REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.105 OF 2015

BENARD SITUMA NAMUKOTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is an appeal arising from a judgment delivered by Hon. Mukabi, Resident Magistrate Sirisia on 5th June, 2015 where the appellant had been charged with 2 counts and an alternative charge. The counts were rape contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act, assault contrary to Section 251 of the Penal Code and in the alternative a Count of indecent Act with an adult contrary to section 11(a) of the Sexual Offences Act. The appellant was found guilty of the two counts of rape and assault and sentenced to 15 years and 3 years respectively the sentences were to run concurrently.

2. The appellant was dissatisfied with the entire judgment and preferred this appeal on grounds that, the trial court erred as the prosecution did not prove its case beyond doubt, evidence was contradictory, inconsistent and uncorroborated, the evidence did not prove the appellant to have been the culprit and the defence was ignored.

3. In brief; the prosecution case was that the appellant who had been involved in an earlier crime within the neighbourhood accosted the complainant who was out as she had been woken up by a knock and when upon not finding the person who had knocked at her door she chose to go for a call of nature and at which point the appellant accosted and assaulted her, dragged her into a bush and raped her. The complainant then sought for help, the appellant was sought for and found sleeping at his brother's house, and was arrested. There were no eye witnesses and the only available evidence is that of the complainant.

4. At the close of the Prosecution case the appellant was found to have a case to answer. He denied the offences and that he knew the complainant.

5. PW1 A N M the Complainant stated

> ***"Evelyn informed me that Titus had informed her that robbers had attacked a bar owned by one Mbarara. It is about 70 meters from her place, upon being told that I informed her we stand outside.***
>
> ***Before she dressed up, I sought to go to the toilet to relieve myself. I saw someone approach me fast, he was carrying stones on both sides. As I was about to finish helping myself the person asked me to follow him. He asked me if I knew him, I replied in the negative. He said he was 'al***

shabaab'. He held me by my throat and marched me ahead so I could not see him. He did not want me to speak. He hit me on the neck from the back, right cheek, left abdomen. He took me in the bushes. He assaulted me until I had no energy. He hit me blows in my nose until I started nose bleeding. He then hit me with a kick on the left abdomen, I was helpless and he then raped me."

"…….there was moonlight, I was able to see him. His nickname is "Sasha."

PW5 Philomena Yamba examined PW1 on the 22nd of October, 2011. She had a swollen face with bruises, upper canine teeth was loose, and had bruises on her vagina wall. He made an impression of rape and soft tissue injuries due to assault.

6. Two things are clear and not in issue that the complainant was raped and assaulted, the issue therefore is whether there is proof linking the appellant to the offence.

7. As stated earlier there were no eye witnesses and the only available evidence is that of the complainant. In the circumstances of the case, the complainant having been seriously assaulted having indicated that she was being held by the neck so as not to see the assailant and subsequently thoroughly beaten. The question is whether she was able to see the assailant? Can I believe that she actually saw and identified him in the circumstances?

8. I have considered the Proviso to section 124 of the Evidence Act and I believe that the complainant was indeed raped she appeared truthful on this score and her evidence was corroborated by the doctor. However I am cautious of her testimony as to identification and considered the holding in In **Roria V R 1967 E.A 573** where the Court of Appeal for East African held

"A conviction resting entirely on identity invariably causes a degree of uneasiness……

That danger is of course greater when the evidence against an accused person is identified by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

9. The circumstances were certainly difficult, it was dark (though there was moonlight) complainant was held on the neck, seriously beaten until she was helpless. Guided by **Abdala Wendo VS R (1953) 20 E.A** where the court of Appeal of East Africa said

"subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification."

10. In the renown case of **R V Turnbul and others (1976) 3 All E.R** widely made reference to the issue of recognition was discussed as follows;

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes on recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused case, the danger of mistaken identity is lessened, but the poorer the quality, the greater the danger."

11. The complainant fell short of saying what made her identify the appellant whether he had any special features, or was it his clothing and how long did the ordeal took place e.t.c.

12. In my view the quality of evidence on identification in this case was poor and there may be danger of

convicting the wrong person.

13. This doubt in identification has to be resolved in favour of the appellant in the circumstances. The police having arrested the appellant the same night and the complainant and appellant having been examined within reasonable time ought to had further tests to collaborate the evidence. They ought to have carried out a vaginal swab to test semen if any which would have ruled out the doubt however this was not done.

14. The Sword of Justice cuts both ways, and in my view it would be a traversity of justice to find the appellant to have been the one who raped the complainant in the circumstances I agree with the appellant that the case was not proved to the required standard. I accordingly therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless he is otherwise lawfully held.

DATED and DELIVERED at BUNGOMA this 16th day of November, 2017.

ALI-ARONI

JUDGE