REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 161 OF 2014

JOHN KANDIE BARTILE …… APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable N. Adalo in Iten Criminal Case No. 419 of 2012, dated 23rd October, 2014)

JUDGMENT

1. The appellant *John Kandie Bartile* was charged with the offence of rape contrary to *Section 3(1)(a)* as read with *Section 3(3)* of the *Sexual offences Act* (the Act). The particulars of the offence were that on 5th June, 2012 at around 7p.m at [particulars withheld] in Elgeyo Marakwet County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *S C* (*name withheld*) without her consent.

2. In the alternative, the appellant was charged with the offence of committing an indecent Act with an adult contrary to *Section 11 (A)* of the

Act in that on the same date and place, he touched the private parts of *S C* namely her vagina and breasts without her consent.

3. After a full trial, the appellant was convicted on the principal count of rape. He was sentenced to ten years imprisonment.

4. Being dissatisfied with his conviction and sentence, the appellant through his advocates *Ms. B.I Otieno & Co. Advocates* proffered an appeal to this court through a petition of appeal dated 28th October, 2014.

In the petition of appeal, the appellant basically complained that he was convicted on the basis of contradictory evidence which did not prove the prosecution's case beyond any reasonable doubt and that the trial magistrate erred by failing to consider the weight of the evidence offered by the defence.

5. At the hearing of the appeal, the appellant was represented by learned counsel *Mr. Awi* while learned prosecuting counsel *Ms Mutheu* represented the state. In his submissions *Mr. Awi* contended that the appellant was wrongly convicted; that the charges against him were not proved beyond any reasonable doubt as required by the law in view of the medical evidence adduced by PW3; that the prosecution case had glaring gaps which were sufficient to create doubt in the prosecution case and that for these reasons,

the appeal ought to be allowed.

6. The state contests the appeal. *Ms. Mutheu* in her submissions urged the court to find that the prosecution had proved every element of the offence; that the offence of rape can be proved by evidence other than medical evidence; that the learned trial magistrate considered the appellant's defence and that the appellant was properly convicted. She invited the court to dismiss the appeal for want of merit.

7. At the trial, the prosecution called a total of four witnesses. The complainant *(SC)* who testified as PW1 recalled that on 5th June, 2012 at around 7pm, she left her farm and walked to a house owned by the appellant's daughter who was a trader in illicit brews (sapphire). She knew the appellant prior to that date since they were neighbours.

8. According to her evidence, she found the appellant, his daughter and son in law in the house. She bought and consumed sapphire worth Ksh.50. She then left but after walking for about 20 metres, the appellant who had followed her wrestled her to the ground, tore the grey khaki short she had worn under her dress , unzipped his trousers and forcefully had sexual intercourse with her. She screamed and *A K* (PW2) went to her rescue.

9. PW2 testified that she lived about 120 metres away from the appellant's daughter. She knew both the appellant and his daughter *W J* because they were her neighbours. She recalled that on 5th June 2012 between 7 - 8p.m, she was in her house when she heard screams from a woman and on rushing to the direction the screams were coming from, she found the appellant on top of the complainant. He was in the act of having sexual intercourse with her. The complainant was still screaming. She saw them with the aid of moonlight. Enraged by what she had seen, PW2 forcefully pulled the appellant away from PW1. The appellant then stood up, adjusted his trousers and walked away.

10. After the appellant left the scene, PW2 took the complainant to her house where they both spent the night. On the following morning, they went to the scene of the crime. PW1 recovered her torn khaki short after which they parted ways. PW1 took the torn short to Tambach police station where she also reported the matter. She was issued with a P3 form which was filled by PW3 *Mr. Martin Lokalis Kiptarus* a clinical officer at the Tambach District Hospital.

11. In his evidence, PW3 recalled that PW1 presented herself to him for examination on 6th June, 2012 at 2.30 p.m. Upon examination, he did not find any bruises, tears or discharge from her genitalia. He produced the P3 form he prepared as Pexhibit 1.

12 .PW4 PC *Kenneth Mwanyalo* is the police officer who arrested the appellant. He recalled that when reporting the offence, PW1 had given him the name of her assailant as *John Kandie* referring to the appellant who was also the village elder. He then summoned and arrested the appellant. He had earlier received a torn grey short from PW1 at the time she lodged her complaint which he produced as Pexhibit 2.

13 .When put on his defence, the appellant elected to give a sworn statement. He called one witness *W Ki*who testified as DW2. In his evidence, the appellant (DW1) denied having committed the offence as alleged. He claimed that on the material date, he was in his shamba from 7p.m to around 11p.m keeping vigil to ensure elephants did not destroy his crops. At 11 p.m he heard screams from his daughter's home. On arrival in the house, W his daughter who used to trade in illicit brew (sapphire) informed him that the screams were being made by a drunkard. He then left but was subsequently arrested and charged with the offences which were the subject of the trial in the lower court.

14. This is a first appeal to the High Court. As the first appellate court, I am enjoined to re-evaluate and consider afresh all the evidence presented before the trial court to draw my independent conclusions while remembering that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses and give due allowance to that disadvantage: See ***Okeno V Republic (1972) EA 32***; ***Simiyu & Another V Republic (2015) 1 KLR 192.***

15. I have carefully considered the evidence on record, the submissions by learned counsel for both parties, the grounds of appeal and the judgment of the learned trial magistrate.

16. The record of proceedings show that the case was fully heard by *Hon. N. Moseti* (RM) and was taken over by *Hon. Rose Ndombi* (Ag SRM) under *Section 200 (3)* of the *Criminal Procedure Code* after DW2 testified. The appellant changed his mind about calling another witness and Hon. *Rose Ndombi* then wrote and delivered judgment in the case based on the evidence recorded by the former trial magistrate.

17. That said, I now wish to turn to the merits of the appeal. One of the grounds that the appellant raised in his appeal is that the learned trial magistrate erred in failing to consider the weight of his defence. A reading of the judgment delivered by the learned trial magistrate shows that she considered in detail the evidence adduced by the appellant and his witness and after comparing it with the evidence tendered by the prosecution as she was obliged to do, she found it to be unworthy of belief. I am unable to fault the trial magistrate for this finding for reasons that will become clear shortly.

18. Regarding the appellant's main grievance that he was convicted on the basis of evidence which did not prove the charges facing him beyond any reasonable doubt, I find that the learned trial magistrate went to great lengths to establish the essential elements of the offence of rape and after analysing the evidence on record came to the conclusion that the offence had been committed against the complainant and that the appellant was positively recognized by PW1 and PW2 as the person who perpetrated the offence.

19. The issue that then arises for my determination is whether the trial magistrate erred in finding that the prosecution had adduced sufficient evidence to prove all the elements of the offence of rape against the appellant beyond any reasonable doubt..

20. For the offence of rape to be established, the prosecution must prove beyond any reasonable doubt that the person accused of the offence intentionally and unlawfully committed an act which caused penetration of his or her genital organ into the genital organ of another person without the victim's consent – See *Section 2* and *Section 3* of the *Sexual offences Act.*

21 .In this case, there is evidence from PW1 which was materially corroborated by the evidence of PW2 that on the material date between 7-8 p.m, the appellant wrestled her to the ground, tore her shorts and had sexual intercourse with her without her consent. PW1 and PW2 testified that they both knew the appellant before even by his name since he was their neighbour and that through moonlight, they were able to see and recognize him as PW1's assailant. In her evidence, PW2 stated *interalia* as follows;

> ***"When I went to the scene I found the accused and the complaint. There was moonlight I was able to discern that the accused was John Kandie. I saw Soti. I saw the accused on top of the complainant. The accused was having sex with the complainant. The complainant was still screaming. I held the accused's shirt pulled him from the complainant. The accused then stood up and adjusted his trousers and walked away. When I stumbled upon them first I asked the accused why he was doing a shameful act to the complainant. The accused resisted and wanted to be violated but he calmed down and went away…."***

The appellant in his defence though he denied having committed the offence admitted that he was indeed a neighbour to PW1 and PW2 and that he did not have any dispute with either of them. In the circumstances, it is reasonable to conclude that PW1 and PW2 were truthful witnesses since they did not have any reason to give false evidence against the appellant.

22.Besides, it is pertinent to note that PW2 was an independent eye witness to the commission of the offence. Her evidence regarding her recognition of the appellant as the person she found having intercourse with a screaming PW1 was clear and straight forward and was not shaken by the appellant in cross examination. The same case applies to the evidence adduced by PW1. From their evidence, it is clear that both saw the culprit through moonlight at close quarters for a considerable length of time. PW1's claim that she had been in the company of the appellant a few minutes prior to the time he

accosted and raped her was not challenged by the appellant in cross examination. Her claim that she was able to see and recognize him as her assailant must be true because she saw him at very close quarters in the course of her ordeal and it was corroborated by the evidence of PW2. Theirs was a case of recognition which is always more reliable than the identification of a mere stranger – See: ***Anjononi V Republic (1980) KLR 59.***

23. It must be clear by now that I have come to the same conclusion as the learned trial magistrate did that the appellant was positively and correctly identified as the person who sexually assaulted the complainant at the time alleged. It was on the basis of that identification that he was arrested since PW1 gave his name to PW4 on the following day when she reported the matter. I find that in this case, there was no possibility of mistaken identity. I have taken into account the appellant's alibi defence . I find that the same was correctly rejected by the learned trial magistrate as it was completely dislodged by the evidence tendered by the prosecution witnesses. It may also be worth noting that DW2 does not appear to have been a credible witness. While the appellant confirmed in his evidence that she was his daughter as claimed by PW1 and PW2, DW2 vehemently denied having any relationship with him.

24. It is also important to note that the fact that PW2 was attracted to the scene by PW1's screams and the shorts she had worn that evening were torn proves that PW1 had not consented to the sexual liaison with the appellant. It is thus my finding that the evidence presented before the trial court proved beyond doubt all the elements of the offence of rape.

25. I have made the above finding well aware of *Mr. Awi's* submission that the learned trial magistrate should have taken PW1's evidence with caution since there is evidence that she was inebriated. But the appellant's conviction was not based on the evidence of PW1 alone. It was also based on the evidence of PW2 and other evidence adduced during the trial. The fact that PW3 did not notice any injuries on PW1 when he examined her about two days later does not mean that the offence was not committed. It would be unreasonable to expect that any injuries would have been inflicted on the complainant's genitalia in the course of the rape considering that according to PW3's evidence and the information in the P3 form, she was about 60 years old at the time the offence was committed and unlike in the case of a minor, sexual activity would not ordinarily be expected to inflict injuries in the genitalia of a lady of that age.

26. In view of the foregoing, I am satisfied that the learned trial magistrate properly evaluated the evidence placed before the trial court and arrived at the correct conclusion that the charges against the appellant had been proved beyond any reasonable doubt. It is therefore my finding that the appellant was properly convicted.

27. On the appeal against sentence, the law at *Section 3* (3) of the Act prescribes a minimum sentence of ten years which can be enhanced to life imprisonment. In this case, the appellant was sentenced to ten years imprisonment which is the minimum sentence allowed by the law. The learned trial magistrate did not have discretion to impose any other sentence. The sentence was thus lawful and I find no reason to disturb it.

Consequently, I find no merit in the entire appeal and it is hereby dismissed.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 20th day of July, 2016

In the presence of:

Appellant

Mr. Awi for the appellant

Ms. Mokua for the state

CC: Emmanuel Lobolia