REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. E024 OF 2021

ANTHONY NYAGA MACHAKI..............1ST APPELLANT

GEOFRREY NGARI MACHAKI............2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the conviction and sentence by Hon. Ngumi P.M. in

Siakago Sexual Offences No.1 of 2017 on 18.08.2020)

JUDGMENT

1. The 1st appellant herein (Anthony Nyaga) was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.The particulars of the offence are that on the 01.01.2017 at [Particulars withheld] area in Mbeere North Sub County intentionally and unlawfully in association with another committed an act which caused his genital organ namely penis to penetrate the genital organ namely vagina of CG without her consent.

2. He was also charged with an alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006. The particulars thereof are; that on 01.01.2017 at [Particulars withheld] area in Mbeere North Sub County within Embu County intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of CG without her consent.

3. The 2nd appellant herein (Geoffrey Ngari Machaki) was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006.The particulars of the offence are that on the 01.01.2017 at [Particulars withheld] area in Mbeere North Sub County within Embu County intentionally and unlawfully in association with another committed an act which caused his genital organ namely penis to penetrate the genital organ namely vagina of CG without her consent.

4. He was also charged with an alternative charge of committing an indecent act with an adult contrary to section 11(a) of the Sexual Offences Act no. 3 of 2006. The particulars thereof are; that on 01.01.2017 at [Particulars withheld] area in Mbeere North Sub County within Embu County intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of CG without her consent.

5. The case proceeded to full hearing and upon considering the evidence that was adduced before it, the trial court convicted the appellants and sentenced each of them to 10 years imprisonment.

6. The 1st and 2nd appellants being dissatisfied with the said conviction and sentence preferred an appeal on grounds set out in their joint petition dated 26.01.2021 wherein they listed the following grounds that:

> ***i.*** *The learned trial magistrate erred in both matters of law and facts by failing to consider that the prosecution evidence was not adequate to sustain a conviction.*
>
> ***ii.*** *The learned trial magistrate erred in both points of law and facts by failing to consider that the adduced evidence contradicted each other and hence uncorroborated.*
>
> ***iii.*** *The learned trial magistrate erred in both matters of law and facts by imposing a harsh sentence upon the appellant contrary to Article 50(2) (p) of the Constitution.*

__iv.__ The appellants cannot recall all that transpired during the trial and so they request to be furnished with certified trial proceedings and judgment so as to adduce further grounds during the hearing of this appeal.

7. Reasons wherefore, the appellants prayed that this appeal be allowed.

8. In the appeal, the appellants submitted that during trial, the prosecution adduced inadequate, contradictory and uncorroborated evidence and as such, it was below the required standard as per the legal standards and further that investigations were never carried out. It is their case that the burden never shifted from the prosecution. Further, that the sentence meted out on them was harsh and severe and as such, offends Section 382 of the Criminal Procedure Code since the trial court did not factor in the period of time the appellants had already spent in prison and as such, the appellants would suffer unfair discrimination. Reliance was made on the case of **Ahmed Abolathi Mohamed & Ano. v Republic (2018) eKLR.**

9. I have carefully considered the grounds of appeal and the submissions by the appellants given that the state did not respond to the petition. From a keen perusal of the petition and grounds thereof, the main ground is whether the prosecution discharged the burden of proof.

10. This being a first appeal, this court has a duty to reconsider and re-evaluate the evidence to arrive at its own conclusion. In the case of **Kiilu and Another v R [2005] l KLR 174** The court of appeal stated the principles governing the hearing of first appeals to be as follows:

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

11. Gang rape is defined under **Section 10 of the Sexual Offences Act** as:-

"***Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."***

12. On the other hand, Rape is defined under Section 3(1) of the Sexual Offences Act, 2006 in the following terms;-

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.

13. Section 2 of the Act defines penetration as:

The partial or complete insertion of the genital organs of a person into the genital organs of another.

14. I therefore find the issues falling for determination to be the following:

i. Whether the appellants committed the offence of rape.

ii. Whether there was penetration.

iii. **Whether the appellants were properly identified.**

15. In her evidence PW1 stated that she was on her way home when she met the appellants who insisted that she buys them liquor since, allegedly she came from a wealthy family. That since she feared the appellants, they went to Dones Bar where she asked that the appellants be served beer and she promised to make the payment of the same the following day. She stated that upon leaving, the appellants stopped her and informed her that she should recognize them as men just like her boyfriend; that it is at this point that the appellants pulled her while placing a knife on her neck and took her to a house where they raped her in turns. This was equally buttressed by the statement of PW2 (Clinical Officer) on how the complainant had gone to the hospital and narrated her ordeal. The evidence of PW3 clearly confirms that the complainant had been sexually penetrated, by more than one male person. It was his case that upon investigations, there were moderate pus cells in the HVS and he came to a conclusion that the complainant was penetrated as evidenced by tear on her perennial area and that her trouser had missing buttons. He proceeded to produce the treatment notes (Exb 4) and the P3 form (Exb 6). I am thus satisfied that the complainant was sexually penetrated.

16. The evidence of the complainant and the report by the clinical officer (PW2) clearly confirms that the sexual activity was without consent. The injuries suffered by the complainant and the resultant bleeding all attest to that. The fact that the clothes that were worn by the complainant i.e. the panty was torn depicts a clear usage of force and equally, the trouser that she wore on the fateful day had two missing buttons which was an indication of a struggle. In the same breadth, the complainant did testify on how the appellants forced themselves on her by pulling her to their house; covering her eyes with a cloth and thereafter raping her in turns. As such, I am of the considered view that there was no consent to the sexual activity by the complainant.

17. On identification, the evidence adduced by the complainant who was the only identifying witness, was that the incident took place at about 6.30 p.m. when she was heading home; that she met the appellants who are twins and apart from being able to see them, she apparently had known them for about 15 years and further that, they hailed from the same area. As such, the appellants were positively identified as the men who raped the complainant in turns on the material date. It is not in doubt that the complainant knew the appellants prior to the occurrence of the offence. On this score, I am guided by the decision of ***Mwaura v Republic (1987) KLR 645*** in which the Court of Appeal adopted the finding in ***Wangombe v Republic (1980) KLR*** at 150, that;

> ***'… In this case guilt turned upon visual identification by one or more witnesses…a reference to the circumstances usually requires the Judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged…***

18. Their defence that the complainant did not refer to them with their real names and further that they don't have alias names and hence that the complainant was not sure of the persons who had sexually assaulted her is not sustainable. Further, the appellants also did contend that the prosecution evidence was marred with contradictions and uncorroborated evidence. That further, the clinical officer who attended the complainant did not appear before the court as a witness and that no DNA was conducted to link the appellants to the alleged crime committed.

19. In the instant case, the appellants contend that there was no corroboration of the complainant's statement but then, this is not a requirement of the law. (See Section ***124*** of the Evidence Act), and even if there was such requirement, it was declared unconstitutional in the case of **Mukungu v R Cr. App. No. 277/02**, as it would be discriminatory of women and girls. In any event the court found, there was corroboration from the clinical officer (PW2) and further, the complainant's mother (PW3).

20. Section 124 of the Evidence Act (empowers the trial court to convict on the basis of the complainant's evidence (See Sahali Omar v Republic [2017] eKLR):

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***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.***

21. In regard to contradictions, which were brought out by 1st appellant wherein he stated that PW7 indicated that there were 63 rolls of bhang while the arresting officer indicated 43 rolls instead. I rely on the case of ***John Mutua Musyoki v Republic, (2017) Criminal Appeal No. 11 of 2016*** where the court was of the view that it must consider such contradictions to determine if they go to the root of the case. In the case of ***Joseph Maina Mwangi v Republic (2000) eKLR***, the court considered this issue and held,

> ***"in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".***

22. In effect, the court is under duty to consider if indeed such inconsistency, if at all, is material enough to affect the conviction. In the instance case, the discrepancy is of no relevance since it does not go to substance of the charge with which the appellants were charged. As such, I find the allegation to be inconsequential.

23. In regard to sentencing, this is within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion unless it is demonstrated and found that the court, in exercising its discretion, acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive. In Shadrack Kipchoge Kogo v Republic Eldoret Court of Appeal Criminal Appeal No. 253 of 2003., the Court of Appeal stated that:

> ***"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred".***

24. I note that the appellant was charged under section 10 of the Sexual Offences Act, No. 3 of 2006. The sentence therein is a term of not less than 15 years' imprisonment, but which may be enhanced to imprisonment for life. The appellants herein were sentenced to serve 10 years' imprisonment. I find this sentence meted out by the trial court to be proper and in accordance with the law since the trial court exercised its discretion.

25. In all therefore, the conviction and sentence in my considered view was sound and the same should not be disturbed.

26. I therefore find no merit in this appeal and hereby dismiss it.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

………………………………..………..for the Appellant

………………………………………..for the Respondent