REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 149 OF 2015

PATRICK MURIITHI IRERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE IN THE CHIEF MAGISTRATE'S COURT AT THIKA CR. CASE NO. 4234 OF 2012 DELIVERED BY HON A. LOROT, SPM ON 30TH OF JULY 2015).

JUDGEMENT

Background.

The Appellant herein, Patrick Muriithi Ireri, was charged with the offence of rape contrary to Section 43 (2) (a) of the Sexual Offences Act No.3 of 2006. The particulars were that on the 8th of November, 2014 at around 10.00 p.m., at [particulars withheld], Muranga County, intentionally and unlawfully caused his penis to penetrate the anus of J N M.

He was also charged in the alternative with the offence of committing an indecent act with an adult contrary to Section 114 of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 8th day of November, 2006 at around 10.00 p.m., at [particulars withheld], Muranga Country, intentionally and unlawfully touched the anus of J N M against his will.

The Appellant was convicted in the main charge and was sentenced to serve 20 years' imprisonment. He was dissatisfied with both the conviction and sentence and he filed the instant appeal. I have condensed his grounds of appeal as follows:

That he was not properly identified.

That the offence of rape was not established.

That the evidence of the prosecution was contradictory.

That the prosecution failed to avail essential witnesses.

That the honorable magistrate did not consider the Appellant's defence.

The Appellant filed written submissions. On identification, he submitted that there was inadequate description of the nature, source and amount of light at the scene of the incident. He took issue with the fact that being at night the conditions of identification were not favourable and the Appellant may have been mistaken as to who raped him. On proof of the offence, he submitted that the medical evidence was insufficient. He was of the view that since PW1 was found to have contracted a sexually transmitted disease, an examination on him ought to have been done to confirm if too was infected. That way, he would have been linked to the offence. He also faulted the evidence on his arrest which he submitted was contradictory. In this respect, he submitted that crucial witnesses, being members of the public who allegedly arrested him or persons who were in the bar where he and PW1 were drinking ought to have been called as witnesses. The failure to call these witnesses meant that there was no evidence on how he was linked to the offence. Finally, he submitted that his alibi defence was not considered before he was convicted.

Learned State Counsel, M/s Nyauncho for the Respondent submitted that the Appellant was adequately identified. She submitted that the identification was by way of recognition as the Appellant was known to PW1 for three years prior to the incident. She submitted that there was bright moonlight and on the night of the incident they were both at the same bar. Counsel added that the medical evidence adduced by PW2 indicated the presence of bruises and swellings on the perianal region which injuries were consistent with sodomy. On further examination, PW2 discovered a stab wound on the shin of the complainant. Counsel further submitted the prosecution had called sufficient number of witnesses who proved their case beyond a reasonable doubt. She added that the sentence passed was lawful and urged that the appeal be dismissed.

Evidence.

It is now the duty of this court to determine whether the case was proved beyond a reasonable doubt. In so doing, the court must reevaluate the evidence on record and come up with its independent findings. It should however bear in mind that it has neither seen nor heard the witnesses. See the case of **PANDYA VS. REPUBLIC [1957] E.A, 336**.

In total, the prosecution called 3 witnesses. **PW1, Jacob Ngugi Mweru,** the complainant testified that on the 8th of November 2014, he was at Honey Comb pub at around 9.00 p.m. where he saw the Appellant. He left the pub at around 10.00 p.m. On his way home, he was accosted by the Appellant on a footpath who pushed him into a nearby ditch where he forcefully undressed him from trousers to underpants. PW1 testified to have seen the Appellants face and called his name out. The Appellant proceeded to sheathe his penis into a condom and inserted it into the anus of PW1. A struggle ensued during which time the Appellant stabbed PW1 in the shin of his right leg with a kitchen knife. PW1 screamed in agony but no one came to rescue to him. PW1 was threatened by the Appellant after the ordeal was over. The Appellant then proceeded to dump the clothes of PW1 at Gatura shopping Centre. PW1 then slowly walked to the residence of his employer and slept. On the following morning, the 9th of November, 2014, he reported the matter at Gatura AP Camp. He was referred for treatment and was treated at Kirwara Health Centre.

PW2, Simon Mwangi Mburu, a Clinical Officer at Gatura Health Centre examined PW1 on the 9th of November 2014 and filled his P3 Form. He used treatment notes issued at Kirwara Sub-District Hospital. He noted that PW1 had injuries on the neck, a superficial cut on the right leg, bruises and swelling on the perianal region. There was also indication of an STI infection. The injuries were consistent with someone who had been sodomized. He prescribed necessary treatment.

PW3, APC John Njau attached to Muranga East Sub-County headquarters received the first report of rape on the morning of the 9th of November, 2014 at about 8:30 a.m. He referred PW1 for treatment. He noticed his right leg was bleeding and had an open wound. Sometime later, an irate mob of people brought the Appellant to Gatura AP Camp. He then escorted him to Kirwara Police Station where he was charged. PW3 knew both the Appellant and PW1 since they lived within the area he worked.

After the testimonies of the 3 prosecution witnesses, the court ruled that the Appellant had a case to answer and he was put on his defence. He gave an unsworn statement of defence in which he denied having committed the offence. He stated that he is a cattle herder and was away on the alleged day of the

incident. He had taken milk to the dairy and on his way was arrested by a mob of people who did not tell him why he was being taken to the Police Post. He asserted that he never used to walk at night and could therefore not have raped PW1.

Determination.

The first issue that arises is whether the Appellant was sufficiently identified. PW1 testified that he had known the Appellant for at least 3 years prior to the incident and that they were in the same pub before the incident. He added that he could clearly see the Appellant because the moon shone and the light was adequate. Furthermore, he called out the name of the Appellant as the ordeal continued. It can therefore be concluded that PW1 identified the Appellant by way of recognition which is more assuring and convincing. See the case of **ANJONONI AND OTHERS VS. REPUBLIC (1976 – 1980) 1 KLR,** in which the Court of Appeal held thus;

> ***"… recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other…"***

The Appellant was not a stranger to PW1 and his identification was therefore meant to be more reliable than that of a stranger. PW1 claims to have recognized the Appellant during the ordeal and soon after, the Appellant threatened him and stabbed his shin. However, there is doubt in the mind of this court that the Appellant was adequately recognized and identified by PW1. At the time of the incident, PW1 contended to have recognized the Appellant due to the nature and brightness of the moonlight. While giving his testimony to the court, PW1 failed to adequately describe the scene, nature and intensity of the light emanating from the moon. He neither stated if there was anything obstructing the light such as trees or branches or clouds in the sky or what the Appellant was wearing at the time of the incident. He did not provide the court with a clear picture that he undoubtedly identified the Appellant as the perpetrator of the act. I have regard to the fact that his testimony was that he was defiled in a ditch. It begs how he clearly recognized the Appellant without stating in what position he lay in the ditch that would have enabled him to clearly see him. PW1 did not also state for how long he had an opportunity of recognizing the Appellant before he was pushed to the ground and subsequently raped. All he testified was that he met with Appellant who felled him to the ground and raped him.

Furthermore, when reporting the incident at the Police Camp the following morning, PW1 did not give the name of the alleged perpetrator but only said that he was known to him. If indeed he knew the Appellant by name, it begs why he did not tell PW3 that he knew the assailant by name. PW3 only knew who the perpetrator was after the Appellant was brought to the Police Post by a group of people. It begs how the said mob knew that the Appellant was the assailant. I then agree with the Appellant that the failure to call crucial witnesses exposed the prosecution case to an obvious flop. For instance, the arresting mob and the investigating officer would have shed light on how it was concluded that the Appellant committed the offence, and obviously what led to his arrest. In the circumstances, I am not convinced that that the Appellant was adequately identified.

I now consider whether the offence of rape was proved. The offence is defined under **Section 3 (1) of the Sexual Offences Act as:**

> ***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.***

It has been established that PW1 was attacked on the night of the 8th of November, 2014. PW1 asserts that the Appellant inserted his penis into his anus after subduing him in a ditch on the side of the road. On the following morning after PW1 reported the incident at the AP Camp, he was examined by PW2, a Clinical Officer. It was the evidence of PW2 that PW1 had bruises and swelling on the perianal region

and had contracted a Sexually Transmitted Infection as well. PW2 also discovered injuries on the neck of PW1 as well as a superficial cut on the right leg, injuries that PW1 claimed arose at the time of the struggle. The evidence of PW1 is corroborated by the Clinical Officer, PW2 that penetration occurred. The injuries his neck and leg indicates that he resisted. Furthermore, on the morning of the 9th of November 2014, PW3 noted that PW1 had a bleeding leg. Clearly, PW1 must not have consented to what befell him.

But notwithstanding that the medical evidence established the offence of rape, I do not think that it linked the Appellant to the offence. In his own evidence in chief, PW1 testified that the assailant used a condom, a fact that was reiterated by PW2. The latter testified that when PW1 went for treatment, he stated that the assailant had used a condom. On his examination, it was established that PW1 had a sexually transmitted infection. It begs how the Appellant infected PW1 with the illness yet he was wearing a condom. Again, no examination of the Appellant was done so as to also confirm if he too suffered from a sexually transmitted disease in which case it would have been ascertained that the Appellant was the culprit.

In his defence, the Appellant stated to have been away at the time of the incident and that he was completely unaware of the allegations levelled against him. He added that he was accosted by a mob of people who took him to the Police Post without giving an explanation for his arrest. While at the Police Post, he claimed to have been with another person with whom he was herding cattle during the period he was arrested. He did not corroborate this assertion though. All the same, the onus lay with the prosecution to prove the case against him beyond a reasonable doubt. Unfortunately, for the reasons I have enunciated in this judgment, this burden was not discharged, as a consequence of which the appeal must succeed.

In the result, I find that the prosecution did not prove their case beyond a reasonable doubt. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH APRIL, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

Appellant in person.

Miss Sigei for the Respondent.