REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 170 of 2011

JOHN MUTHARIA GITHOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's court at Kibera Cr. Case No. 5065 of 2009 delivered by of Hon. Nyakundi, PM on 22nd June 2011)

JUDGMENT

Background

John Mutharia Githogo, herein the Appellant, was charged with the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the charge were that on 21st October, 2009 at Ongata Rongai Township in Kajiado County, in association with others not before the court, intentionally and unlawfully committed an act which caused penetration by inserting his male genital organ (penis) into the female genital organ (vagina) of one CNM without her consent.

The Appellant was also charged in the alternative of **committing an indecent act** in that he indecently with an adult namely CNM intentionally caused contact between his genital organs and those of CNM.

He was found guilty of the main charge and sentenced to serve 20 years imprisonment. He was dissatisfied with that court's decision and has lodged the present appeal. He filed his amended grounds of appeal on 31st July, 2017. They were that the prosecution evidence was contradictory, that **Section 77 of the Evidence Act** and **Section 122(a), (b) & (d) of the Penal Code** were violated, that he was not identified and that his defence was rejected without any cogent reasons.

Submissions

The Appellant represented himself whilst the respondent was represented by learned State Counsel, Ms. Atina. The Appellant relied on written submissions which he filed on 31st July, 2017; Ms. Atina made oral submissions in reply.

The Appellant started off his submissions by urging the court to take cognizance of the fact that the Complainant was drunk when the offence occurred. He submitted that given her state of mind she was not in a position to positively identify her assailants. He submitted that the identification was also called into question by the fact that he was a stranger to both the complainant and PW1. He was of the view that in

these circumstances an identification parade should have taken place to ensure that the identification evidence was free from error or mistake.

He submitted that documentary evidence was adduced contrary to **Section 77(2) of the Evidence Act**. This was with regard to the medical report which was not produced by the maker, Dr. Muhombe. He was of the view that his consent in its production should have been sought before it was admitted. He submitted that in the circumstances the document lacked evidentiary value. He also submitted that the manner in which DNA samples were extracted from him was in contravention of Section 122A of the Evidence Act. He submitted that the samples were collected by one PC Serah who was not competent to do so as she was below the rank of an Inspector of Police. He relied on the case of **Abiud Muchiri Alex & another v. Republic [2014] eKLR.**

He submitted that the evidence on record exonerated him as it did not point to him as a member of the gang that attacked the complainant. His foundation for the submission was the fact that the vaginal swab showed no presence of spermatozoa. Other analyzed evidence too did not link him to the offence. He submitted that it was impossible for the complainant to be raped by four men and spermatozoa be not noted in PW3. He also queried the fact that his defence did not receive due consideration before a guilty verdict was arrived at. He submitted that the appeal had merit and pleaded that it be allowed.

Ms. Atina opposed the appeal. She submitted that the samples taken from the complainant were taken three weeks after the offence which explained why they could not confirm the presence of spermatozoa. She rejected the first ground of appeal lodged by the Appellant that the prosecution evidence was full of contradictions, and submitted that it was meritorious. She submitted that there was sufficient evidence linking the Appellant to the commission of the offence. She submitted that the Appellant was known to PW2 and was with him on the day in question when he took the complainant and PW1 to the hospital. She submitted that given the abundance of time spent with him and the prior familiarity with PW2 there was no need to conduct an identification parade.

With regard to the Appellant's submission that there was a failure to comply with **Section 77(2) of the Evidence Act** she submitted that the medical report in question was produced by Dr. Gacheria, PW4 who had worked with Dr. Muhombe the maker of the medical report. The witness was familiar with the hand writing of the latter and as such **Section 77(1)** was not contravened. She also submitted that the Appellant's defence was adequately considered before being dismissed. She urged the court to dismiss the appeal as it lacked merit.

Evidence

The prosecution called a total of five witnesses. The case in hand is set off by the evidence of **PW3 Caroline Martha Mwongela** and **PW1, Yassin Mansur Ali.** Both were a girlfriend and boyfriend respectively. On 21st October, 2009 at about 1.00 am, they were walking to PW3's home after leaving Visa Place club in Ongata Rongai for entertainment. They opted to walk because PW3 could not reach a Taxi driver whom she wished takes them home as her house was not far from the club. As they walked, they were attacked by robbers. PW1 sustained a cut on the head while PW3 was robbed of her mobile phone and cash Ksh 500/=. PW1 also lost a mobile phone. He then reached a friend who was a Taxi driver namely, **Josephat Janja Kioko** who testified as **PW2**. PW2 drove both PW1 and 3 to the nearest hospital called Wama. Treatment was not available at this hospital and they had to drive to Gawlands Hospital where PW1 got assistance. At the time PW2 went to help PW1, he arrived in the company of the Appellant who was his friend. On arrival at the hospital, PW1 alighted from the vehicle with both PW2 and the Appellant. Meanwhile, PW3 was left lying on the back seat of the Taxi. After a short while, PW2 returned to the car and informed PW3 that her boyfriend, PW1 had suggested that she goes home and changes her clothes. This was necessitated by the fact that at the time PW1 and PW3 were attacked by robbers, her clothes got soiled after she fell on mud. She walked into the hospital reception in the hope of getting PW1's approval to go home and change the clothes. But she was informed by the attending doctor that the treatment would take some time and did not therefore see PW1. She therefore agreed to go home and change.

PW3 was accompanied to her house by PW2 and the Appellant. As they drove to her house, a quarrel ensued between her and PW2. PW2 was ridiculing her and PW1 on why they could not afford a Taxi to her house only a stone throw away distance from the Visa Place Club. She got agitated telling PW2 that they had tried to raise a taxi in vain. As the quarrel persisted, she threw her hand at PW2 as a result of which PW2 told her to alight from his car which she did. As she walked to her house, the Appellant followed her and caught up with her. He told her he would escort her to where she was going. In her mind, PW1 was at Wama Hospital but as they walked she remembered that she left him at Gawlands Hospital. On informing the Appellant of the change of direction, the Appellant told her that he had to pay for escorting her to the hospital. The Appellant insisted on immediate payment after PW3 told him that they had to get to the hospital for her to get her ATM Card so that she could withdraw the money to allow her to pay him. It was at this point that three men appeared. They called the Appellant by name and according to PW3, they were conversing in the Kikuyu language. Suddenly, one of the men grabbed her by the neck and the rest dragged her into the nearby bush. They tore her blouse and bra. They also removed her trouser and tore her pants and one by one including the Appellant raped her. They then deserted her in the bush.

Back to the hospital, PW1 testified that he entered into the doctor's room alone for treatment. After he was done with the stitching of the wound, he returned to the reception hoping to find PW2, PW3 and the Appellant waiting for him. Unfortunately, none was present at the reception. He was however informed by the doctor that PW2 had taken PW3 in the company of the Appellant to her house to change clothes. After about 15 minutes, PW2 returned to the hospital alone. PW2 informed PW1 that he had taken PW3 to her house. PW1 requested PW2 to drive him to PW3's house. But on arrival, the watchman informed him that PW3 had not gone to her house. He confronted PW2 on why he was lying that he had dropped PW3 to her house. That is when PW2 told him that PW3 had become problematic on their way to her house and had alighted from the car before they reached her house. He also told PW1 that upon alighting the Appellant had followed PW3. In addition, he assured PW1 that PW3 was fine and he needed not to worry about her. Since he was in pain, PW1 decided to go home and rest.

One hour after arrival to his house, PW3 arrived while crying. She narrated the entire ordeal visited on her by PW2, the Appellant and his accomplices. He confirmed seeing PW3 with scratches on her neck. Not being convinced by the narrative of PW2, he declined to pay him until the next day when he became certain of what had transpired. This was particularly so because he had not sanctioned PW3 to go back to her house to change clothes. On the next day, PW2 informed PW1 that he had not seen the Appellant since they parted ways the night before. PW1 told PW2 that he could only pay for the taxi after he availed the Appellant. PW2 then traced the Appellant on the following day. PW3 by then had reported the matter at the police station.

Back at the scene of rape, PW3 could only trace her trouser which she wore together with PW1's jacket to cover up her body. She later collected her other clothes from the scene which were exhibited and produced in court. As she walked backed to the hospital, she came across a taxi that was carrying a girl she knew. That is the taxi that took her to the police station to report the matter. She was treated at the Nairobi Women's Hospital in the morning and a report was compiled by Dr. Muhombe (deceased) and produced on her behalf by **PW4, Dr. Charles Gacheria.** The diagnosis of the medical report was that PW3 had been sexually assaulted.

The matter was investigated by **PW5, PC (w) Serah Kabatha**. In the course of her investigations, she compiled some exhibits for DNA analysis. This included vaginal swab from PW3, samples from trouser of PW3, blood and saliva samples of the Appellant. In his analysis, the government analyst, PW7 stated that the vaginal swab did not have semen or spermatozoa. The long trouser had seminal stains and a few degenerated spermatozoa. He was unable to classify the seminal stain because the amount was small. He confirmed the suspect's blood group was A. He also arrived at a finding that PW3 was sexually assaulted although he could not determine if the Appellant was involved.

PW3's medical examination report was filled by **PW6 Dr. Kamau** of Police Surgery. His findings were that she had no physical injuries or infection or a history of vaginal bleeding. The diagnosis was rape. PW5 exhibited before the court PW3's torn blouse and her jeans trouser. She also preferred the charges

against the Appellant.

After the close of the prosecution case, the court ruled that the Appellant had a case to answer. He gave unsworn statement of defence. He denied committing the offence. He stated that on 21st October, 2009 at about 10.30 p.m., PW2 who was a taxi driver went to Civil Based Club where he worked as a cleaner to look for customers to ferry home. The Appellant informed him that they were closing up business. Both had a drink at the club after which PW2 offered to give him a lift to his house. As they drove to his house, PW2 was called by PW1 to drive him to his house. They went and picked up PW1 with his girlfriend PW3. PW1 had an injury on the head and PW2 took them to a hospital for treatment. It was while at the hospital that PW1 informed them that he did not have money to pay the hospital bill. Since PW2 was PW1's friend, he decided to go to his house to fetch money to pay the bill. They all drove to PW2's house where PW1 collected some money. Thereafter, they drove to another hospital called Gawlands. On their way to Gawlands Hospital, the Appellant alighted at Kobil Petrol Station as he insisted it was late and he needed to go home where he lived with his parents. On 5th November, 2009 PW2 went to his place of work where he informed him that he was being sought by the police for raping PW3. The police thereafter went and arrested him and he was charged accordingly. He insisted that he was innocent.

Determination

This being the first appellate court, its duty is to reevaluate and reanalyze the evidence afresh and come up with its independent finding. See **Okeno v. Republic [1972] EA 32.**

I have deduced the issues of determination to be whether **Section 77 of the Evidence Act** and **Section 122A of the Penal Code** were violated and whether the case was proved beyond reasonable doubt.

With regard to violation of **Section 77 of the Evidence Act**, the Appellant contends that it was improper for the court to allow the admission of medical documents by a person other than the maker. For avoidance of doubt the relevant part of **Section 77 is subsection (1) and (2).** They read as follows;

> ***(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."***
>
> ***(2) The Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."***

The document in question was a medical report produced by PW4 in place of Dr. Muhombe who was the maker. In his testimony he said he was adducing it on behalf of the Late Dr. Muhombe. He was a doctor who had worked with Dr. Muhombe at the Nairobi Women's Hospital and was conversant with her reports and signature. Thus he met the criteria met under **Section 77 (1) and (2)** to adduce the document. I uphold that it was properly produced.

The next issue relates to **Section 122A of the Penal Code**. The section sets out the procedure to be followed when obtaining samples for DNA identification. The Appellant contends that the procedure was infringed when the investigating officer ordered for the sampling whereas her rank fell short of the rank designated in the section, of an Inspector of police. In this case the order was made by the investigating officer whose rank was that of police constable. This was clearly a violation of the provision. Thus, the results of the DNA analysis could not be used as evidence to found a conviction against the Appellant. Be that as it may, the sampling did not offer any results and was therefore not instrumental in the conviction of the Appellant.

The next issue is whether the offence in question was proved beyond a reasonable doubt. The offence in question has three elements, namely; identification, penetration without consent and the presence of more than one perpetrator.

My analysis of the evidence leads me to conclude that the Appellant was identified by way of recognition. This is a man who on the fateful evening was in the company of PW1 and 3 not just for a few minutes but for more than one hour. He accompanied PW2 to pick up PW1 and 3 from where they needed help after the attack by robbers. He accompanied PW1, 2 and 3 to the hospital until he turned against PW3. Indeed, save for lack of evidence, PW2 was part and parcel of the plan that PW3 should be driven out of the hospital without the knowledge of PW1. This is vindicated by the fact that when he returned to the hospital alone after dropping off PW3 and the Appellant, he first lied to PW1 that he had dropped PW3 at her house. This was in sharp contrast of the findings of PW1 who after being driven by PW2 to PW3's house, was informed by the watchman that PW3 was not in her house. PW2 then changed the narrative and informed PW1 that PW3 was fine and that he needed to go home rest assured that everything was fine. It was not until the next day when PW1 informed PW2 of what had happened to PW3 that PW2 gave in and indicated that he could not attest to what happened with PW3 and the Appellant after he had dropped them. Those facts clearly indicated that there was a hatched plan between the Appellant and PW2 that the Appellant would follow up with PW3 after she had alighted from the taxi.

The Appellant submitted that an identification parade was necessary so as to ascertain the correctness of the identification. However, the same would have been of no consequence as the Appellant was identified by recognition. PW2 testified that he knew the Appellant before the day in question for a period spanning more than 5 years. He testified that on the day in question he ferried the Appellant in the vehicle a fact the Appellant conceded to his statement of defence. It is therefore clear that the Appellant was recognized by PW2 and this evidence was corroborated by his own admission in his statement of defence.

The next issue for consideration is whether penetration was proved. The examination at Nairobi Women's Hospital confirmed the sexual assault as well as the report by PW6, Dr. Kamau who filled the P3 Form. Of course, no physical injuries were noted on PW3. The prosecution was enjoined, in the circumstances to demonstrate that the sexual intercourse was obtained without PW3's consent. The lack of consent may be demonstrated in many ways as seen in **R v. Malone [1998] EWCA Crim. 1462,** thus;

> ***"The actus reus of rape is an act of sexual intercourse with a woman who at the time of the act of sexual intercourse does not consent to that act of sexual intercourse.***
>
> **…**
>
> ***No doubt in order to obtain a conviction there will have to be some evidence of lack of consent to go before the jury. But what that evidence will be will depend on the particular circumstances of the case that the jury is trying. The evidence may be of widely differing kinds as few illustrations will show. It may be the complainant's simple assertion "I did not consent to sexual intercourse with the defendant". It may be evidence of threats uttered by the defendant. It may be evidence of the use of physical force by the defendant. It may be evidence that the complainant was by reason of drink or drugs incapable of giving consent or incapable of being aware of what was occurring. It may be evidence that by reason of age or lack of understanding due to mental handicap the complainant did not give consent. The jury may accept that the complainant was asleep when sexual intercourse occurred or that she was tricked into giving consent in the belief that the defendant was her husband or partner. We do not for a moment suggest that this examples exhaust the possible factual situations which may arise. They suffice to demonstrate that it is not the law that the prosecution in order to obtain a conviction of rape have to show that the complainant was either incapable of saying no or putting up some physical resistance or did say or put up some physical resistance."***

In her own testimony, PW3 was candid that as the Appellant escorted her, three other men joined him, attacked her by the neck and thereafter dragged her to a nearby bush whereby they raped her one by one. This seals the element that the rape was committed by more than one person one of whom the Appellant was positively identified. The use of force is demonstrated by the fact that PW3's clothes were torn. She testified that the assailants forcibly pulled off her blouse and bra. They then descended on her lower part of the body where they pulled off her trouser, tore her pants before raping her. A torn blouse and the jeans trouser were exhibited in court as true evidence of force meted against PW1. Thus, she could not

have consented to the sexual intercourse; that is to say that she did not give in to the sexual intercourse.

Although the Appellant claims that he was not involved, PW2 does confirm that he never took him to PW3's house or dropped him at the Kobil Petrol Station he purports he alighted at. Indeed, PW2 also testified that the Appellant alighted only 20 meters from where PW3 had alighted. He recalled seeing the Appellant walking back to where PW3 was. Therefore, it cannot be through imaginations that PW3 confirmed that the Appellant paced back to where PW1 was after which the other gang emerged and all of them attacked and raped her. It is a fact that the Appellant was part and parcel of the gang that raped PW3. I cannot find to the contrary.

On whether it was proved that the offence was committed by more than one offender, I have already delivered myself on this issue and I need not add more.

I am unable to make a conclusion that the Appellant was innocent. Instead, I am convinced beyond any doubt that he was one of those persons who raped PW3. His defence that he never accompanied PW1, 2 and 3 to the hospital where PW1 finally got treatment is entirely rebutted by the testimony of the three witnesses. More so is the testimony of PW2 his friend who in fact confirmed that he accompanied the three of them to Gawlands Hospital and further to where PW3 was dropped. His defence was therefore a total lie and did not aid him against the strong prosecution evidence that he committed the offence. I equally dismiss it as lacking in merit.

On sentence, Section 10 of the Sexual Offences Act provides for a minimum of fifteen years imprisonment. But this is a case in which PW3 entrusted her security with the Appellant only for the latter to turn against her. The aggravating factors called for an enhanced sentenced. I will therefore not vary the sentence imposed.

I the end, I find that the main charge of gang rape was proved beyond reasonable doubt. The appeal is accordingly dismissed. I uphold both the conviction and sentence. It is so ordered.

Dated and Delivered at Nairobi this 31st day of October, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person.

2. Miss Sigei for the Respondent.