No. 344/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 256 OF 2013

BENARD MUTHIANI ….....APPELLANT

VERSUS

REPUBLIC ……..……..…….……..RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Sexual Offence Case No. 13 of 2013 by Hon. Sandra Agot, RM on 20/9/2013)

JUDGMENT

1. The appellant was charged with five (5) counts:-

   i. Gang-rape contrary to **Section 10** of the **Sexual Offences Act, No.3** of **2006.** Particulars thereof being that on the **16th day** of May**, 2013** at about **3.00am** in **Ikutha District** within **Kitui County,** Jointly with another not before Court, intentionally and unlawfully caused his penis to penetrate the vagina of **F M** without her consent.

2. In the alternative, the Appellant was charged with committing an act of **indecency** with an adult contrary to section **11(6)** of the **Sexual Offences Act No. 3** of **2006.** Particulars thereof being that on the **16th** day of **May, 2013** at about **3.00am** in **Ikutha District** within **Kitui County,** jointly with another not before court, committed an act of indecency with **F M** by touching her private parts namely vagina.

   ii. **Assault-** causing actual bodily harm contrary to **Section 251** of the **Penal Code.** Particulars thereof being that on the 16th day of May**, 2013** at about **3.00am** in **Ikutha District** within **Kitui County** jointly with another not before court, unlawfully assaulted **F M** thereby occasioning her actual bodily harm.
   iii. Assault causing actual bodily harm contrary to **section 251** of the Penal Code. Particulars thereof being that on the 16th day of **May, 2013** at about **3.00am** in **Ikutha District** within **Kitui County** jointly with another not before court, unlawfully assaulted **K K,** thereby occasioning him actual bodily harm.
   iv. **Malicious damage** to property contrary to **Section 339(1)** of the **Penal Code**. Particulars thereof being that on the **16th** day of **May, 2013** at about **3.00am** in **Ikutha District** within **Kitui County** jointly with another not before court, willfully and unlawfully damaged one blouse, one skirt and one biker all valued at **Kshs. 1200/=** the property of **F M .**
   v. **Stealing-** from a person contrary to **Section 279(a)** of the **Penal Code.** Particulars thereof being

that on the 16th day of **May, 2013** at about **3.00am** in **Ikutha District** within **Kitui County** jointly with another not before court stole one mobile phone make Techno valued at **Kshs, 3500/=** the property of **F M .**

3. He was tried, convicted on all the five counts and sentenced thus:-

Count 1 - twenty five (25) years imprisonment.

Count 2 - two (2) years imprisonment

Count 3 - two (2) years imprisonment

Count 4 - two (2) years imprisonment

Sentences were to run concurrently.

4. Being aggrieved by the sentence and conviction thereof the appellant now appeals on grounds as follows:-

i. The learned magistrate erred in law and fact by concluding that the entire case was proved beyond any reasonable doubt.
ii. The learned trial magistrate erred in fact and law by convicting based on evidence of identification yet no identification parade was conducted.
iii. **Sections 137(d)** of the **Criminal Procedure Code and Section 163(1) (c)** of the Evidence Act were contravened.
iv. Crucial witnesses were not called to testify per the requirement of Section 150 of the Criminal Procedure Act.
v. The conviction was based on evidence adduced by a clinical officer other than by a medical officer or pathologist which was contrary to **Section 77** of the Criminal Procedure Code.
vi. The defence put up was not taken into consideration.

5. According to the prosecution's case, on the **16th May, 2013** at 3.00am **PW1 F M** was being escorted to her place work by **PW2, K K** her boyfriend. They encountered two (2) persons whom they were able to see due to security lights that were on at a nearby **Kilindini Bar.** The person she identified as the appellant carried a spanner and items in a gunny bag. The appellant's mate hit PW2 on the side of his head using a spanner. He ran away. She attempted to run; they chased after her and hit her on the head. She bled. They demanded for her cellphone which they took, make techno, valued at **Kshs, 3500/=.** She declined to give her personal identification number (PIN) for the cellphone. They held her, dragged her into the bush demanding for money. The appellant tore her skirt and told her to lie down.

6. She lay down; her biker was torn in the process. The appellant's accomplice had carnal knowledge of her. On finishing the appellant went onto her, penetrated her and also had sexual intercourse with her. Then told her to remove her blouse and wipe him. She complied. She wore the blouse and carried the skirt and biker. On the way home she encountered PW2 and two (2) of his colleagues They followed them and saw them enter Kilindini bar. They inquired from PW3, **M N M** where the two (2) persons were. She had booked them in room No. 13 but they had argued and one left. PW2 locked the door from outside. Administration Police were called. PW6, No. 2009016422 **APC Charles Muricho Mugo** arrested the appellant. They searched the room and recovered some mechanical tools (spanners) that were in the sack.

7. PW1 & PW2 sought treatment. Pw4, Daniel Mulwa, A clinical officer on examining PW1 found that she had bruises and blood stains on the head. She had no laceration but had foul smelling discharge. A high vaginal swab showed pus cells and a few spermatozoa. He concluded that she had been raped. On examination of PW2 he had injuries and wounds on the lateral side of the right eye. The degree of injury sustained was harm.

8. In his defence the appellant stated that he is a mechanic based in Makindu. He denied having committed the offence. He went on to discredit what each witness stated. He called a witness. DW2 Kyalo James Matuku who stated that he was expecting the appellant to service a vehicle at his home between 13th and 14th in May. They spoke prior to him leaving Kibwezi. He did not turn up. Later on he learnt he had been arrested.

9. This being the first appeal this court has the duty to re-evaluate the evidence, draw its own inferences and conclusions bearing in mind that unlike it, the trial court had the opportunity of hearing and seeing witnesses who testified hence observing their demeanor (***see Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1973]E.A. 32].***

10. The learned trial magistrate in reaching the finding alluded to by the appellant analyzed the evidence adduced critically. She found that the evidence adduced linked the accused to offences he was charged with.

11. The issue of identification was questioned. Was it necessary to hold an identification parade? A court dealing with a question of identification must be cautious. The court must take into consideration all circumstances that prevailed at the time of commission of the offence. When it comes to identification, a witness who is honest can be mistaken. **(See Kamau versus Republic (1975) E.A. 139)**

12. In the case of Roria versus Republic (1967) E.A. 583 Sir Clement De Lestang V.P. had this to state:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as a Lord Gardner, L.C. said recently in the House of Lords in the cause of debate…

"There may be a case which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity"

13. In this case two (2) witnesses identified the appellant. They stated that they were near a bar/lodge known as Kilindini. There was light emanating from the security lights that enabled them to see. PW1 described how the appellant was dressed. She was hit prior to being dragged into the bush, where she was raped by both of her assailants. PW2 on being assaulted ran to seek help. He returned with his colleagues. They followed the assailants but kept a distance between them. They reached the lodging /bar. They were led to room No. 13 that the persons hired that night. The appellant was found therein. PW3 explained that his mate disagreed with him. He was apprehensive that it was dangerous to stay at the lodging.

14. In his defence the appellant argued that it was not possible for him to rape a person in the neighbourhood then get lodging at the same place. He faulted PW1 for not screaming on being shown a weapon. According to him it was his defence that the offence was not committed.

15. PW1 and PW2 were emphatic that one of their assailants carried a gunny bag which contained some items. PW3 said that the persons who went to hire a room at the lodging carried a gunny bag. They told her it contained spanners. One of them carried a spanner in his hand. The two (2) argued. The one who stated that they would be arrested if they stayed left. A few minutes later, PW1, PW2 and other people arrived. Thereafter the police were called and the one who remained behind was arrested. The gunny bag with spanners was recovered. He was arrested soon after the commission of the offence.

16. In the case of **Muiruri and 2 others versus republic [2002] 1KLR 274**, the Court of Appeal held thus:-

"It cannot be said that all dock identification is worthless. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and prior thereto the court duly warns itself of the possible danger of mistaken identification"

17. Although the trial magistrate did not specifically caution herself of there being a possibility of

mistaken identity, she critically analyzed evidence adduced and considered the circumstances in which the offence was committed, events that led to the arrest of the appellant moments thereafter. She also found evidence adduced by PW3 to have confirmed what PW1 and PW2 stated.

18. There was the issue of time raised. The time the complainants were assaulted and the time the appellant went to the lodging was estimated to be 3.00am by witnesses. As correctly found by the trial magistrate the time alluded to was an estimate therefore the case cannot fail on account of disparity in the evidence of witnesses as to what exact time the event happened. They all referred to 3.00am which was at some wee hours of the morning. In the premises I find identification of the appellant having been cogent. There was no need for an identification parade to be conducted.

19. Section 137 (c) o the Criminal Procedure Code alluded to by the appellant is in respect of plea agreement negotiation with a victim of crime hence irrelevant in the instant case. In respect of Section 163(1) (c) of the Evidence Act in respect of impeachment of witnesses. The contradiction in respect of time was not material. Such that it could be detrimental to the prosecution's case.

20. The appellant faulted the prosecution for not calling people who escorted PW1 and PW2 to the lodging. No particular number of witnesses ought to be called to prove an act (see Section 143 of the Evidence Act). With the evidence adduced, failure to call the two (2) persons who escorted PW1 and PW2 to the lodging was not adverse as they were not vital witnesses (**see Amedi Omuranga versus Republic [2014] Eklr.**

21. The prosecution was faulted for adducing evidence of a clinical officer who examined the complainants as he was not qualified as medical officer. A clinical officer is a licensed practitioner of medicine who is legally qualified to sign legal documents like the P3 form and to prepare and present medical evidence in a case of law such as assault cases. **(see Raphael Kiilu versus Republic) Criminal Appeal No. 198/2008.**

22. The appellant's defence was a denial of the allegations. He did not tell the court circumstances that resulted into his arrest. He chose to discredit what each witness stated in an endeavour to establish that it was impossible for the acts complained of to have occurred. On cross- examination he admitted having been arrested while at the room by a crowd of about twenty (20) people having been identified by PW1 and PW2. He admitted having had his spanners but stated that he did not know what happened. It was DW2 who stated that he had asked him to go and repair his motor vehicle.

23. In his defence the appellant interrogated why only his shoe was photographed to establish that he was at the scene of crime yet PW4 and PW2's shoe prints were not taken. It is important to note that shoes print evidence is circumstantial. it can only be sufficient to sustain a conviction if it satisfies beyond a reasonable doubt of the elements of the crime charged. (**See people versus Brown [1963] 27.III.2d 23].** Other than such evidence having required some other evidence to support it, it was irregularly admitted in evidence. PW6 was an Administration Police Officer who visited the scene and arrested the appellant. We are not told under what circumstances the photographs were taken. Prior to production of photographs in criminal proceedings there must be a certificate issued by the person who processed the film. The certificate shows circumstances under which the film was received and processed. There must be proof that it was not interfered with. (***see Section 78 of the Evidence Act).*** This is a case where PW5 received photographs from PW6. He did not even investigate to establish how the photographs were processed. In the circumstances evidence of the photograph of the shoe print should have been rejected.

24. That notwithstanding, evidence adduced as to the fact that the complainants were assaulted prior to PW1 being raped was cogent. Circumstances that prevailed that led to the appellant's arrest pointed at him as the person who sexually violated PW1. With regard to count 1; although the appellant stated that the spermatozoa seen in the vagina of PW1 could have been from PW2, that is a possibility but it does not disapprove the fact that the appellant herein was in company of another person. Both of them had carnal knowledge of the complainant (PW1) without her consent. To accomplish their mission each one of them intentionally, contrary to the law caused penetration of their penis to penetrate the vagina of PW1. To

achieve their intention they assaulted her, she did not consent to the act. Both of them had formed a common intention to do so. The charge was therefore proved against the appellant to the required standard of proof beyond any reasonable doubt.

25. With regard to the counts of assault, PW1 & PW2 on examination had sustained actual bodily harm. They stated that each one of them was hit by the appellant who used a weapon (spanner) that he carried. He did so intentionally. The act was unlawful. The offences were proved beyond any reasonable doubt.

26. With regard to the charge of malicious damage to property, it was stated that the appellant and another maliciously damaged one blouse, one skirt and one biker valued at Kshs. 1200/= – the property of PW1. It is important to note that the said items were damaged in the course of commission of the offence of rape. Evidence of damaged clothes that PW1 was wearing were used to establish the fact that there was no consent on the part of the complainant as to the offence of gang-rape. These were facts that constituted the motive to commit the offence of rape. In the circumstances the appeal in respect of count IV succeeds. The conviction is quashed and sentence meted out set aside.

27. With regard to the charge of stealing, it was the evidence of PW1 that the appellant took her cellphone make techno valued at Kshs. 3500/=. Evidence of ownership/existence of the cellphone was crucial. Such evidence was not adduced. PW2 who was with her was silent on the issue of the cellphone. In the circumstances there was no proof beyond reasonable doubt that at the time, she was in possession of cellphone. In the premises the appeal on the charge of stealing from a person **succeeds.** The conviction is quashed and sentence passed set aside.

28. In regard to counts 1 and 3 the conviction is upheld. Sentences on count 2 and 3 are confirmed. However, on count 1, a person found guilty of the offence upon conviction is liable for a term of imprisonment of not less than 15 years but it may be enhanced to life imprisonment. (see ***Section 10 of the Sexual Offences Act, 2006).***

29. A court can only interfere with sentences if it is evident that the trial court acted upon some wrong principle or overlooked some material facts or if the sentence was manifestly harsh or excessive in the circumstances (***see Waguda versus Republic [1993] KLR 569).***

30. The appellant was a first offender. There is no likelihood that he will commit the same offence again. The court should have questioned if he is capable of reforming. In the circumstances I set aside the sentence meted out and substitute it with the minimum prescribed sentence for the offence, 15 years imprisonment. Sentences will run concurrently.

31. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **JULY, 2014.**

L.N. MUTENDE

JUDGE