REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 69 OF 2014

JAMES WAMBUA MUTUA ……..……APPELLANT

VERSUS

REPUBLIC…….....….....……RESPONDENT

(An appeal arising out of the judgment and sentence of H.M. Nganga RM in Criminal Case No. 1476 of 2008 delivered on 10th April 2014 at the Resident Magistrate's Court at Tawa)

JUDGMENT

The Appellant was charged with two offences in the original trial Court. In Count I he was charged with the offence of rape contrary to section 3(1) of the Sexual Offences Act. The particulars of the offence were that during the night of 30th June 2013 and 1st July 2013 at [particulars withheld] village, [particulars withheld] location, Kitundu sub-location in Mbooni West District, within Makueni County, he intentionally and unlawfully caused his penis to penetrate the vagina of L M K, without her consent.

The Appellant was charged with an alternative offence to Count I of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act. The particulars of the offence were that during the night of 30th June 2013 and 1st July 2013 at [particulars withheld] village, [particulars withheld] location, Kitundu sub-location in Mbooni West District, within Makueni County, he intentionally and unlawfully did an indecent act to L M K, by touching her private parts, namely vagina, with his penis.

Count II was burglary contrary to section 304(2) and stealing from a dwelling house contrary to section 279(b) of the Penal Code. The particulars were that during the night of 30th June 2013 and 1st July 2013 at [particulars withheld] village, [particulars withheld] location, Kitundu sub-location in Mbooni West District, within Makueni County, the Appellant broke and entered the dwelling house of L M K with intent to steal therein and stole cash kshs. 400/=, 10 Kgs of maize, 10 Kgs of beans and assorted clothing all valued at Kshs. 4,000/=, the property of L M K.

The Appellant was arraigned in the trial court on 3rd July 2013 and he pleaded not guilty to the charges. He was tried and acquitted of the charges of burglary and stealing from a dwelling house. He was however convicted of the offence of rape and sentenced to thirty (30) years in prison.

The Appellant being aggrieved by the judgment of the trial magistrate preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition of Appeal dated 23rd April 2014 and filed in Court on 24th April 2014. The grounds of appeal in summary are that

there were no witnesses who lined the Appellant to the offence; the medical evidence was unsatisfactory; there was no proper identification; the prosecution did not adduce evidence to support the charges of rape; the evidence was not corroborated; and that the case was not proved beyond reasonable doubt.

The Appellant's learned counsel, J. N. Kimeu & Co Advocates filed written submissions dated 9th October 2015. It was argued therein that the Appellant was called upon to prove his innocence severally during trial. Further, that the prosecution did not conclusively prove that the Appellant was the person who had broken into the house. It was further submitted that PW1 did not describe the density of the light of the "Koroboi" or where it was placed in the room and she used to identify the Appellant as it was at night. It was also argued that the trial Court should not have relied on a single identifying witness, and the decisions in **Roria V republic (1967) E, 583, 584** and in **R v Turnbull (1977) QB 224(CA)** were cited in this respect.

According to the Appellant, the psychological disturbance depicted by the victim should not have been the basis of forming an opinion that the victim was truthful. It was submitted that her evidence should have been corroborated. Lastly, it was argued that the prosecution should have had the Appellant examined for a link between him and the epithelial cells found from the medical examination of the victim. The Appellant in this regard referred to the decision by the Court of Appeal in **Ben Joseph Nanzala VS Republic, Criminal appeal No. 175 of 2010**.

The prosecution did not file any submissions on the appeal despite directions and the opportunity to do so.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses during the trial of which, the complainant, L M K (PW1), testified as to the happenings of the night 30th June 2013 and 1st July 2013 when the offences are alleged to have been committed by the Appellant.

K K (PW2) who was the complainant's son; M M N alias N (PW3), a village elder at Itundu; APC Richard Mutisya (PW4) a police officer attached at Utangwe police post; and P.C Bernard Njenga (PW6), who was the investigating officer in the case, all testified as to the reports they received from the complainant of the alleged offences committed against her, and on the arrest of the Appellant. The last witness was Dr. Pius Mutuku (PW5), who stated he examined the complainant on 02.07.13 at Mbooni District hospital.

The trial court found that the prosecution had established a *prima facie* and put the Appellant on his defence. The Appellant gave unsworn testimony and did not call any witnesses. He stated that he did business in his father's hotel and he could not leave his work to go to an elderly woman's home. He stated that this case was as a result of malice arising from business and a land dispute.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise two issues. These are firstly, whether there was proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of rape was based on consistent and sufficient evidence.

On the issue of identification, **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness in ***Maitanyi vs Republic*** **, *(1986) KLR 196*** as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is**

needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

I have also reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".

In the present appeal, the offence that the Appellant is convicted of took place during the night. PW1 testified that at midnight on the night of 30.06.13 and 01.07.13 she was asleep in her house and the door was closed. She then heard someone digging at the door to open it and she screamed. She stated that no one came to her aid at the time, but that she saw the intruder since she was awake and a '*koroboi*' lamp was lit.

PW1 stated that she knew the intruder by the name 'K and that he was the Appellant. PW1 also stated that at that time she was lying on her bed with her clothes on. It was then that the Appellant removed her underpants and put his penis into her vagina her for a long time while holding her neck firmly such that she could not scream. In addition, that after the rape, the assailant stayed around to ask for money and stole items from her.

I note that PW1 testified that there was a light that was on during the ordeal, in a one roomed house, and which she said enabled her to identify the Appellant. In addition the time was considerably long enough for PW1 to be able to identify her attacker as it was not a fleeting attack. Lastly, PW1 testified as follows on her recognition of the Appellant:

"I recognized the face of the intruder. I knew him by name. He is called K at the village… K is there (points at accused; he is my neighbor at home. His father is called M. I know the father of K"

The Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. The Appellant was not a stranger to PW1 and her identification of him was therefore reliable for the foregoing reasons, irrespective of the fact that the identification was by a single witness in difficult circumstances. I therefore find that the Appellant was properly identified as the person who had sexual intercourse with PW1.

On the issue whether there was sufficient evidence to convict the Appellant for the offence of rape, section 3(1) of the Sexual Offences Act provides the elements of the said offence as follows:

"A person commits the offence termed rape if-

a) He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;

b) The other person does not consent to the penetration; or

c) The consent is obtained by force or by means of threats or intimidation of any kind."

The Court of Appeal in its decision in **Republic vs Oyier (1985) KLR 353** elaborated on these elements as follows:-

1. **The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is**

primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. **To prove the mental element required in rape, the prosecution has to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**

3. **Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.**

In the present appeal, I will first address the ground raised by the Appellant of lack of corroboration of the evidence of PW1 that she was raped by the Appellant. PW5 in his testimony stated that after examining PW1 he found that her left eye was swollen, her face and neck had bruises and upon testing her vaginal area they found pus cell, epithelial cells and red blood cells as well as signs of an infection. He stated that the injuries were 3 days old, and that the medical examination revealed there was penetration in a post menstrual woman. PW5 produced a P3 form to this effect and his medical evidence did corroborate the fact of a sexual attack on PW1.

Besides, the proviso to section 124 of the Evidence Act provides that no corroboration is required in cases involving sexual offences, where the Court believes that the complainant it telling the truth. The testimony by PW1 was consistent as to what transpired during the night of her terrible ordeal even under cross-examination, and there is no reason for this Court to doubt its credibility.

As regards the requirement of lack of consent, from the evidence of PW1, the Appellant gained entry into PW1's house by force, by digging through her mud wall. This evidence was corroborated by PW6, the investigating officer, who testified that upon visiting the scene of crime he found that the PW1 was living alone in a mud house and on the right side of the door was a hole which the Appellant used to push the door open.

The Appellant also removed PW1's underpants and held her by the throat during the sexual attack such that she could no scream, which evidence was corroborated by the medical evidence by PW5 that showed that her left eye was swollen and she had bruises on her neck. PW1 also testified that the Appellant threatened to cut off her head if she screamed. It is therefore clear that the Appellant used force during the sexual attack on PW1 and there was no consent on her part to the sex. I therefore find that the offence of rape was proved to the required standard. The Appellant's conviction for the offence of rape was therefore safe.

Lastly, the Appellant in his Petition of appeal also appealed against the sentence. The penalty for rape under section 3(3) of the Sexual Offences Act is imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. It is to be noted from the said provision that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment. While sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu – Vs- Republic Criminal Appeal No.8 of 2008.**

I note that the Appellant was found to be a first offender by the trial Court, and that it was held by the Court that he needed a deterrent sentence as he had committed an heinous offence against an elderly woman. It is my view in this respect that the minimum sentence provided for by law was enough deterrent in the circumstances of the offence that the Appellant committed against PW1, and that the sentence of imprisonment of 30 years imposed by the trial magistrate, although lawful, **was excessive.**

I accordingly uphold and affirm the conviction of the Appellant for the charge of rape contrary to section 3(1) of the Sexual Offences Act, Act No. 3 of 2006. I will however set aside the sentence imposed by the trial magistrate and substitute it with an appropriate sentence of this Court. I accordingly sentence the

Appellant to 10 (ten) years imprisonment, which term of imprisonment shall run from the date of the Appellant's conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF MAY 2016.

P. NYAMWEYA

JUDGE