REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 8 OF 2014

DAVID MUCHIRI NJUE …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of ten (10) years imprisonment imposed upon him by the court of Resident Magistrate at Embu on 14.2.2014 in respect of the offence of rape.
2. He has listed eight (8) grounds of appeal in his petition, that was filed in court on 21.2.2014.
3. In a condensed form those grounds of appeal are that the prosecution witnesses gave contradictory and uncorroborated evidence. He has further stated the trial court erred in law and fact by failing to find that the complainant visited the appellant's house as a relative and that no rape was committed.
4. Furthermore, the appellant has stated that the trial court erred in law and fact by relying on the evidence of a single witness and that the offence was not proved beyond reasonable doubt. He has also stated that the trial court failed to consider that vital witnesses were not called to testify in court and that P.W.1's evidence was framed up against him.
5. The appellant has also stated that the trial court relied on hearsay evidence in convicting him. He also submitted that the medical evidence of the doctor concerning the complainant should not have been relied on as the examination was not done immediately following the rape.
6. Finally the appellant states that his sworn evidence was wrongly rejected which he says is in violation of section 169 of the Evidence Act (Cap 80) Laws of Kenya.
7. This is a first appeal. According to the Court of Appeal in ***Pandya v R (1957) E.A 336***, a first appeal is required to re-assess the evidence produced at trial. Thereafter the court is required to make its independent findings, while deferring to the trial court findings based on credibility. The reason is that the trial court had the advantage of assessing the demeanour of the witnesses an advantage that is not possessed by this court.
8. The evidence of the complainant (P.W.1) is that she had been sent to fetch water from a river by P.W.2. She then met the appellant who is her uncle. The appellant took her to his house and had sexual intercourse with her.
9. P.W.1 testified that she did not scream as the appellant told her not to do so. P.W.1 was rescued from the appellant's house by her grandmother (P.W.2) and the uncle of the appellant (P.W.3). In addition to P.W.2 and P.W.3 the appellant was rescued by S K (P.W.4), who is a cousin to the appellant and F K (P.W.5).
10. These witnesses forced open the door to the appellant's house. Inside the house they found the complainant on the bed of the appellant with the latter standing armed with a panga. They disarmed him and had him tied and taken to the police (P.W.6).
11. The complainant (P.W.1) was examined by Dr. Kubo of Embu Provincial General Hospital. Dr.

Kubo's report was put in evidence by Dr. Goffrey Njiru (P.W.7), because Dr. Kubo had resigned from Government Service. P.W.7 was familiar with the handwriting of Dr. Kubo. Dr. Kubo found the complainant to be mentally retarded and was aged 19 years old. She found no physical injuries on P.W.1 and also found no external genitalia injuries. However, the doctor found that the hymen of P.W.1 had a fresh tear, which was not actively bleeding.

12. The examining doctor found no spermatozoa after analysis of P.W.1's vaginal swab. The doctor noted the presence of bacteria. According to the doctor, the failure to find spermatozoa did not mean that there was no penetration. The doctor positively indicated that P.W.1's hymen had a fresh tear, which was proof of penetration.
13. The doctor also examined the appellant. She found that the penis of the appellant had no bruises, no blood stains and no discharges on his clothes. Her report was put in evidence as prosecution exhibit PEX 2. While under cross-examination Dr. Njiru found that P.W.1 had been sexually assaulted on 16.5.210 and was taken to hospital on 17.5.2010. This doctor concluded that the blood on the hymen could have clotted due to lapse of time between the date of the alleged assault and when P.W.1 was examined.
14. The appellant gave sworn evidence and called no witnesses. According to him P.W.1 went to his house of her own free will. He then opened for her, only to find that it was (P.W.1) who is his niece. According to the appellant, P.W.1 told him that she had disagreed with her grandmother and was looking for accommodation for that night. He accommodated her. She slept on the sofa set.
15. The following morning the appellant heard his brother calling him. He responded. Immediately thereafter his door was kicked open. He then saw his uncle, who then asked him as to whether the complainant was in his house. He answered in the positive. He then informed the uncle the circumstances that led to P.W.1 being in his house.
16. Instead of being listened to by the uncle, the appellant was tied with a rope and taken to Gathangariri AP Camp and thereafter to Manyatta police station.
17. According to the appellant, it is his uncle with whom he had a case that ended in his being imprisoned for 18 months. The uncle threatened to ensure that he could have him imprisoned for a second time.
18. While under cross-examination, the appellant admitted that the complainant was mentally retarded. He also stated that he had disagreements with his uncle and grandparents, since they caused him to be imprisoned in 2007.

Evaluation Of The Evidence Findings And The Law.

19. I have re-assessed the evidence that was produced at trial in terms of the Court of Appeal in ***Pandya v R***, *supra*. I find that the complainant (P.W.1) was penetrated sexually by the appellant. Her own evidence is supported in this regard by that of Dr. Godfrey Njiru (P.W.7) who positively stated that the hymen of P.W.1 had a fresh tear caused by a blunt object. P.W.7 concluded that it was not unusual for spermatozoa not to be seen during medical examination and was positive that the vagina of P.W.1 had been penetrated.
20. I find that P.W.1 and P.W.7 are truthful witnesses and were rightly believed by the trial court.
21. The circumstantial evidence of the witnesses who went to rescue P.W.1 from the house of the appellant was that P.W.1 was on the bed of the appellant and that the latter was standing there armed with a panga. These witnesses (P.W.2, P.W.3, P.W.4 and P.W.5) corroborated the evidence of the complainant that she was sexually assaulted by the appellant.
22. In the light of the complainant's evidence which is corroborated by that of P.W.2,3,4 and 5, I find that their evidence is cogent and consistent. In ground 2 of the petition of appeal the appellant has stated that there are contradictions in the prosecution evidence, which in view of this evidence is without merit and is hereby dismissed. In ground 3 the appellant has stated that he did not sexually assault PW.1. In the light of the above evidence this ground is without merit and is similarly dismissed.
23. In ground 4 the appellant has stated that the conviction was based on the evidence of a single witness (P.W.1). This ground is without merit and is hereby dismissed in the light of the abundant circumstantial evidence which corroborates that of P.W.1.
24. In ground 5 the appellant has complained that vital witnesses were not summoned. The only

witness who was not called was an AP officer, who escorted the appellant to Manyatta police station.

25. In respect of that witness, the prosecution stated that they were unable to trace his whereabouts. I find that he was not a vital witness, because his evidence related to escort duties only. The issue of the appellant being escorted was not in dispute.
26. The appellant has also attacked the trial court for relying on hearsay evidence from one family to convict and sentence him as set out in ground 6. The evidence of the complainant (P.W.1) against the appellant is direct eye witness evidence. The other evidence consists of circumstantial evidence as outlined by the foregoing paragraphs. The fact that the circumstantial evidence was from members of the same family does not make it hearsay evidence. It is clear therefore that this ground is without merit and is hereby dismissed.
27. The appellant has also attacked the evidence of the Dr. Njiru, which he says should not have been relied upon because the complainant was not examined the same day as particularly set out in ground 7.
28. The evidence of Dr. Njiru is credible. He found that the complainant had been sexually assaulted. He also found that there was a fresh cut on the hymen. The examination took place one day after the rape. In the circumstances I find that ground 7 is without merit and is hereby dismissed.
29. In ground 8 the appellant has attacked the judgment because his defence was rejected "*on weak reasons*". He says that this is in violation of Section 169, Criminal Procedure Code. In his regard the court stated:

    "*The accused's defence that the complainant went to his home at night after a disagreement with her grandmother does not hold any water and I shall dismiss the defence of the accused and convict him accordingly."*

It is clear from this passage that the defence evidence was considered and rightly rejected. This ground of appeal fails and is hereby dismissed.

30. Both the appellant and the state have not raised the issue as to whether rape was the proper charge. I have on my own motion (*sua sponte*) done so in the light of the evidence adduced. The evidence shows that the complainant (P.W.1) is a niece of the appellant. This is clear from the evidence of P.W.2, who stated that the appellant is an uncle to P.W.1. P.W.3 and P.W.4's evidence is to the same effect. The sworn evidence of the appellant is that the complainant is his cousin's daughter.
31. In the circumstances the offence committed was incest contrary to section 20 (1) of the Sexual Offences Act and not rape. It therefore follows that the conviction and sentence in respect of rape are not supported by the evidence. I hereby set aside the conviction and sentence in respect of rape. I find that there is ample evidence in support of the charge in respect of count 2, which charges the offence of an indecent act with an adult contrary to section 11 (A) of the Sexual Offences Act (***Act No. 3 of 2006, now Cap 62A, Laws of Kenya***), as an alternative charge to count 1. In the circumstances, the appellant is hereby convicted of the alternative charge of an indecent act with an adult contrary to Section 11 (A) of the Sexual Offence Act (Act No. 3 of 2006).
32. According to the Court of Appeal in ***Kantilal Jivraj v R (1961) EA 6*** an appeal court is allowed to convict an appellant on the alternative charge, since the trial court is not allowed to make any finding in respect of an alternative charge, where it has convicted an appellant on the main charge. The reason is that a trial court in Kenya sits as a jury and a judge of law. As a jury the trial court finds an accused guilty or not guilty of an offence. Thereafter the trial court as a judge of law then proceeds to convict or acquit the accused person and concludes the trial by sentencing the accused or setting him free.
33. It should be noted that the trial court did not make a finding in respect of count 2. That court therefore followed the proper procedure in law. The reason for this is that count 2 is charged as an alternative charge to count 1.
34. It is equally important to point out that the complainant is mentally retarded. She was able to speak through E R (PW.2) who is her grandmother. PW.2 stated that: "*I am speaking on behalf of the complainant because she is mentally retarded and not able to testify*.**"** It therefore follows that P.W.2 should have been sworn as she was the witness through whom PW.1 testified. This procedure was judicially approved in ***Hamisi s/o Salum v. R. (1951) EACA 217***. In that case a

sister of the deaf and dumb witness acted as an interpreter to the witness who spoke through signs and noises. The sister who interpreted was sworn before she started to interpret. Furthermore, the interpreter has to lay the basis of his ability to interpret what the disabled witness is telling the court.

35. In the instant case, the record should have shown the following: PW 1 sworn in Kiembu through signs and through the interpreter (E R) states. This is then followed by the evidence of the disabled witness. Furthermore, E R (PW 2) should also have been sworn before starting to interpret. Because E R was also a witness, she should have given her evidence first before the complainant(PW 1) testified. This is in accordance with the long standing court practice of keeping out of the court room, potential witnesses who have not testified from listening to the live evidence of a witness, who is testifying. This rule is intended to avoid the live testimony of a witness from influencing those who have not testified. In doing so, potential complaints by the accused are avoided. There is statutory authority in ***section 126(1) of the Evidence Act (Cap 80) Laws of Kenya*** which permits the reception of evidence given through signs. In terms the provisions of that section state as follows:

> *"126 (1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written, and the signs made, in open court. 126 (2) Evidence so given shall be deemed to be oral evidence."*

36. It is equally important to point out that section 125 (2) of the Evidence Act declares that a mentally disordered person such as PW 1 is a competent witness and may testify unless he is prevented from doing so by his condition from understanding the questions put to him and giving rational answers to them. I am satisfied this mentally retarded witness testified intelligently in her evidence in chief, under cross examination and in re-examination. This is clear from the record of the proceedings. In the circumstances I find that the trial court properly exercised its discretion by allowing her to testify as a sworn witness through her grandmother.

Factors that Guide the Sentencing Process

37. On 7th December, 2015, I ordered the Deputy Registrar to avail the judgement of the High Court (Majanja, J) in ***David Muchiri Njue v. R,*** Criminal Appeal No. 210 of 2011, in order to satisfy myself that the current appeal before me arose from the re-trial ordered therein on a charge of rape. The record indicated that a re-retrial followed the finding by that court that the charge of rape upon which the accused had been tried was defective. I find that it is the order of re-trial therein that gave rise to this appeal.
38. Furthermore, the record of the previous appeal in which a re-trial was ordered was necessary to ascertain whether or not the appellant was continually in prison. This aspect is essential for sentencing purposes. I find that the appellant was in prison following the order for re-trial on 18th October, 2013. I also find that he was in prison for over 5 years and 8 months, that is, from 18th May, 2010. Part of this period of over 5 years and 8 months includes the remand periods when the appellant was on the original trial and the re-trial that was ordered by the High Court.
39. In sentencing the appellant I have taken into account that the maximum sentence for the offence of an indecent act is five years. In sentencing the appellant I have taken into account that he is a first offender and has been in prison for over five years and eight months. Since the complainant was then an adult person (aged nineteen (19) years old by then), the appellant is hereby sentenced to five years imprisonment.

Verdict And Disposal Order

40. I have convicted the appellant on alternative charge of an indecent act with an adult contrary to Section 11 (A) of the Sexual Offence Act (Act No. 3 of 2006). The sentence that is provided for is a maximum of five years imprisonment or a fine not exceeding fifty thousand shillings or to both. Since the complainant was then an adult person (aged nineteen (19) years old by then), the appellant is sentenced to five years imprisonment.

41. However, in the light of the fact that the appellant has been in custody for over 5 years and eight months, the appellant is hereby discharged and set free unless he is otherwise held on other lawful warrants.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **26th** day of **JANUARY 2016**

In the presence the appellant and Ms Nandwa for the state/Respondent

Court clerk Njue

J.M BWONWONGA

JUDGE

26.01.16