REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.55 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.899 of 2014 by: Hon. V. Ochanda – R.M.)

WILSON MAINA KIONYO……APPELLANT

- V E R S U S –

REPUBLIC……..……..……..RESPONDENT

J U D G M E N T

Wilson Maina Kionyo, the appellant herein was convicted by the **Hon. V. Ochanda - R.M**. for the offence of rape contrary to section 3(1)(a)(b) (3) of the Sexual Offences Act and was sentenced to serve a term of 20 years imprisonment.

The particulars of the charge were that on 19/4/2014 at about 5.00a.m. at [particulars withheld], Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of **G M W**.

The complainant was also charged with alternative charge of Committing an indecent Act with an adult contrary to section 11(A) of the Sexual Offences Act No.3 of 2006.

The particulars of the charge were that on 19/4/2014 at around 0500 hours in [particulars withheld], Location within Nyandarua County intentionally and unlawfully caused his penis to come into contact with the vagina of **G M W**. No finding was made on the alternative charge.

The appellant is aggrieved by the conviction and sentence and preferred this appeal based on the following appended grounds found in the petition of appeal filed in court on 28/7/2015 and submissions filed in court on 24/5/2017:

1. That he was convicted on a defective charge sheet;

2. That the conditions were not favourable to positive identification;

3. That the offence of rape was not proved;

4. That he was not supplied with witness statements hence Article 50(2)(j) of the Constitution was breached;

5. That there was no medical evidence to support the charge;

The appellant therefore urges this court to allow the appeal by quashing the conviction and setting aside the sentence.

The appeal was opposed by the learned counsel for the State Mr. Mong'are, on grounds that the court ordered that the appellant be supplied with witness statements and he never complained after that till the case ended; that the court must have presumed that he was given the statements; that the complainant's evidence was corroborated by the medical evidence adduced by the clinical officer; that it was not mandatory for the appellant to undergo a medical examination unless the court did not believe the complainant; that the evidence of PW1 and 2 pointed to the appellant as the perpetrator and therefore the court should not interfere with the conviction.

This being the first appeal, it behoves this court to review, examine and analyze all the evidence tendered in the trial court afresh and arrive at its own conclusions and determination but bearing in mind that this court did not have an opportunity to see or hear the witnesses testify. *See* ***Okeno v Republic (1972) EA 32***.

Before I analyze the evidence I need to review the evidence that was tendered in the lower court. The prosecution called a total of three witnesses.

PW1 G M W who was then aged 26 years was heading to work at 5.00 a.m. on 19/4/2014 at AAA Growers, she met a person who stopped her, introduced himself as a police officer and asked for her identity card and she gave him; he slapped her and she fell, she screamed and he threatened to stab her; he took Kshs.200/= from her bag, dragged her off the road into the bush; that he undressed her by tearing her trouser, he undressed himself and raped her; he then told her she had been stupid in refusing to greet him the previous day and she apologized; PW1 said it was misty and still dark and there was nobody around; that she knew the assailant's voice as he talked to her telling her that police were bad people; that he raped her for about 10 minutes and told her to go to work. She went home, then reported at Mairo-Inya police station and was referred to hospital where she was treated and P3 was filled. PW1 said she knew accused as a shoe shine or cleaner and had cleaned her shoes there before.

PW2 APC Joseph Wainaina of Mairo-Inya Chief's Camp said that the complainant's mother called him and informed him that the daughter had been raped by the appellant and pointed out the appellant to him and he arrested him.

PW3, Dr. Francis Kimene examined PW1 on the same date, her clothes were blood stained; her hymen broken, in the urine he found spermatozoa and pus cells and bacteria; had bruises and swellings on the face and they also conducted a post rape care.

PW4 PC Erick Oduk told the court that on 19/4/2014 about 6.00 a.m. the complainant made a rape report and he issued her with a P3 form.

When called upon to defend himself, the appellant made an unsworn statement. He admitted that he is a shoe shiner and on 19/4/2014 he went to work, that at 5.00 p.m. he was helping offload beer when he was arrested.

The first ground of appeal is that the charge is defective two fold in that the charge sheet did not include the Act in which the appellant was charged, that is, Sexual Offences Act No.3 of 2006 and secondly, that the particulars did not include the word '***without consent***'. Section 134 of the Criminal Procedure Code provides for what the components of the charge sheet constitute as follows:

> ***"Every charge or information shall contain, a statement of the specific offence or offences together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

The definition of rape is:

> **"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"

In effect, in a charge of rape, the prosecution is required to prove that there was no consent. But, one mere omission of inclusion of the definition section in the statement of the charge cannot render the charge sheet defective because the charge contains a statement of the specific offence namely rape and such particulars as may be necessary for giving 'reasonable' information as to the nature of the offence charged. The other alleged defect is that the charge does not indicate 'Act 3 of 2006'. Again, I find that that omission cannot render the charge defective because, first there is only one Sexual Offences Act in operation and there were particulars contained in the charge, sufficient to disclose the offence. Besides, those two purported errors are curable by Section 382 Criminal Procedure Code which provides as follows;

"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."

I appreciate that the appellant appeared in person in the trial court because this are minor defects that should have been corrected.

That ground must fail.

Whether the appellant supplied with witness statements; under Article 50(2)(j) of the Constitution, the accused has a right to be informed in advance of the evidence that the prosecution intends to rely on within reasonable time. From the record, after the charge was read to the appellant, and he denied the offences, the court ordered that the appellant be supplied with witness statements at his own cost. Thereafter, the case came up for mention severally but the appellant never complained that he was never given the statements. He cannot complain at this stage. The court must have presumed that he was given the witness statements because he never complained that he was not given the statements or could not proceed without the statements.

The complainant narrated in detail, how he was accosted, slapped until she bled, her clothes were torn and was raped. Her evidence was corroborated by PW4 who examined her on the same day, her hymen was broken; the urine contained spermatozoa with pus cells and bacteria which is evidence that she had taken part in a sexual act. The torn clothes, the blood stains and injuries to her face were evidence that force was visited on the complainant.

The question is whether it is the appellant who committed the offence. The complainant is the only identifying witness and the offence was committed when it was misty and dark. PW1 said the appellant had a torch which he shown at her face. She did not however say whether it helped her see accused. PW1 maintained that she recognized the appellant's voice whom she knew as a shoe shiner which the appellant admitted. From PW1's evidence the appellant talked at length to enable the complainant identify his voice. First, he stopped, PW1 asked for the identity card, told her how she had refused to greet him and then that he kept saying how police are bad and later called her stupid as he dismissed her. Besides, the appellant was in very close proximity with PW1 as he raped her that in my view would have enabled her hear and recognize his voice well. In the case of ***Kiilu and another v Republic (2005)1 KLR***

174 the Court of Appeal had this to stay of a single identifying witness under unfavourable conditions;

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

In the case which the court cited ***Anjononi & others V Republic (1980) KLR 54*** at page 60 the court said:

> **"….being night time the conditions for identification of the robbers in this case where not favourable. This was, however, a case of recognition not identification of assailants; 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."**

In this case the complainant maintained she knew the appellant. In fact to confirm that they knew each other the appellant asked PW1 about N who turned out to be PW1's aunt but not sister. After the incident, the complainant led to the appellant's arrest on the same on day. It means that PW1 had no doubts as to the identity of the assailant. I am satisfied that in the circumstances, the complainant was able to recognize the appellant by voice because he conversed at length and they were in close proximity.

In the trial court's judgment, the court made an observation based on the appellant's submissions that the complainant's hymen had long been broken and that she had a child but these facts are not bone out in the evidence on record. The court should restrict itself to the evidence on record and not any other matters extraneous or statements made in submissions.

The applicant complained that he was not taken for medical examination. However, there is now a host of authority that it is not mandatory to get medical evidence because a charge of rape can be proved by any other evidence either circumstantial or direct. In the case of ***Ami v Republic (2012) KLR MSA***, the court upheld the view that "***the fact of rape or defilement is not proved by way of DNA test but by way of evidence".***

Again, ***Kassim Ali v Republic CR.App.84/05*** the court said ***"…..the absence of medical examination 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."***

In this case the complainant identified the appellant and placed him at the scene of crime. The appellant's defence was a mere denial and was not plausible.

In the end, I am satisfied that the trial court arrived at the correct finding in connecting the appellant to the offence of rape and the court will not disturb that finding.

The appellant complained that the sentence of 20 years imprisonment is harsh. After conviction, the prosecutor said that the appellant did not have previous criminal records. The appellant asked for sympathy because his parents are physically disabled and that his sister depends on him. The minimum sentence under Section 3(1)(b) is 10 years imprisonment. Being a first offender, I think 20 years was on the higher side and I will set aside, the sentence of 20 years. Instead, I will sentence the appellant to serve 12 years imprisonment from the date he was sentenced on 12/6/2015. The appeal succeeds to that extent.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***22nd*** day of ***September,*** 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Tirian - Court Assistant

Appellant – in person - present