed that he had a disagreement with the complaint's mother over some water. This was however not put to her when she testified. In any case the credibility of the appellant was in doubt since he lied that his wife was in Nairobi while his mother (DW-2-) told the court his (appellant's) wife was in Mwea.

Where it is clear that the appellant has lied on oath, his testimony cannot be relied on. His credibility is in doubt. The testimony by the complainant is reliable.

The appellant raised ground that the witnesses lacked sufficient evidence because they belonged to one family member (sic). No submission was made by the appellant on this ground. However though the witnesses who were called, that is PW2 & 3 were parents of the complainant, they were competent and compellable witnesses **Section 125(1) of the Evidence Act** provides:-

> **"(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."**

It is for trial court to determine whether the witnesses are reliable and once it is satisfied that the witnesses are reliable, it proceeds to convict. In this case the trial Magistrate found that PWI, 2, & 3 were credible and it was therefore safe to rely on their testimony. It is stated by the trial Magistrate that he found the complainant was credible. He had the chance to see the complainant and assess her demeanor. This is a fact which this court cannot dispute as it is exclusive to the trial court. She testified on the fact of rape. Her testimony was corroborated by the medical evidence. PW 2 & 3 acted on what was reported to them. They were competent and compellable. This ground is therefore without any merits.

The appellant raised the ground that the scene of crime had no sufficient evidence and no witness was available. The complainant stated that her clothes were thrown outside through a broken window. That P. C. Peter Njathi who was the Investigating Officer and claimed to have visited the scene in the course of investigations, in cross-examination he stated that the room did not have a broken window.

I find that these are minor contradictions which are excusable and do not shake the credibility of the witness. Not every contradiction will vitiate a conviction especially if it is not on the issue for determination. If it is not a material contradiction the court will ignore it. Where the clothes were thrown is not material. PW4 found that indeed there was a room where the offence was committed. It is also noted from the testimony of PW-4- that he visited the scene two days after the incident. The room had been interfered with. The bed had been made/close. He said by the time he visited the scene all was intact. Nothing was broken in the room including the windows. The scene had not been preserved and anything could have happened before PW-4- visited the scene. The issue of contradiction and inconsistencies was addressed by the Court of Appeal in the case of **Ondeng –v- R Cr. App. 5/2013 C. A. Nairobi** which quoted with approval the decision in the Ugandan Case of **Twehangane Alfred –v- Uganda Cr. Appeal No. 139 of 2001(2003) UGCA-6** where it was stated that not every contradiction that warrants rejection of evidence.

As the court put it:

> **"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave**

**contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."**

The alleged contradiction is not grave. The PW-4- found there was a room and a bed, there was also a corridor. Minor contradiction will not lead to the rejection of the evidence and as will show below, the evidence of the complainant was corroborated on the fact of rape.

The appellant contends that the complainant agreed to withdraw the case unconditionally. No submission was advanced on this ground. The record shows that the complainant had said she wished to withdraw the matter but the Director of Public Prosecution opposed due to the nature of the charge. There is nothing to show that the complainant wanted to withdraw because nothing had happened. The record shows that she had said she discussed the matter and given reasons in the letter Exhibit –D2-. She gave evidence which was credible and sustained the charge. The trial Magistrate found that the complainants father had received Kshs 12,000/- to terminate the case. This he found had no bearings on the merits of the case. The complainant's father and the father of accused entered an agreement which was produced as exhibit D-1-. It cannot therefore be said the complainant had fabricated the case and yet the appellant readily compensated her. ***Section 40 of the Sexual Offences Act*** provides:

**"The State acted within the law when they declined to allow the complainant to withdraw the case."**

The appellant submits that no medical check up was done on him.

In considering this ground, ***Section 36(1) of the Sexual Offences Act*** provides:-

**Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."**

The court of appeal had occasion to consider this ground in the case of ***Mutingi Mumbi –v- R. Cr. Appeal No. 52 of 2014 (Malindi)*** where it was stated:-

**"Section 36(1) of the Act empowers court to direct a person charged with an offence under the Act to provide samples for tests including for the DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not concluded in mandatory terms."**

Decisions of this court abound which affirm the principle that Medical or DNA evidence is not the only evidence of which commission of a sexual offence maybe proved.

The Court of Appeal further stated in **Williamson Sowa Mbwanga –v- R.**

**"…….As the Court of Appeal of Uganda rightly stated in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured ……. It is partly for this reason that section 36(1) of S. O. A is couched in permissive rather than mandatory term, allowing the Court if it deems it necessary for purpose of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific or DNA testing."**

It is not mandatory that the perpetrator of a sexual offence be subjected to medical examination in order for the case to be proved beyond any reasonable doubts. The evidence of the complainant is key to a conviction in a sexual offence. If penetration is proved and the perpetrator is known, and there is medical evidence to corroborate it, if the trial Magistrate finds that the complainant is credible, the evidence is sufficient to support a conviction. This despite the provision of **Section 36 of Sexual Offences Act**. The trial Magistrate at Page 66 , line 9-10 of the record stated:-

**"I found the complainants testimony to be credible and the same was not shaken at all on cross-examination."**

I find that failure to examine the appellant was not fatal to the prosecution case and the ground is without merits.

The appellant submits that the trial Magistrate erred in law by failing to find that the medical document did not belong to the complainant.

He stated that the documents that is the P.3 form was in the name of H W K whereas the complainant is H W K. The treatment notes exhibit P. is in the name of H W K. The P.3 form **Exhibit P-2-** gives the name of complainant as H W K. She gave her name in court as H W K. This ground is a sham as it is not supported by the record. There was no violation of his right to fair trial.

**Burden of proof**

It is trite that the burden of proof always lies with the prosecution to prove their case.

**Section 3 (1) of the Sexual Offences Act No. 3 of 2006**

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.

The appellant forcefully raped the complainant after he had offered to take her out for lunch. The complainant did not consent and which forced the appellant to hold her down and strangled her neck which was confirmed by medical examination.

Looking at the entire evidence adduced, the prosecution has proven his case beyond all reasonable doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant raped the complainant in the manner described.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record.

The prosecution urged the court to enhance the sentence. The appellant was given notice and opted to proceed with the appeal.

**Section 3 (3) of the Sexual Offences Act No. 3 of 2006**

*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.*

**Regulation 3 of the Sexual Offences Regulations, 2008**

1. For purposes of sentences imposed by sections 3(3), 4, 5(2), 10 or any other under the Act which may require alteration, revision or enhancement, the High Court may exercise the powers and procedures provided for under sections 362, 363, 364, 365, 366, and 367 of the Criminal Procedure Code.

2. In exercise of the power to alter, revise or enhance sentences under the Act, regard shall be had to—

a. whether the sentence imposed is unlawful or contrary to that provided for by the Act;

b. the number of times the perpetrator of the offence has committed the offence;

c. the age of the victim(s) of the sexual offence;

d. the age of the perpetrator(s) of the sexual offence;

e. the victim impact statements adduced in accordance with section 33(b) of the Act;

f. whether force was involved;

g. prior criminal history;

h. the relationship existing at the time of the offence between the victim and the accused; and

i. any other factor which may be relevant in the opinion of the Court:

Provided that proceedings under this regulation shall be subject to ***Section 382 of the Criminal Procedure Code*** which provides*:*

**"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

**Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

The principles of altering a sentence was stated in the case of **Ogolla S/O Owuor, (1954) EACA 270** wherein the Court of Appeal held:

**"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

The prosecution has not proved that the trial court acted upon wrong principles or overlooked material factors. The penalty for the charges against the appellant is imprisonment for a term not less than ten years but which may be enhanced to imprisonment for life. Therefore the sentence meted out was lawful. I see no reason to interfere with the sentence.

**In Conclusion:-**

For the reasons I have stated, and having carefully considered and evaluated the evidence, I find that this appeal is without merits.

I dismiss it.

**Dated at Kerugoya this 22nd day of November 2018.**

**L. W. GITARI**

**JUDGE**