REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 113 OF 2011

ELVIN KIMEMIA NJAU..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in criminal case Number 3476 of 2010 in the

Chief Magistrate's Court at Kibera – Mr. Onyango (SRM) on 21st April 2011

JUDGMENT

1. The Appellant, **Elvin Kimemia Njau** was charged with the offence of Rape contrary to **Section 3(1)(c)** and **(a)(3)** of the **Sexual Offences Act No.3 of 2006** in count I. In the alternative he was charged with indecent act with an adult contrary to **Section 11(6)** of the same Act. In count II the appellant was accused of stealing contrary to **Section 275** of the **Penal Code**.

2. The particulars of the charge were that on the 19th day of July 2010, at Kiserian Gatanguru area in Kajiado North District intentionally and unlawfully caused his penis to penetrate the vagina of J W K by use of force without her consent. In the alternative counts it was alleged that at the same date and place, he intentionally and unlawfully touched the vagina of J W K with his penis against her will and stole a mobile phone make L. G. valued at Kshs.2000/= in count II.

3. **PW1**, who is the complainant in this case, told the court that on the material day at 5.30 p.m. she was removing clothes from the drying line within the compound of her employer's house, when the appellant approached the gate. She asked the appellant what he wanted but he did not respond. Instead he pushed the gate and came into the compound. He declared that he had wanted her for a long time, and pushed her into one of the bedrooms.

4. He overpowered her by holding her by the throat with one hand and removed her inner wear and also removed his own with the other hand. He then raped her for about 10 minutes, and when he was finished, he grabbed her phone and ran away. **PW1** reported to her employer what had happened whereupon she was escorted to Kiserian Police Station to report the incident. She was also treated at Nairobi Women Hospital. Following subsequent investigations the appellant was arrested and charged.

5. The appellant in his defence given by way of unsworn testimony and without calling witnesses, told the

court that he visited **PW1** on the fateful day upon her invitation. That they stood outside her gate and talked, but they disagreed when **PW1** received a call from a man she alleged to be her brother. That the said man also sent the appellant a short message text that caused him to leave in anger and that he was arrested one month later and only learnt of the charges herein at the police station.

6. The appellant was convicted of the main charges in count I and count II following a full trial and was sentenced to 15 years imprisonment. Being disgruntled he filed an appeal against both conviction and sentence. He advanced several grounds in which he stated that no prompt first report was made to the police following the alleged robbery; his arrest was based on mere suspicion; the charges were not proved in light of the medical evidence; the evidence was riddled with doubt and contradictions and that his defence was not challenged by the prosecution.

7. Learned counsel Mr. D. M. Mwangi urged the court to review the evidence tendered before the trial court and find that the conviction was unsafe for several reasons. First he contended that the sexual contact between **PW1** and the appellant was consensual, since there was no evidence that the appellant threatened her with a weapon. Further, that it was not possible for the appellant to hold her by the throat and at the same time remove her clothes, or for **PW1** to go out to collect the milk after the said rape instead of remaining in shock and confusion. Learned counsel Miss Ndombi appearing on behalf of the respondent, argued that from the evidence it cannot be said that there was consent, or that the report made to the police was an afterthought after **PW2** had caught **PW1** "red-handed with the appellant" as contended by the appellant.

8. I reevaluated the evidence to determine whether sexual contact between **PW1** and the appellant was with her consent or was forced upon her. The appellant himself did not make any mention of having had an encounter of the sexual kind with **PW1**. I am aware however, that this being a criminal trial he was not obliged to explain himself in one way or the other. His narrative however, ended at the gate where he said he came upon **PW1**'s invitation. His evidence was that he stood there and chatted with **PW1** until they disagreed over a phone call that she received and he left.

9. It is my considered opinion that the appellant having not adopted this line of defence that there was sex and that it was consensual, in his cross examination of **PW1**, or in his defence, Mr. Mwangi cannot do so at this late hour as that would amount to his introducing his own evidence that has no basis in the lower court record. If the sexual encounter was consensual there was no reason for **PW1** to turn around and report it to **PW2** her employer, since there were no witnesses thereto.

10. Mr. Mwangi also submitted that the complainant's evidence was not corroborated since **PWII** was not herself a witness, but only the recipient of a report of the rape from **PW1**. Also that **PW3**, Dr. Zephaniah Kamau who examined the complainant seven days after the alleged rape, found no injuries to her genitalia although her hymen was broken. Further that the doctor observed that the bleeding seen was due to the use of A.R.Vs but did not indicate whether there were any tears or discharge seen.

11. In rebuttal Miss Ndombi responded that **PW2** stated that she had tried to call **PW1** but she could not be reached after **PW1** herself had tried to call her (PW2) at 5.30 p.m. and the call got disconnected. In Miss Ndombi's view this was consistent with **PW1**'s evidence of having tried to call **PW2** before the appellant snatched her phone from her and that therefore, the appellant was properly convicted and sentenced going by the lower court record. She added that the court in its judgment found the evidence of the prosecution overwhelming as to warrant the conviction and sentence meted upon the appellant.

12. Indeed **PW2** her employer, did not see **PW1** being raped, but it is pertinent to note that in her testimony she told the court that when she left the house to take her grandchild to hospital that afternoon, she noticed the appellant some 100 metres away from her house. She had never seen him in her compound or in the company of **PW1** before but she knew him as a neighbor She also confirmed that upon her return from the hospital she found **PW1** in a state of shock and she had difficulty speaking to **PW2**.

13. PW1 testified that when she tried to call **PW2** immediately after the sexual assault the appellant

snatched her phone and left with it. In corroboration **PW2** confirmed that at about 5.30 p.m. on the fateful day **PW1** had tried to call her but the call got disconnected before she received it. **PW2** called back but **PW1** could not be reached.

14. Mr. Mwangi further argued that the report from Nairobi Women's Hospital compiled on 20th July 2010, a day after the alleged assault indicated that **PW1** had multiple hymenal tears but without active bleeding. It was his submission that there was no basis for the doctor who compiled the report to make a diagnosis of sexual assault in those circumstances, where there was absence of active bleeding, spermatozoa or discharge and where the exhibits, that is the under pant and biker had been discarded.

15. Miss Ndombi contended that the trial court, after a careful evaluation of the evidence, found no reason to doubt that indeed the appellant had sex with the complainant without her consent on the material date and that **PW4** the medical doctor from Nairobi Women's Hospital had formed the opinion that there was sexual assault. That hymenal tears were present and in the opinion of **PW4** may have been caused by a struggle.

16. The evidence before me shows without a doubt, that **PW1** was involved in sexual activity prior to her examination by the doctor who filled her medical report on 20th July 2010 at Nairobi Women's Hospital. Exhibit I, the medical report compiled by Dr. Adan of Nairobi Women's Hospital, reads that the vaginal examination revealed normal external genitalia, multiple fresh hymenal tears and no active bleeding. She made a diagnosis of sexual assault.

17. The medical evidence therefore, did support the allegations of forced sexual intercourse as evinced by the multiple fresh hymenal tears, which led both **PW4** Dr. Nziza Liku, and Dr. Adan whose report he produced, to conclude that there was sexual assault. Dr. Liku stated that the hymenal tears could have been as a result of a struggle.

18. Dr. Kamau also noted the broken hymen in **PW1**. Dr. Adan termed these as "fresh hymenal tears" because she examined **PW1** a day after the assault as opposed to Dr. Kamau who examined her a week later. I therefore find no contradiction or inconsistencies that are material enough to create reasonable doubt in the prosecution case.

19. The absence of blood and spermatozoa may be explainable by the fact that **PW1** was examined by the doctor a day later. However I must make reference to **Section 3(1) Sexual Offences Act** No. **3 of 2006** which describes the offence of rape as follows:

"A person commits the offence termed rape if-

a. **he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**

b. **the other person does not consent to the penetration; or**

c. **the consent is obtained by force or by means of threat or intimidation of any kind."**

The ingredients of the offence of rape therefore, comprise of the commission of an act which causes intentional unlawful penetration with the genital organs and the lack of consent on the part of the other person. The offence is not predicated on there being found semen or spermatozoa on the victim, nor indeed, is it dependent on the emission of seed by the assailant.

20. PW1 did make a report of the rape promptly to **PW2** upon her return from hospital. The appellant was subsequently arrested on the identification of **PW1** and a parade would therefore have served no purpose. The defence was indeed challenged by the prosecution. **PW1** said that although the appellant used to follow her around, she had never spoken with him or gone with him anywhere before the attack and that he had never come to her employer's compound before. Her evidence was corroborated by **PW2** who said she had never seen the appellant in the company of **PW1**, or on her compound before. The

learned trial magistrate did consider and dismiss, rightly so, the defence evidence as being totally unconvincing and as not having displaced the overwhelming evidence from the prosecution.

21. I also find as did the learned trial magistrate, that there is no basis in the evidence to conclude that **PW1** had motive to fabricate this complaint in order to frame the appellant as there is no evidence of pre-existing relationship or acrimony.

22. Finally, Mr. Mwangi urged that since the lower court record did not indicate whether **PW1** was sworn or affirmed before she testified her evidence should be expunged and also that since the trial court omitted to specify the duration of the sentence pertaining to each count in which the appellant was convicted this was fatal to the prosecution's case.

23. The record does not indicate whether **PW1** was sworn or affirmed. This indeed was an omission but the record reflects that **PW1** testified and was cross-examined and there is no discernible prejudiced occasioned to the appellant. This in my view can be corrected under **Section 382** of the **Criminal Procedure Code**.

24. On the sentence the appellant was convicted for the offence of Rape contrary to **Section 3(1)(a)(c)** as read with subsection **(3)** of the **Sexual Offences Act No.3** of **2006** in count I and for stealing contrary to **Section 275** of the **Penal Code** in count II. Upon conviction for the offence in count I a person is liable to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. The sentence of 15 years imposed on the appeal was therefore lawful and the appellant has not argued that it was unlawful or excessive. The trial court should have indeed, pronounced a separate sentence for the offence in count II which, in any case would not have exceeded three years imprisonment and would have run concurrent to the sentence in count I.

25. As the first appellate court I have treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect. The court cannot affirm a conviction resting on evidence which, if duly reviewed, would be found to be so defective as to render the conviction manifestly unsafe. See **Pandya v Rep [1957] E.A. pg 336**. I find that the evidence adduced before the trial court was sufficient to sustain the conviction and I dismiss the appeal. I uphold both conviction and sentence as determined and imposed by the trial court.

SIGNED DATED and DELIVERED in open court this 24th day of September 2014.

L. A. ACHODE

JUDGE