**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CRIMINAL APPEAL NO. 146 OF 2015**

**GEOFFREY KAIRU NYAMBURA........................................................................APPLICANT**

**-VERSUS-**

**REPUBLIC..............................................................................................................RESPONDENT**

***(Being an Appeal from the Original Conviction and Sentence in Criminal Case No.34 of 2014***

***in the Senior Principal Magistrate's Court, at Engineer, G. N. Opakasi, RM)***

**JUDGMENT**

1. Geoffrey Kairu Nyambura was charged with rape contrary to **Section 3 (1) (a) (b)** as read with **Section 3 (3)** of the **Sexual Offences Act**. The particulars were that on 12th January, 2014 at [particulars withheld] Village Njabini, he caused his penis to penetrate the vagina of PNN, a person with mental disability, without her consent. He was convicted of the offence on 9th September, 2015, and sentenced on 10th September, 2015, to ten (10) years in prison.

2. Dissatisfied, he filed a petition of appeal on 29th September, 2015 containing the following grounds:

> *1. THAT, the learned trial magistrate erred in law and fact when he convicted and sentenced me in the present case yet failed to find that the charges were just but allegations to get money from my pocket.*
>
> *2. THAT, the learned trial magistrate erred in both law and fact when he convicted me in the present case failing to find that Section 2 (i) of the Sexual Offences Act 3 of 2006 were not complied with.*
>
> *3. THAT, the learned trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that Section 48 of the Evidence Act Cap 80 Laws of Kenya wasn't duly observed.*
>
> *4. THAT, the learned trial magistrate erred in law and fact in convicting me failing to find that vital and crucial witnesses did not testify breaching Section 180 of the Criminal Procedure Code.*
>
> *5. THAT, I pray to be furnished with a copy of the trial record to enable me raise more reasonable grounds and further pray to present during the hearing of this appeal.*

3. The certified proceedings of the lower court were not available for several years. Eventually, the file was admitted for hearing of the appeal on 20th July, 2020 after proceedings had been availed. The appellant having then served almost five years in prison, did not file submissions on his appeal as directed by the court. Instead, he sought to withdraw the appeal and asked the court to review his sentence.

4. The appellant being unrepresented, the court is duty bound to ensure that he obtains the most beneficial outcome to him that the justice of the case can afford. I think that is the purport of **Article 50** of the **Constitution** on the right to a fair hearing, including the right to be presumed innocent until the contrary is proved.

5. The DPP in the meantime filed her submissions in which she conceded the appeal. She submitted that; it was true that the complainant was raped which was corroborated by the medical evidence of PW6 and the Medical Report P3 (P. Exhibit 1). However, the identification of the appellant was done through dock identification; the appellant was a stranger to the complainant having been arrested because he was a

stranger in the community; and that the dock identification was inadequate to found a conviction.

6. The DPP stated that during her testimony the complainant walked and touched the accused, evidence that was not corroborated. Further, the trial court had ordered the complainant to undergo a medical assessment to determine if she could testify on her own, and the medical report indicated that she could not so testify.

7. Notwithstanding that no intermediary was appointed to assist the complainant according to the DPP, the court instead stated that it had extensively assessed the complainant and she seemed to understand what had happened to her. However, the said assessment by the court is not on record. Yet the trial magistrate decided that the complainant would testify and the complainant proceeded via dock identification. She thus conceded the appeal.

8. Having carefully considered the evidence on record, I agree with the concession by the DPP for reasons I shall detail herein. Accordingly, I reject the withdrawal of the appeal by the appellant since the conviction cannot stand, and the sentence cannot be judiciously reviewed.

9. At page 15 of the proceedings, the trial court directed on 10th February, 2015:

> ***"I find it is imperative that the complainant is subjected to a Medical Examination to confirm whether she is able to understand the court process and whether she is able to testify."***

On 24th February, 2015 the court felt that the case was taking too long. On 5th March, 2015 a medical report was availed and the court noted that it was not clear whether the complainant could testify on her own or through an intermediary. A further report by the doctor was ordered by court.

10. On 26th May, 2015 the court noted that the medical report indicated:

> ***"……that the complainant cannot testify on her own."***

On 4th May, 2015 the court stated:

> ***"I will assess the witness and give directions on how the matter will proceed."***

Then the court on the same date stated:

> ***"Having carefully and extensively assessed the complainant/ witness…….other witnesses. Matter to proceed."***

The Court then asked the complainant a number of questions, similar to a *voir dire* examination, and concluded:

> ***"Complainant to proceed to testify but shall give unsworn testimony."***

11. This happened despite a letter dated 14th March, 2015 from Dr. Catherine Gitau, Psychiatrist, in response to the Court's request to the medical expert to "*assess whether (complainant) is able to understand the court process and whether she is able to testify on her own or through an intermediary*". In the letter the Psychiatrist, a medical expert, concluded:

> ***"Due to the fact that she (complainant) suffers from intellectual disability, <u>she is not able to follow court proceedings, and cannot testify on her own</u> or through an intermediary."***

12. Of course, it is true that an intellectually disabled person can give evidence. **Section 125** of the **Evidence Act** provides:

> ***"1. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.***
>
> ***2. A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."***

Since a mentally disordered person is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers, how should the court have proceeded?

13. In this case the court ignored the medical opinion of the psychiatrist entirely and allowed the complainant to give unsworn testimony. Hence, when testifying she was asked by the prosecutor to identify the person who put his penis in her vagina, she went up to the accused in the dock and touched his shoulder. However, in cross-examination, the accused asked her:

> ***"Accused : Have you ever seen me?***

***PW1 : No***

***Accused : And why have you said it is me?***

***PW1 : Because you are the one."***

Clearly, the complainant's testimony here is shaky and this is one of the reasons for its fundamental discrepancy given her intellectual disability. If she had never seen the accused, there is no way she could identify him, and there could be no basis for her insistence that he was the perpetrator.

14. More significantly, although there were no eyewitnesses, the evidence concerning the identity of the person who raped the complainant is hardly credible for not being verifiable. PW2 the complainant's mother said she was told by the complainant about the rape and subsequently examined her and found she was bleeding. On asking around, her neigbour's son, one Karanja, told her there was a person around who had been looking for a job. When she went home she found the accused had been arrested near her gate.

15. Similarly, PW4 John Gathirimu said he was told by the complainant's mother that Karanja knew the person who had raped the complainant. He went with Karanja to where the alleged offender was, and eventually arranged for the complainant to select from three people, who had raped her. The complainant pointed to the accused and they called for the headman. The accused was subsequently arrested as the offender. How did Karanja know the accused was the offender?

16. PW3 David Karanja Ngwemi, testified that he was at home at about 11.00am on the material day, when the accused came by looking for a person called Henry. No one called Henry lived there. The accused then sought directions to the home of one Julius. At about 2.00pm his mother asked him whether he had seen the accused. He told her he had, and that he knew where he was employed. The people at home told him not to lose sight of the accused, so he and some other boys followed the accused. He said:

> ***"I was with other boys so we decided to follow him behind and we met another group that mobilized itself after I made a call and the accused was arrested. He was arrested because he had raped a girl. That is all I know. The complainant is my neighbour"***

17. When cross-examined by the accused he admitted he had not witnessed the rape. He said:

> ***"PW3: I just saw you at home from the direction of the complainant's home, you found me walking.***
>
> ***Accused: So you only saw me pass by the road and you did not see me do anything?***
>
> ***PW3: Yes."***

18. The evidence of PW3, Karanja, which both PW2 and PW4 relied upon in determining who the perpetrator was, does not in my view, stand scrutiny, or even implicate the accused with the rape. PW3 did not say how he came to the conclusion that it was the accused who raped the complainant.

19. The dock identification by the complainant was also unsafe in light of the legal authorities. In **Fredrick Ajode Ajode v Republic [2004] eKLR** the court held:

> ***"It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade."***

Thus, identification in this case was improper having been based entirely on dock identification.

20. As far as the evidence of the star witness, PW1, is concerned, I think it was compromised by the following considerations: the fact of the psychiatric assessment; the fact of the self-contradiction of the witness; the fact that no intermediary was called to facilitate the court to garner the correct evidence from the complainant; and the fact that the trial court determined that the complainant "*seems to understand what happened to her*" after it "*carefully and extremely assessed the complainant*" without setting out or explaining the nature type and manner of the alleged careful and extensive assessment.

21. **Section 31 (2)** of the **Sexual Offences Act** allows the court to declare a witness as vulnerable. Vulnerability includes age, intellectual, psychological or physical impairment. In a case such as this where there is a psychiatrist's report that the witness has a mental disorder, the court is duty bound to treat the report with seriousness and not to wantonly ignore it. In **MM v Republic [2014] eKLR** the Court of Appeal stated:

> ***"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."***

Here, I believe the assistance of an intermediary would have been appropriate and would have safeguard the integrity of the trial.

22. In my view, the underlying requirement in handling cases with a witness with disability is to adopt appropriate measures that adequately facilitate that witness to tender intelligible evidence without compromising the accused person's right to a fair trial.

23. For all those reasons, I agree with the prosecution that the conviction was unsafe and was reached without discharging the criminal burden of proof of beyond reasonable doubt.

24. The conviction by the trial court is therefore quashed and the sentence set aside, and substituted with a finding of acquittal. The appellant is therefore set at liberty forthwith, unless otherwise lawfully held.

**Administrative directions**

25. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

26. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

27. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 8TH DAY OF MARCH, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Geoffrey Kairu Nyambura - Appellant in person in Naivasha Maximum Prison

3. Court Assistant - Quinter Ogutu