REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HC CR.A NO.17 OF 2015

FORMERLY MERU HC CRA NO.140 OF 2014

JOSEPH MAINGI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

An appeal from the Judgment of Hon. F. M. NYAKUNDI R.M made on 20th June, 2014

in Marimanti Principal Magistrate's Court Criminal Case No. 668 of 2013

JUDGMENT

1. Joseph Maingi M'Ekandi, "the Appellant," was arraigned before the Principal Magistrate's Court Marimanti on 11th February, 2014 with the charge of rape contrary to section 3 (1)(a)(b) and (3) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 14th day of December, 2013 at ***[particulars withheld]*** Village in Tharaka North District within Tharaka Nithi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of G .K. M aged 26 years, a person with physical disabilities without her consent. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act, No. 3 of 2006.

2. After trial, the Appellant was found guilty, was convicted of the charge of rape and sentenced to 10 years imprisonment. He has now appealed to this court on four (4) grounds set out in the Petition of Appeal. These were that:-

a. the trial court failed to consider that the medical report did not establish the offence of rape;

b. the trial court failed to consider that most of the prosecution witnesses were related to the complainant;

c. the trial court failed to consider the Appellant's defence; and

d. the trial court failed to consider that there was a grudge between the complainant and the Appellant.

3. This being a first appeal, this court is enjoined to re-examine and re-evaluate the evidence afresh and reach its own independent findings and conclusions. See **Okeno – VS – Republic (1971) EA**. In doing

so, this court must be alive to the fact that it did not have the advantage of seeing the witnesses testify to be able to read their demeanour.

4. The evidence before the trial court was that PW1, the complainant is physically challenged; she has been so ever since birth and was admitted in hospital for seven (7) years during her formative years and was finally discharged on a wheel chair. Throughout her life time, she relies on B N her mother (PW2) to move her around and she cannot move herself. As a result, she is always left at home and PW2 does everything for her. On 14th December, 2013 at about 3pm, PW1 was at home alone as PW2 had gone to look after sheep. The accused came and on finding PW1 alone in the house, he took off her clothes and had sexual intercourse with her without her consent. PW1 cried but there was no one to help. After he was through, the accused left behind a panga. When PW2 came back, PW1 narrated to her what had happened. PW1 told the court that before that fateful day, she used to see the Appellant pass through their home when going to have local brew.

5. PW2 told the court that on the material day, it had rained and she told PW1 to remain in the house while she, PW2, went to look after her goats. When she returned, PW1 told her that someone had raped her. When she examined her, she found her private parts wet. PW1 told her that the person who raped her used to pass through that home to go and take local brew. That he had left behind a panga. PW2 then went to Peter Mpuria Rukwaro (PW3) and asked him to come and see what had happened to PW1. When PW3 came, he noticed that the private parts of PW1 had blood. When PW2 showed him the panga that had been left behind by the person who had raped PW1. PW3 identified it as the one he had given to the Appellant the previous day for the latter to prepare sacks for charcoal. It is PW3 who identified the person he had given the panga PExh 2 as the Appellant. It was then that the matter was reported to Gatunga Police Station and PW4 arrested the Appellant on 17th December, 2013.

6. PW5, the Medical Officer from Tharaka Hospital told the court that PW1 was taken to Tharaka District Hospital on 17th January, 2014. On examination, she was found to have changed her clothing; she was of air general condition; she had no abrasion or laceration in her genitalia, her virginity was broken but she had no discharge. The witness attributed this to the fact that PW1 was seen four(4) weeks after the alleged incident. PW6, the investigating officer told the court that the incident was reported at Gatunga Police Station on 16.12.2013. That the report was made late as PW2 had lacked transport to the station. Indeed because of the Doctors and Nurses strike at the time, PW1 could not be taken for medical examination immediately until four (4) weeks later after the strike was over. He charged the Appellant with the offence and a P3 form PExh 1 was filled.

7. In his defence, the Appellant gave unsworn testimony and told the court that he was from Tigania and was a charcoal burner. That he was arrested on 16.12.2013 because of burning charcoal. That when he was taken to the chief's camp, the chief asked to be paid Kshs.30,000/= to be allowed to continue burning charcoal. That when he was unable to raise the money, he was charged with the offence of rape.

8. At the hearing of the Appeal, the Appellant relied on his written submissions which rehearsed his grounds of appeal. On his part, Mr Ongige Learned Counsel for the state opposed the Appeal. He submitted that the medical evidence showed that PW1's hymen wan broken signifying rape; that the delay for the examination of PW1 was properly explained; that on the authority of the case of Michael Randu Mwaseka – vs – Republic [2015] eKLR, the evidence of PW1 on the rape was sufficient. That the trial court had considered the Appellant's defence and found it misleading. Counsel submitted that nothing turned on the fact that the prosecution witnesses were relatives of the complainant. He urged the court to dismiss the Appeal.

9. The first ground was that the trial court failed to consider that the medical evidence did not establish the offence of rape. The Appellant contended that the medical examination was undertaken over a month after the alleged incident. The Court has considered the evidence on record and the submissions. PExh 1, the P3 form, shows that the alleged rape was committed on 14.12.2013. The complainant was taken to hospital and examined on 17.1.2014. She was found to have no abrasions on her vaginal walls but the hymen was broken. Medical evidence in sexual offences is no doubt crucial. Be that as it may, it is only secondary to corroborate the primary evidence being that of the victim as well as other witnesses. In the

case of Michael Randu Mwatseka – VS – Republic [2015] eKLR, the court held that medical evidence is only part of the prosecution case to show that the victim was taken to hospital. In the present case, the only importance that can be attached to the medical evidence is that PW1's hymen was found not to be intact. That shows that for sure PW1 was at some point involved in sexual intercourse. It is for the prosecution to tender evidence to connect the absence of PW1's hymen and her encounter with the Appellant. To my mind, the medical evidence proved that PW1 was not a virgin and that she must have been engaged in sexual activity at the same point. That evidence in my view was crucial. I will later on revert to this ground.

10. The second complaint was that the trial court failed to consider that most the of the prosecution witnesses were related to the complainant. A critical examination of the record shows that , PW2 was the complainant's mother, PW3 was a neighbor, PW4 was the assistant chief of the complainant's village; PW5 and PW6 were a clinical officer, from Tharaka Hospital and the investigating officer, respectively. Save for PW2, all the others were independent witnesses. In this regard, the complaint has no basis. In any event, even if all the witnesses may have been related to the complainant, I know of no law that bars close relatives from being witnesses for a victim of an offence. It is for the accused in such a case, through cross examination, to show that the evidence of such witnesses is unreliable and biased. Nothing of that sort happened in this case. I reject that ground.

11. The third ground was that the trial court failed to consider the Appellant's defence. The Appellant gave unsworn testimony. He told the court that he was arrested because of burning charcoal; that it is because he refused to pay a bribe to the assistant chief, PW4, that he was charged with the present offence. The court looked at this defence and noted that the Appellant did not cross-examine either PW3 or PW4 on their allegations about him. The court found the defence to be misleading. From the record, it is clear that when PW4, the assistant chief testified, the Appellant did not ask him even a single question. In my view, it is at that stage that the Appellant should have put to PW4, the alleged issue of charcoal burning and bribery. Having failed to raise that contention at that stage, it was in my view an afterthought to raise it in his defence way after the alleged perpetrator had testified and left. I see no reason to fault the trial court on its evaluation of the defence and the conclusions it arrived at.

12. The final ground was that the trial court failed to consider that there was a grudge between the complainant and the Appellant. The record shows that at no point during the trial did the Appellant raise the issue of any grudge between him and the complainant. Save for PW4, the Appellant cross-examined all the prosecution witnesses including the complainant but did not allude to the existence of the alleged grudge. Even in his defence, the Appellant did not raise the issue of the grudge. In this regard, this is but an afterthought and has no basis. The same is rejected accordingly.

13. Let me now revert to the issue of the medical evidence which was the first ground. As already stated above, medical evidence is only corroborative in nature. In the present case, PW1's evidence was categorical. She knew the person who came to their house, removed her clothes and raped her. He had previously seen him pass outside their house while going to take local brew. That the assailant had sexual intercourse with her without her consent. That when he was through with her, he left behind a panga PExh 2. PW2 examined PW1 a short period after the incident and found that her private parts were wet. PW3 saw blood in PW1's private parts. PW3 identified the panga PExh 2, that was left at the house of the complainant by the person who had raped her as the one he had given to the Appellant. When PW1 saw the Appellant at the trial, she identified him as the one who had raped her. All this, in my view, proved beyond reasonable doubt that PW1 had been forced into having sexual intercourse, that the person who did so was none other than the Appellant. The medical evidence proved that PW1's hymen was not intact thereby being corroborative of the evidence of PW1, PW2 and PW3 as to rape. The prosecution evidence was in my view consistent and corroborative. The prosecution had proved its case of rape to the required standard.

14. Accordingly, the Appeal is without merit. The same is hereby dismissed.

Dated and delivered at Chuka this 22nd day of January, 2016.

A.MABEYA,

JUDGE.