REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 61 OF 2015

KENNEDY SHEVEKA MWAKIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 409 of 2013 in the Senior Principal Magistrate's court atVoi delivered by Hon S.M. Wahome(SPM) on 15th November 2013)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Kennedy Sheveka Mwakio, was charged with the offence of rape of a person with mental disability contrary to Section 7 of the Sexual Offences Act No 3 of 2016. The particulars of the charge were that on the night of the 27th May 2013 at [particulars withheld] within Taita Taveta County, he unlawfully and intentionally penetrated the vagina of C W (hereinafter referred to as 'PW 1") who was a person with a mental disability without her consent.

2. The alternative charge was committing an indecent act with a mentally disability (sic) person contrary to Section 7 of the Sexual Offences Act. The particulars of this charge were that on the aforementioned date, time and place, he intentionally and unlawfully touched and rubbed PW 1's vagina with his penis.

3. The Learned Trial Magistrate Hon S.M. Wahome, Senior Principal Magistrate, convicted him on the main charge and sentenced him to ten (10) years imprisonment.

4. Being dissatisfied with the said judgment, on 9thSeptember 2015, the Appellant filed a Notice of Motion application seeking leave to have his Appeal heard out of time, which application was allowed and his Appeal was deemed to have been duly filed and served. The grounds he relied upon initially appeared to have mitigation in nature. He filed Amended Grounds of Appeal on 12th July 2017.

5. When the matter came up on 11thOctober 2017, the State informed this court that it would not be filing its Written Submissions because it was conceding to the Appeal herein.

LEGAL ANALYSIS

6. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

7. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR,**the Court of Appeal made a similar observation when it stated as follows:-

> **"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited."(*See* *NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)).*"**

8. The State submitted that they had conceded to the Appeal herein because save for the history by Dr Jane Njeri Njenga (hereinafter referred to as "PW 5") in the P3 Form, there was no medical evidence that showed that PW 1 was mentally challenged which was an ingredient of the charge under Section 7 of the Sexual Offences Act. This was one of the Amended Grounds of Appeal.

9. A perusal of the proceedings shows that the Learned Trial Magistrate noted that PW 1was mentally unstable and was unable to express herself without much difficulty (sic). Her mother, R S (hereinafter referred to as "PW 3") informed the Trial Court that PW 1 had been mentally challenged since her childhood.

10. PW 1's evidence was that she was going to the river to fetch water when the Appellant accosted her while carrying panga, dragged her to a pit latrine and raped her. She screamed but no one came to her rescue. As C M (hereinafter referred to as "PW 2") passed by a neighbour's house to collect a wheelbarrow, he saw clothes outside a latrine and found the Appellant having sex with PW 1. The Appellant charged at him with a panga and ran away and in the process left his maroon trousers and a pair of shoes which PW 1 and PW 2 took to PW 1's grandfather. PW 1was then taken to Voi District Hospital where she was examined. The Appellant was arrested thereafter.

11. Both PW 1 and PW 2 identified the maroon trouser and pair of shoes as those that the Appellant left at the scene when he fled. On the other hand, the Investigating Officer, No 91529 PC Nduku Mbithe (hereinafter referred to as PW 4") adduced in evidence a faded blue trouser and plastic sandals as evidence before the trial court. PW 4's evidence of a faded blue trouser contradicted PW 1's and PW 2's evidence that the Appellant left a pair of maroon trousers. PW 4's evidence that the Appellant left a pair of plastic sandals also contradicted PW 1's reference to "shoes" and PW 2's reference to "old shoes."

12. Clearly, this was an inconsistency that could not be ignored as it created doubt in the mind of this court whether the trousers and shoes were meant to have squarely placed the Appellant at the scene where PW 1 was said to have been raped. The Learned Trial Magistrate's conclusion that the colour of the trousers was immaterial could not have been further from the truth. Witnesses must adduce evidence that must be consistent and not contradictory to each other to avoid a court questioning if indeed those witnesses were present at the time of the alleged offence.

13. Turning to PW 5, she gave PW 1's age as twenty one (21) years at the time she was being examined at Voi District Hospital. This was a glaring contradiction from PW 3's evidence that PW 1 was aged thirty (30) years at the material time. Appreciably, the alleged rape was said to have occurred in May 2013 and PW 1 testified in July 2013. It is incomprehensible how PW 3 and PW 5 could give such divergent views of PW 1's age.

14. It is important to point out that although PW 5 averred that PW 1's hymen was missing when she examined her about two (2) hours after the alleged incident, it was not conclusive proof that the same had been caused by the Appellant herein. Indeed, there was no discharge or blood noted but the urine had pus cells.

15. The Prosecution's failure to adduce any evidence to demonstrate that the pus cells in PW 1's urine were as a result of the rape by the Appellant herein was a great omission in the Prosecution's case in linking him to the alleged offence.

16. Going further and as was pointed out by the Appellant and the State, there was no evidence

whatsoever to show that PW 1 was mentally challenged. If she was mentally unstable as the Learned Trial Magistrate observed, he ought to have recorded reasons why he believed the evidence of PW 1 and not that of the Appellant herein more so as she had difficulties expressing herself and she did not adduce evidence through an intermediary.

17. If PW 1 was not that mentally challenged because she answered questions she was asked by the Appellant during Cross-examination without an intermediary, it was then debatable if she was really mentally challenged as the Learned Trial Magistrate and PW 5 had observed. The question of whether or not the charging of the Appellant under that Section 7 of the Sexual Offences Act was proper thus came into sharp focus.

18. This court also found it curious why the Learned Trial Magistrate observed that the P3 Form was not conclusive as to whether the rape took place but believed that the Appellant raped PW 1 merely because PW 2 testified that he saw the Appellant rape PW 1. There could not have been any better evidence than that of the P3 Form because the evidence therein would have proven the charge that had been preferred against the Appellant herein.

19. Further, this court also found PW 2's evidence to have been wanting. His assertions that he saw clothes lying outside the latrine and that he found the Appellant having sex with PW 1 were not easy to comprehend because he did not say how he saw the Appellant. Was the door of the latrine open? Were there gaping holes in the walls of the latrine that would have allowed him to see what was happening in the latrine? As there was no evidence that PW 2 actually witnesses the Appellant having sex with PW 1, his testimony was therefore not sufficient to have been the basis of the Appellant's conviction by the Learned Trial magistrate.

20. The court took cognisance of the provisions of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that stipulate as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

21. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

22. Looking at all the gaps, inconsistencies and contradictions in the Prosecution's case, this court found and held that the Prosecution did not prove its case to the required standard in criminal case, which is, proof beyond reasonable doubt. It was constrained to ask itself whether there was indeed a possibility that the Appellant was framed in this matter.

23. In his sworn evidence, the Appellant contended that he was framed due to dispute on cultivation of land. Could this have been the cause of this case? This court will never know the answers. All it can say is that even if the Appellant had remained silent in his defence, the proof the Prosecution's case still fell well below the standard in criminal cases.

24. Having considered the Appellant's Grounds of Appeal, his Written Submissions and the oral submissions by the State, this court came to the firm conclusion that the Learned Trial Magistrate

misdirected himself when he arrived at the conclusions he did without any cogent evidence. Against the backdrop of the evidence that was adduced in the case herein, it was the view of this court that the Appellant herein was not accorded a fair trial and he was greatly prejudiced as he has been in prison since 2013 in a case which could be sustained in any court of law.

25. Lastly, the Learned Trial Magistrate erred in law by not conducting a *voire dire* examination before PW 1 took oath. Having observed her mental condition, he was under a duty to have inquired as to whether or not she understood the meaning of taking oath. Be that as it may, the Appellant did not suffer any prejudice as he Cross-examined her and she responded to his questions.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 9th September 2015 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

27. Doubts were raised in the mind of this court lending it to give the Appellant benefit of doubt. This court therefore hereby quashes the conviction and sets aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

28. It is so ordered.

DATED and **DELIVERED** at **VOI** this **30th** day of **November**2017

J. KAMAU

JUDGE

In the presence of:-

Kennedy Sheveka Mwakio- Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk