REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 69 of 2012

RAPHAEL JAMES MICHUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the

Chief Magistrate's Court at Kibera Cr. Case No. 1334 of 2010

delivered by Hon. D. O. Onyango, PM on

delivered on 2nd March 2012).

JUDGMENT

Background

1. The Appellant herein was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 27th February 2010 at Kawangware village within Nairobi Area province, jointly with another before court intentionally and unlawfully committed an act by inserting his male genital organ(penis) into a female genital organ(vagina) of SML which caused penetration without her consent. He was charged in the alternative with an indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006 in that he jointly with another before court and another not before intentionally and unlawfully committed an indecent act by touching an adult genital organ (vagina) of SML, aged 24 years.

2. The Appellant was found guilty of the main offence while his co-accused was acquitted. He was sentenced to 20 years imprisonment. He was dissatisfied with the conviction and sentence against which he proffered the instant appeal. He relied on Amended Grounds of Appeal filed on 6th November 2017. In summary, he was dissatisfied that he was convicted on the basis of contradictory prosecution evidence, that investigations were shoddy, that crucial witnesses were never called and that the sentence was harsh in the circumstances.

Submissions.

3. The Appellant relied on written submissions while Miss Segei for the Respondent made oral submissions. The Appellant submitted that the complainant's evidence was riddled with contradictions. He questioned the inconsistency in the evidence regarding the police station where the matter was reported submitting that the record showed that it was done in both Muthangari and Muthaiga police stations. He also raised question regarding the identity of the complainant given the differing names indicated on the charge sheet and the name she gave in her in evidence. He urged that the contradictions be resolved in his favour. He relied on **Peter Mwawana *v.* Republic[2007] eKLR** to buttress the submission.

4. He then submitted that the failure to call the investigating officer was fatal to the prosecution case as he was a crucial witness who could shed light on certain matters including and not limited to the manner in which the medical evidence was collected. He also questioned the failure to call the complainant's husband, her father and the arresting officer who he deemed held crucial evidence. Finally, he submitted that the sentence was harsh and excessive in the circumstances.

5. Ms. Sigei in opposing the appeal submitted that the Appellant was culpable. She submitted that he was identified by recognition as he was

employed as a watchman at the complainant's father's house. She submitted that penetration was corroborated by the medical report prepared by Dr. Mohombe and produced by PW5, a doctor at Nairobi Women's Hospital. A vaginal swab disclosed the presence of spermatozoa. She submitted that this court could rely on the evidence of a single witness pursuant to provisions of Section 124 of the Evidence Act. She submitted that the case was reported at Muthangari Police Station as evidenced by the P3 form which was issued by the police station. It was her case that the conviction was safe, the prosecution case having been proved beyond a reasonable doubt. She urged the court to dismiss the Appellant's defence and uphold both the conviction and sentence.

Evidence.

6. **PW1, SLM** hailed from [particulars withheld]in Kawangware and was 24 years old. She recalled that on 26th February, 2010 at around 8.00 p.m. she differed with her sister-in-law and her husband and in her anger she stormed out of the house and decided to go to her parent's house at 56 in Kawangware. When she arrived at the gate to her parent's home she found the watchman whom she identified as the Appellant. She asked him to open the gate but he questioned her as to where she was headed to. She explained her predicament but the Appellant refused to open the gate stating that it was late. It was about 10.00 p.m. She testified that the Appellant knew her as he used to see her often.

7. She recalled that at about 11.00 p.m. the Appellant made a call on his phone in a language she could not understand and that soon two men arrived. She recognized the men physically but she did not know their names. One of them was the Appellant's co-accused. The men interrogated her and insisted to her that her parents had relocated but they denied her entry into the plot to confirm the allegation. She started shouting and one of the men produced a knife and threatened to stab her. The Appellant informed her that the men worked for the local chief, but when she requested they take her there they refused.

8. They then dragged her to a house and every time she screamed she was threatened with the knife. The house was empty and she was ordered to strip and lie on the bed at which point the Appellant forcefully had sex with her while the two men held her legs. He raped her through the vagina and anus. The beastly acts continued until morning when she was asked to dress and leave running. She was weak and had difficulty walking. She went to her cousin's house and informed him that the Appellant alongside others had raped her. He accompanied her to her father's house after which she was taken to hospital. They first reported the matter to the chief and then went to Nairobi Women's Hospital where she received treatment. Thereafter they reported the matter at Muthangari Police Station where a P3 form was issued and later filled by police a doctor. The police would later arrest the Appellant after she led them to him.

9. **PW2, BNM** a cousin to PW1 and who hailed from Kawangware 56 was woken up by PW1 on 27th February, 2010 at around 6.00 a.m. PW1 whilst sobbing informed him what had happened. They reported the matter to a village elder and went to Nairobi Women's Hospital where she was treated and thereafter the matter reported to the police. PW1 assisted in the arrest of the Appellant after he was positively identified by PW1. In cross examination he stated that he did not know the Appellant's names but that he commonly referred to as Maasai.

10. **PW3, JA** a nephew of PW2 was called by PW2 on 27th February, 2010 at around 6.00 a.m. requesting him to go to his house. He found PW1 who told him that she had been raped by the Masai who was a watchman. He accompanied PW1 and PW2 to hospital.

11. **PW4, Dr. Zephania Kamau** a Police Surgeon examined PW1 on 3rd March 2010. He did not find any injuries on her and her genitalia. He filled a P3 to the effect. On 11th March, 2010 he examined the Appellant who he also found with no injuries and filed a P3 form to the effect.

12. **PW5, Dr. Charles Gechenia** of Nairobi Women's Hospital produced a medical report made by Dr. Muhombe who was then deceased. The same was prepared on 27th February, 2010. The patient had a history of being assaulted by three men and on examination she was found to have normal genitalia with no lacerations. There was discharge and old hymenal tears. A vaginal swab revealed presence of spermatozoa. A finding was made that she had been sexually assaulted. She was put on treatment and referred for counseling.

13. After the prosecution closed its case a ruling was made that a *prima facie* case had been established requiring the Appellant to be put on his defence. He chose to give an unsworn statement of defence and called no witnesses. He stated that he worked as a guard in Kawangware. He recalled that on 7th February, 2010 the complainant came to where he worked at around midnight in the company of three men. She asked him to open the gate but he refused and they left. That on 5th March, 2010 he was arrested in the morning and escorted to the police station after which he was charged.

Determination.

14. It is now the duty of this court to reevaluate and reanalyze the evidence on record before arriving at an independent finding. In so doing, the court must take into account that it has neither heard nor seen the witnesses and give due regard for that. See **Pandya v Republic (1957) E.A.336, Kariuki Karanja v Republic (1986) KLR, 109.**

15. I have accordingly considered the evidence on record and the respective rival submissions. I have arrived at a conclusion that the following issues arise for determination; whether the prosecution case was riddled with contradictions, whether crucial witnesses failed to testify and whether the case was proved beyond a reasonable doubt.

16. The Appellant pointed to a number of contradictions which in his view were of such a fundamental nature that they weakened the prosecution case. One related to the police station where the matter was reported. He submitted that the witnesses mentioned different police stations, namely; Muthaiga and Muthangari. I have noted that this arose from a typographical error. The handwritten record clearly shows that the matter was reported at Muthangari Police Station. Again, the P3 form was issued by the same police station.

17. The other contradiction he pointed to was in respect of the identity of the complainant which he submitted differed in the charge sheet

and in the evidence. He submitted that the name set out in the charge sheet differed from the name given by PW1, PW2 and the doctor. It is clear that the last two names of PW1 are in different order as indicated in the charge sheet as opposed to what she gave in her testimony. However, the materiality of this contradiction is nominal as it does not go to the core of the case. With regards to the evidence of PW2, a typographical error occurred with the name "Mwali" showing in the typed proceedings instead of "Muhati" as per the charge sheet. The same case applies to the evidence of PW4 with the name "Mihanda" in the typed proceedings instead of "Muhati". All the same, the identity of the complainant was established and the Appellant in his defence also admitted he knew her from his place of employment which renders this limb of his submission moot.

18. On the failure to call crucial witnesses, the Appellant contended that the failure to call the investigating officer, the complainant's father and her husband was fatal to the prosecution case. By dint of Section 143 of the Evidence Act the prosecution is under a duty to call only the witnesses necessary to prove a fact. With regards to PW1's father and husband the value of their testimony would be negligible as none witnessed the incident. As regards the investigating officer his necessity in all criminal trials cannot be downplayed as he plays the crucial role of stitching together the prosecution's evidence. His importance varies in relation to the complexity of the matter and whether other witnesses are able to fill the void that he would have added value to. In the present case, the absence of the investigating officer did not cripple the prosecution case as PW1,2 and3 clearly accounted how the offence was reported and the Appellant arrested. Other evidence added value in establishing the case for the prosecution. This ground of appeal is therefore dismissed.

19. On proof of the case, the first paramount issue is identification of the Appellant. There is no doubt that both PW1 and the Appellant were acquaintances. PW1 knew him as he was the watchman in the residence where her parents lived. Thus, identification was by recognition. On penetration, medical examination revealed the presence of spermatozoa. PW1 did not consent to the sexual assault. She accounted how she even pleaded with the Appellant to take her to the chief if he was not willing to open the gate for her but he refused. He then called two other men who aided him to commit the heinous act. Her testimony was echoed by PW2 and 3. And in PW2's word, PW1 went to his house crying, a testimony that she did not acquiesce to the assault. I have no doubt that the Appellant gang raped PW1, and that therefore the offence was proved beyond all doubts.

20. The Appellant took issue with the sentence stating that it was harsh. He was sentenced to 20 years imprisonment for an offence that carries a minimum sentence of 15 years which may be enhanced to life. The provision confers the trial court with the discretion to sentence the accused appropriately. An appellate court as often said will be hesitant to interfere with the sentence unless the sentence is too harsh or too low or the principles of law or necessary factors were not taken into account. The rationale for this is that the appellate must not be seen to micro manage the trial court. See **Re J(A child)[2005] All ER 291** in which it was held thus;

> ***"If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial [****magistrate****]. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere:… Too ready an interference by the appellate court, particularly if it always seems to be in the direction if one result rather than the other, risks robbing the trial [****magistrate****] of the discretion entrusted to him be law."***

21. The circumstances of this case are that the Appellant took advantage of PW1's situation. He lied to her that her parents had moved from the premises he was guarding. He then called some other two men whom he lied to her were from the chief's place. Unknown to PW1, these were persons the Appellant planned to rape her with. He therefore refused her entry into her parent's premises so that he could, in the company of others, orchestrate the heinous crime. This cannot be forgiven. The aggravating circumstances warranted an enhancement of the sentence. I will not therefore disturb the sentence passed.

22. In the end, and on evaluation of the evidence, I find that the prosecution proved their case beyond a reasonable doubt. The conviction of the Appellant was safe. I accordingly dismiss the appeal. The period the Appellant was in custody prior to the sentencing of 2 years shall be deducted from the sentence.

DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. M/s Sigei for the Respondent.