REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.36 OF 2013

JONATHAN KIPLETING MUTAI…… APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence in criminal case number 6115 of 2010 in the Chief Magistrate's court at Eldoret before Hon. N. Shiundu (SR.M.)

JUDGMENT

1. The appellant ***Jonathan Kipleting Mutai*** was jointly charged with another person one ***William Kipchumba Koech*** with the offence of gang rape contrary to ***Section 10*** of the ***Sexual Offences Act*** with an alternative count of committing an indecent act with an adult contrary to ***Section 11(1)*** of the ***Sexual Offences Act.*** After a full trial, they were convicted and sentenced to fifteen (15) years imprisonment.
2. The particulars of the offence of gang rape alleged that on the 16th December 2010 at Kuinet location in Eldoret East District in the Rift Valley province, the appellant in association with his co-accused, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of ***J C K*** without her consent.
3. The appellant was aggrieved by the conviction and sentence hence this appeal. In his memorandum of appeal, he raised four grounds in which he faulted the learned trial magistrate for allegedly failing to properly appreciate the evidence adduced before the trial court. He specifically complained that the learned trial magistrate erred in law in failing to find that he was not positively identified as one of the complainant's assailants; in failing to appreciate that no forensic evidence was adduced to link him with the offence and that there was a long lasting grudge between him and one of the prosecution witnesses over a land dispute.

In a nutshell, the appellant complained that he had been convicted on the basis of evidence which did not prove the charges preferred against him beyond reasonable doubt.

4. In prosecuting his appeal, the appellant relied entirely on written submissions which he presented to the court. In his submissions, he reiterated his grounds of appeal and emphasized that he had been wrongly convicted since he was not positively identified as one of the persons who had gang raped the complainant as alleged; that PW1 in her evidence named her assailants as ***"Kipchumba"*** and ***Kiptoo*** and that none of those names referred to him. He urged the court to allow his appeal.
5. The state represented by learned prosecuting counsel ***Miss Karanja*** opposed the appeal. Counsel submitted that the appellant was properly convicted as he was correctly identified as one of the persons who had committed the offence. Counsel maintained that the prosecution adduced sufficient evidence in the lower court to prove the charges against the appellant beyond any reasonable doubt. She invited the court to dismiss the appeal for lack of merit.

6. Briefly, the prosecution case is that on 16th December, 2010 at about 9 p.m, the complainant (PW1) was walking alone from her home going to her in law's home to sleep. Two people caught up with her who she recognized as ***Kipchumba*** and ***Jonathan.*** They were her neighbours. One of them slapped her and she fell down. They then proceeded to rape her in turns. According to the complainant, the ordeal lasted about three hours and all this time one of the assailants was holding her throat to prevent her from screaming. When it was all over, she screamed for help and PW2 went to her rescue. Pw2 recalled that on arrival at the scene at around 11 p.m, he found the appellant putting on his trousers and his co-accused was walking away. PW1 on the following day reported the matter to the police and caused the arrest of the appellant and his co-accused. She was also issued with a P3 form. On the same day, she attended Uasin Gishu District Hospital for treatment.

7. This is a first appeal to the High Court. I am aware of my duty as the first appellate court which is to re-evaluate the evidence adduced before the trial court in order to arrive at my own independent conclusions. In doing so, I should bear in mind that I did not have the advantage of seeing or hearing the prosecution witnesses. See ***Pandya V Republic (1975) EA 336; Kiilu & Another V Republic (2005); KLR 174; Soki V Republic (2004) 2 KLR 21.***
8. I have carefully considered the submissions made by the appellant and the state, the grounds of appeal and the evidence on record. I find that the only evidence adduced before the trial court which connected the appellant to the commission of the offence and which the learned trial magistrate substantially relied on in convicting the appellant was the evidence of the appellant's alleged identification and recognition as one of the persons who had sexually assaulted the complainant. This finding is informed by the fact that the appellant was not found in possession of the clothes the complainant said she had worn during her rape ordeal which were produced in evidence by the investigating officer and no forensic evidence was availed to link him with the offence. The only other material evidence availed to the trial court was the medical evidence tendered by PW4 which only went to prove that the complainant had indeed been raped.
9. It is trite law that where the only evidence against an accused person is the evidence of identification or recognition, the trial court is enjoined to carefully consider such evidence and be satisfied that the circumstances in which the alleged identification was made were favourable to a positive and correct identification of the culprits and that they were free from any possibility of error before making such evidence the basis of a conviction – See: ***Wamunga V Republic (1989) KLR 424.*** Though the evidence of recognition is always more reliable than that of identification of a stranger, the courts have held that even in cases of recognition, mistakes are sometimes made and that an honest witness may nonetheless be mistaken thus the need to ensure that the circumstances surrounding identification or recognition of suspects were such that they did not create room for the possibility of a mistaken identity. See: ***Kiarie V Republic (1984) KLR 739; Republic V Turnbull & others (1976)3 ALL ER 549.***

10. Turning to the instant case, the evidence on identification of the appellant was adduced by PW1 and PW2. It is clear from their evidence that the offence was committed at night between 9 p.m and 11 p.m. They both claimed to have seen and recognized the appellant as one of the people who had accosted and sexually assaulted the complainant.

They however did not explain how they were able to see and identify or recognize the appellant at night. They did not say that there was moonlight or that the scene of crime was illuminated by any other kind of light. So the question which went answered by the prosecution witnesses is - how were they able to see and identify the appellant under the cover of darkness?

11. It is important to note that identification precedes recognition and if the circumstances obtaining at the time the offence was committed could not allow a witness to positively identify an accused person, the issue of recognition cannot arise. In this case, it is worth noting that though PW1 specifically stated in her evidence in cross examination that she identified the appellant's co-accused through seeing his face and through his voice, no such evidence was given in respect of the appellant. She did not say that she was previously familiar with the appellant's voice and that heard and recognized his voice when the offence was being committed.

12. I have read the judgment of the trial court. It is clear that in relying on the evidence of PW1 and PW2, the learned trial magistrate did not carefully interrogate their evidence to establish whether the circumstances under which they allegedly recognized the appellant were favourable to a positive, correct and reliable identification or recognition of PW1's assailants. This was an error on his part. The trial magistrate had a legal obligation to cautiously consider the evidence of identification and to be satisfied that the circumstances in which the alleged identification was made were conducive to a positive and correct identification of the culprits before he could rely on such evidence. The trial magistrate in this case failed to discharge that obligation. He did not take into account that the offence was committed at night with no indication of the presence of any kind of light and that the witnesses had not explained how they had been able to see or otherwise recognize the appellant as one of PW1's assailants. He also failed to appreciate that PW2 had admitted that he had previously had some disagreements with the appellant and that the appellants complaint that he had given false evidence against him was probably true.
13. Given the evidence on record, it would appear that PW1 was not sure about the identity of one of her assailants whom she identified in court as the 1st accused who is the appellant herein. At page 21 of the record, PW1 stated as follows:-

> ***"After a distance two people reached me. It was Kipchumba and Jonathan. They are in court…… they greeted me and asked me where I was going. I told them I was going to sleep at the home of an in law. The person called Kiptoo stood ahead and Kipchumba was behind. I was slapped and fell down …."***

One wonders whether the complainant was referring to the appellant when he named one of her assailants as ***Kiptoo*** because ***Kiptoo*** is not one of the names used to describe the appellant in the charge sheet.

The appellant's name according to the charge sheet is ***Jonathan Kipleting Mutai.*** There is nothing in the evidence to suggest that he was also known by the name of ***Kiptoo.*** If the complainant previously knew the appellant and she had identified him as one of the persons who had accosted her, it is difficult to understand how she would have described him using the wrong name.

14. Having analysed the evidence on record, I find that the circumstances in this case were not favourable to a positive and reliable identification of the appellant. There having been no light to see the assailants and in the absence of evidence that the appellant was recognized through his voice, I am persuaded to find that the evidence of identification in this case was not free from the possibility of error. Put another way, it was not water tight to justify the appellant's conviction.

15. In view of the foregoing, i have come to the conclusion that though the medical evidence produced before the lower proved beyond doubt that the complainant had been raped, the evidence on record does not establish beyond a reasonable doubt that the appellant was one of the persons who had committed the offence. The standard of proof in criminal cases is proof beyond reasonable doubt and the onus of proof is always on the prosecution. As the prosecution had failed to discharge its burden of proof in this case, I am satisfied that the appellant was wrongly convicted. It is therefore my finding that this appeal is merited and it is hereby allowed.

The appellant's conviction is accordingly quashed and the sentence set aside. He is to be released forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 23rd day of July 2015

In the presence of:-

The appellant

M/s Mwaniki for the Republic

Mr. Lesinge Court Clerk