REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 105 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 232 OF 2014)

(Being an appeal against conviction and sentence in Narok Criminal Case No. 130/2014 – T. A. SITATI Ag SRM)

NICHOLAS RATIA ……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

J U D G M E N T

1. **Nicholas Ratia,** the Appellant herein, was tried and convicted for the offence of Rape contrary to Section 3(1)(a) and (b) as read with Section 3(3) of the Sexual Offences Act. The particulars state that on the 20th day of January 2014 in Narok North District within Narok County, he intentionally and unlawfully caused his penis to penetrate the vagina of **N.S.** without her consent.

2. He was sentenced to 15 years imprisonment. His original Petition of Appeal was focused on the sentence. The Appellant subsequently filed amended grounds as follows:

> **"1. That the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the orders made by the same court were not complied with.**
>
> **2. That the learned trial magistrate erred in both law and fact when he convicted me in the instant case by relying on evidence adduced by hostile witness.**
>
> **3. That the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the investigation carried out were shoddy and faulty.**
>
> **4. That the learned trial magistrate erred in both law and fact when he convicted me in the instant case yet failed to consider the medical evidence that supported my plausible defense." Sic**

3. He also relied on written submissions in support of the grounds. The Appellant complains that an order made by the trial court to bring an extra charge of robbery was not complied with. The result, he argues, is a mistrial. He also asserts that **PW1** and **2** were "hostile" witnesses in light of their evidence concerning a piece of torn under wear. He called to his aid the provisions of Section 163(1)(c) of the Evidence Act. It is his contention that the investigations were not carried out in a diligent manner. He

stated that the medical evidence exonerated him but that the trial court ignored exculpatory evidence adduced at the trial.

4. He contended that with regard to the phone Nokia 1100 recovered from a neighbor while charging, the said neighbor did not testify. And further that the Complainant's phone was said to be a Nokia 1200 and not Nokia 1100.

5. The DPP was represented by Miss Waweru. She reiterated the evidence of the Complainant, medical evidence, the torn clothes, the identification evidence by the Complainant and recovery of her phone from the Appellant to confirm that the offence was proved. She stated that the Appellant's defence was evasive and concluded by urging the court to reject the appeal.

6. In the case of **Okeno -Vs- Republic [1973] EA 32**, the Court of Appeal set out the duty of the first appellate court in the following terms:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."**

7. The prosecution evidence at the trial was as follows; **N.S (PW2)** resided at [Particulars Withheld] with her husband **N.S (PW3)** and their children. On 20th January 2014, the Complainant visited a relative at a place known as Mbirisha. She was walking back to her home between 5.00pm and 6.00pm when she met the Appellant. The two struck up a conversation, the Complainant pretending not to know the Appellant, even though he was related to her family through marriage. As they proceeded on, the Appellant attacked her, throwing her onto the ground. He tore off her clothes while also strangling her. He bit her on the right middle finger when she resisted. Overcoming her, he had sexual intercourse with her. Afterwards, he took her Nokia handset and left the scene.

8. **PW 2** picked herself up and proceeded on her journey home. She reported the incident to her brother one **M** and her husband **PW3**. The area chief was also notified. The Complainant was heading to the hospital in the company of **PW3** at 1.00am when information came through that the assailant had been caught. **PW3** first proceeded to the scene of arrest which was the house of the Appellant's grandmother.

9. The Appellant was bound with ropes at the time and **PW3** demanded his wife's phone. The Appellant led his captors who included Maitai to the house of a neighbor identified as Kaare. The Complainant's phone was recovered. The Complainant was treated at Narok District hospital and the P3 form completed by **Edwin Kopere Kiprotich (PW1)** a Clinical Officer. The Appellant was also examined by the same witness after he was handed over to the police.

10. In his unsworn defence statement, the Appellant stated that he was from Melili where he carried on a boda boda business. He was residing with his grandmother in the material period. On the material evening at 5.00pm, he was at the said home. In the night at 5.00am, an in-law one Njoroge Sameri came knocking requesting transport. He headed out with him on his motor cycle but after 1km, the visitor requested him to stop. He was confronted by a group of men who bound him and walked him to Rotian, arriving at 6.30am.

11. On the way, the men took from him Shs 5,000/= and a Nokia CI phone. The Complainant was among the group of men who took him to Rotian. They brought the Appellant to Narok police station. He and

the Complainant were escorted to the District hospital for examination, and at that point, he realized he had been set up for the offence of rape. The Complainant demanded Shs 10,000/= to withdraw the case but the Appellant offered Shs 5,000/= which was rejected.

12. I have considered the trial evidence and rival submissions made at the hearing of the appeal. Medical evidence by **PW1** confirms the evidence by **PW2** that there was penile penetration. There were lacerations and tenderness on the Complainant's genitalia. Although the HVS showed no spermatozoa**, PW1** noted a foul smelling white discharge. There need not be evidence of spermatozoa in the HVS to prove penetration. In my own view, the evidence adduced clearly establishes penetration.

13. With regard to the elements of intentional and unlawful penetration, I have reviewed the evidence by **PW2**, the medical evidence and physical exhibits. The Complainant said that the assailant strangled her and bit her right middle finger in a bid to subdue her. This is confirmed by the medical evidence tendered by **PW1**. The P3 form documents the human bites on the right middle finger, lacerations and bruises on the neck and right hand. Equally, the clothes **PW2** wore on the material date including a petty coat and skirt were produced as **exhibits 2** and **1** respectively. The same bore tears and were soiled with cow dung.

14. **PW2** told the court that upon knocking her to the ground, the Appellant tore off her petty coat and skirt, removed her under pant and threw it in the bushes. Her documented injuries and the torn clothes strongly confirm her evidence that the sexual encounter between her and the assailant was not out of consent but forced by the assailant.

15. Much was made by the Appellant regarding the fact that the Complainant apparently wearing pink under wear when she was examined by PW1. Contrary to the Appellant's assertions, **PW2** told the court that her under pant was left at the scene of the attack and was not among exhibits in court. During cross-examination, she said that it was thrown into the bush, not the river. Equally, **PW1** told the court that the complainant's inner wear had tears. In this regard, he only mentioned a pink petty coat and purple skirt, which unfortunately were not physically present at the time of his evidence.

16. In his P3 form however, under the section reserved for "state of clothing including presence of tears, stains (wet of dry), blood etc, **PW1** indicated as follows:

> **"Torn under wear into pieces, torn petticoat pink in colour and torn skirt purple in colour at the front. All clothes soiled (by) wet soil and cow dung to involve the yellow lessos" sic**

17. Evidently, if **PW2** wore any under pant at the time of examination, it was not the same one she wore on the date of the assault. However, even if there was, as it appears some contradiction in relation to the eventual fate of **PW2's** under wear, that does not render witnesses such as **PW1** and **PW2** hostile or incredible witnesses.

18. Not every contradiction is significant or material. In the case of **Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003) UGCA**, the Supreme Court of Uganda stated:

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case**."

This decision was quoted with approval by the Court of Appeal in Kenya in the case of **Erick Onyango Ondeng -Versus- Republic (2014) eKLR.**

19. Evidence of the dung stained torn petty coat and the torn skirt positively identified by **PW2** cannot be displaced by the small mix up regarding the under pant which was not placed before the court. The trial

magistrate upon considering the evidence on torn clothing, concluded, correctly in my opinion that:

> "**The soiled and torn clothes also exemplified the physical struggle that ensued before and after the rape."**

20. In my considered view, the real sticking point in this appeal is the identity of the assailant. One of the Appellant's complaints in this regard is that medical examination conducted on him did not prove sexual activity on his part. That submission is consistent with the fact that **PW1** did not observe any injuries on his genitalia although his clothes were soiled from the knees. In the absence of physical injuries to his genitalia and laboratory evidence of venereal disease on the Appellant, **PW1** concluded that;

> **"Physical and laboratory evidence could not exhibit <u>any medical evidence of engaging in sexual acts</u>." (emphasis added).**

21. Thus the only evidence that tended to connect the Appellant with the sexual assault was the identification by **PW2** and the recovery of the Complainant's phone with the Appellant on the same night. In this regard, **PW1** told the court that when he met the Appellant it was 6.00pm. She knew him because he had previously visited her homestead where the Appellant's sister one **Nkanoshe** was married.

22. In his defence, the Appellant appeared to confirm this familiarity when he said that his in-law **Njoroge Sameri** came to his house at 5.00am on the day of his arrest. He also seemed to know the Complainant, identifying her as the person he found in the company of the men who took him to Narok police station. From this evidence and the account given by **PW2**, **Njoroge Sameri** is the same person described as **N.S (PW3).**

23. In her evidence in chief **PW2** stated:

> **"Nicholas saw me. He greeted me and asked if I knew him. I pretended not to know him. I asked him if he knew me. I asked Nicholas from which family he comes. He said he comes from Saaya's family. I asked him where he was headed. He said he was headed to Olenkasurai. We started to walk together in the same direction. After a short distance, he grabbed me from behind and pushed me on the ground…"**

24. The Complainant proceeded thereafter to give a blow to blow account of what happened next. She stated that on arriving home, she informed her brother **M** and her husband **PW3** that "one of Ratia's sons had raped me." During cross examination by the Appellant, **PW2** stated:

> **"I only said in my initial report to my husband and brother that it was Ratia's son. I am illiterate… I dictated to the police what had happened and who did it…You raped me on the foot path not inside bushes. The foot path is not commonly used… yes my phone was taken away…You were found with my phone. It still had my mobile phone line."**

25. **PW2's** husband **(PW3)** returned home at 11.00pm. He said in his evidence in chief that **PW2** reported that Ratia's son had raped her. On learning of his arrest some few hours after the event, he rushed to go to the home of the grandmother of "Nicholas". He stated:

> **"I left my wife (after receiving information on arrest) in a nearby homestead as I went back to where the accused had been arrested by M and 2 others…We bound Nicholas' hands with ropes. We walked him up to Entiak. My wife had mentioned that the accused had taken away her Nokia phone. I asked the accused to surrender the phone. He led us to a neighbour's house whereat he had placed it for charging. I confiscated the phone…. I knew Ratia's family. One of Nicholas' sisters is married at our place…"**

26. He stated to the Appellant during cross-examination that:

> **"I know you by name. The moment she (PW2) described you, I instantly knew it was you… We found you with both the phone and her mobile line inside. You were charging the phone at Kaare's place. You took us there…"**

The said phone, described as a Nokia 1200 was received by **PW4** when the accused was escorted to the police station with the allegation that the Appellant had taken it from his victim.

27. From the foregoing evidence, the complainant and her husband were familiar with the Appellant. The rape incident occurred in daylight following a conversation between **PW2** and the Appellant. The entire incident took time. The witnesses knew the Appellant by his name Nicholas son of Ratia even though he had introduced himself to **PW2** as being a member of the Saaya family.

28. It is difficult to believe that the Complainant randomly and falsely selected the Appellant for blame out of other possible members of his family. There was no proven bad blood between them preceding the incident. The Appellant admits that a Nokia phone of a different make (C1) was retrieved from him. This suggestion, however, was not put to **PW4** or **PW3** during cross-examination. At some point during a mention, the Appellant complained to the court that **PW3** took his phone and money. This is what he repeated in his testimony but there is no evidence that more than one phone was recovered. The indirect suggestion that **PW3** took the Appellant's phone of a different make and that it was substituted with the Nokia 1200 phone exhibited in court by the Complainant's husband appears far-fetched.

29. It is not likely that **PW3** and his colleagues colluded to fabricate such evidence against the Appellant within hours of the offence even before reaching the police station. It is true that in this case, it would have been useful to call **Kaare** as a witness but the admitted fact of recovery of a Nokia phone by the Appellant on arrest only left the question of the make of such phone. The phone in question was produced as an exhibit, identified by **PW2** and **PW3** as the property of the latter.

30. In dealing with the identification and recovery evidence, the trial magistrate stated in his judgment that:

> **"The victim's description of her attacker was proved as accurate when her relatives acted on the information. Initially, the accused deceived her that he was from Saaya's family unaware that she knew him as one of Ratia's family. She told her relatives that the accused had snatched away her mobile phone. PW3 personally recovered the phone P. Exhibit 3 from the accused when he went to arrest him. The accused led the arresting civilians to a neighbour's house where at he had taken the phone for charging. These pieces of evidence firmly confirmed that Ratia was the culprit…was identified by his victim…was found with her mobile phone so soon after the rape….the surrounding circumstantial evidence inevitably pointed to the guilt of the accused."**

31. In **Odhiambo -Vs- Republic [2002] KLR 241** where the Court of Appeal stated *inter alia* that:

> **"Evidence of recent possession is circumstantial evidence which depending on the facts of each case may support any charge."**

The possession by the Appellant of PW2's phone hours after the rape and theft of the phone confirms that the Appellant committed the offence.

32. Upon my own review of the evidence, I cannot find any reason to fault these findings even though the trial court did not take time to set out its analysis of the evidence before making the conclusions above. The Appellant's contention that the medical evidence "exonerating" him was more important than identification evidence, holds no water. Under the proviso Section 124 Evidence Act, a court trying a sexual offence is entitled to base a conviction on the sole testimony of a victim. In my view, the evidence of **PW2** identifying the Appellant was credible and confirmed by medical evidence (her injuries) and the recovery of her phone in the Appellant's possession.

33. The medical evidence regarding the Appellant's and Complainant's examination did not exclude the possibility of sexual intercourse, merely because the Appellant had no injury on his genitalia and that no spermatozoa was noted in the complainant's HVS. The Appellant's defence was effectively dislodged by the overwhelming direct and indirect evidence which placed him squarely at the scene of the assault. The court was entitled to dismiss it. The evidence in defence was not plausible. It seems highly unlikely that his in-laws with whom he had no known grudge would pick on him in the middle of the night to accuse him falsely of an offence he never committed and worse still, plant on him a phone he knew nothing about, after taking his own phone and money from him. In light of the foregoing grounds 2 - 4 of the appeal have no substance and are rejected.

34. Ground 1 is misplaced. The Appellant benefitted from the fact that no additional offence of robbery was brought against him despite the court's directions in that regard. The fact that the court's order was seemingly abandoned does not have any significance to the charge of Rape and the conviction thereon. The said first ground is therefore without merit. In the result, I find no merit on the appeal against conviction and the same fails.

35. Regarding the sentence, the trial court noted the violence attending the offence and the fact that the Appellant showed no remorse. There were no previous convictions proven against the Appellant. It is appalling that the Appellant did not just stop at raping in broad daylight, the complainant who was several years his senior, he also stole her phone. The conduct demonstrates blatant callousness. The sentence of 15 years imposed does not in the circumstances of this case appear harsh or excessive, given that the minimum sentence for the offence is ten years. There is no justification for this court to interfere with it. In the circumstances, the entire appeal fails and is rejected.

Delivered and signed at Naivasha this **23rd** day of **June**, **2016**.

In the presence of:

For the DPP : Mr. Koima

Appellant : present

Court clerk : Barasa

C. MEOLI

JUDGE