REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 53 OF 2014

(FORMERLY KISII HCCRA 254 OF 2012)

BETWEEN

J M N ……...… APPELLANT

AND

REPUBLIC ……...…….…….. RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case No. 601 of 2011 at the Senior Resident Magistrates Court at Kehancha , Hon. A. T. Sitati, RM, dated 23rd October 2012)

JUDGMENT

1. The appellant, **J M N** appeals against a conviction and sentence of life imprisonment for the offence of rape contrary to **section 3(1)(a), (b)** and **(3)** of the ***Sexual Offences Act***. The particulars of the charge against him were that on 13th November 2011 at [Particulars Withheld] Village in Kuria West District, he intentionally and unlawfully caused his penis to penetrate the vagina of RWN, without her consent. He also faced an alternative charge of committing an indecent act with an adult contrary to **section 11(A)** of the ***Sexual Offences Act***.

2. According to the record, PW 1 testified that she was the sister in law of the appellant and on 13th November 2011 at about 10.00 am, the appellant came to her house, grabbed her from behind and started strangling her and although it was difficult to see him, she turned and saw the appellant with a panga. He dragged her to her sitting room, tore off her clothes and had sexual intercourse with her. She testified that he bit her two fingers. While in the course of the act and in response to the screams, PW 2, PW 1's aunt came in causing the appellant to run away. PW 1 was in a semi-conscious state and PW 2 revived her. PW 1 further testified that when PW 2 went to check on her children, the appellant came back and threatened to kill her.

3. PW 2 testified that on the material day, while she was herding her cow, she heard screams for the direction of her home. She went to the complainant's house where she found the appellant sexually assaulting the PW 1. The appellant fled when he saw her. She confirmed that she found PW 1 in a semi-conscious state, poured water on her to revive her. When she stepped out to tether he cow, she stated the appellant came back and threatened PW 1. She took PW 1 to hospital for treatment 3 days later.

4. PW 3, a clinical officer, testified that he examined PW 1 on 15th November 2012 and when he examined her she had swollen eyes and a bruised neck. The injuries were 2 days old and he

opined that they were caused by a blunt object. He did examine her sexual organs and did not see any semen or discharge. He stated that he did not see any evidence of sexual intercourse. In his examination he relied on treatment notes prepared by his colleague. He produced the P3 Form.

5. PW 4, the investigating officer, recalled that PW 1 came to the Isebania Crime Office on 15th November 2011 at 1553 Hours and reported that she had been raped on 12th November 2011 by the appellant. She had a swollen face and scratches on the neck. He recorded here statement, issue a P3 form and escorted her to Isebania Sub-District Hospital. He recorded statements and caused the appellant to be arrested. PW 5, a clinical officer at Isebania Sub-district Hospital, was summoned by the court to produce the initial treatment notes which were prepared by a clinical officer student as she is the one who first examined PW 1 on 15th November 2011.

6. When the appellant was called upon to make his defence, he elected to give an unsworn statement. He denied the charges and stated that they were brought as a result of a grudge which he had with his brother over land.

7. The appellant appeals on the basis of the grounds of appeal filed on 1st November 2012 in which he states that the learned magistrate erred in not considering the fact that the medical examination conducted on PW 1 did not reveal any deposits in the vagina. He essentially complains that the prosecution failed to prove its case and that his defence was not considered. Ms Owenga, counsel for the respondent, supported the conviction on the ground that the prosecution proved every element of the offence.

8. As this is the first appeal I am obliged to review and evaluate the evidence on record in order to come to an independent conclusion as to whether I should uphold the conviction and sentence. In carrying out this task, I must make an allowance for the fact that I neither saw nor heard the witnesses testify **(*Okeno v Republic* [1972] EA 32)**.

9. The offence of rape is provided for under **section 3(1)** of the ***Sexual Offences Act, 2006*** as follows;

   A person commits the offence termed rape if-

a. *He or she intentionally or 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*

In the case of ***Republic v Oyier*** **[1985] KLR 353**, the Court of Appeal held 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 had 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 to through fear of death through duress, it is rape and 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.*

10. The first issue is whether the appellant is the person who committed the offence. The appellant was a brother in law of the PW 1 and was known to her. She therefore recognized him when he talked to and assaulted her on the material day in daylight. PW 2 caught the appellant in the act. PW 2 was also the step-mother to appellant. The evidence, in my view, was firm that it is PW 1 who sexually assaulted PW 1.

11. The next issue is whether there was penetration. *"Penetration"* under **section 2** of the ***Sexual Offences Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."* PW 1 gave clear testimony how she was raped. PW 1's testimony did not require corroboration in light of the proviso of **section 124** of the ***Evidence Act*** which states;

> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

12. The testimony was readily corroborated by the testimony of PW 2 who found the appellant having sexual intercourse with PW 1. PW 1's testimony was also clear that she was forced to have sex with the appellant as evidence by the fact that she testified that he tried to strangle her and PW 2 found her unconscious. The strangulation was confirmed by the examination by PW 3 who had swollen eyes and a swollen and bruised neck.

13. I have considered the evidence of PW 3 and PW 5 in relation to the fact that the examination of the genital organs did not reveal any spermatozoa or any injury to the PW 1's genital organs. PW 5 noted that it was not possible to observe any spermatozoa as the examination was carried out after 48 hours. The lack of such evidence does not undermine the prosecution case in light of the testimony of PW 1 and PW 2. Such evidence would be merely corroborative.

14. In his grounds of appeal and submissions, the appellant contends that he was incapable of having sexual intercourse. Unfortunately, he did not raise this issue in the court below as the matter was one peculiarly within his knowledge. It cannot be raised at this stage.

15. As regards the sentence, the general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see ***Wanjema v Republic*** **[1971] EA 493**).

16. The learned magistrate imposed the maximum sentence of life sentence on the ground that that the appellant had been convicted of rape in ***Migori Criminal Case No. 1406 of 2003*** and had served a term of 7 years in prison. He noted that the appellant used violence on his brother's wife who was a close relative and he did not show any remorse. The learned magistrate considered the relevant facts but I hold that a life sentence was on the higher side and excessive in the circumstances.

17. I therefore affirm the conviction and reduce the sentence to 20 years imprisonment.

DATED and **DELIVERED** at **MIGORI** this 13th day of **February** 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.