REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 13 OF 2019

KELVIN YEGON ALIAS HILLARY

YEGON CHEBOCHOK.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(*From Original Conviction and Sentence in Bomet Senior Principal Magistrate's Court Criminal Case Number 27 of 2017 by Hon. P Achieng – SPM)*

JUDGEMENT

1. Kelvin Yegon *alias* Hillary Yegon Chebochok (Appellant), was convicted of the offence of rape contrary to section 3(1) (a), (b) and (3) of the Sexual Offences Act, 2006. The particulars of the offence were that on 21st September 2017, within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of **PC** without her consent. He also faced an alternative count of committing an indecent act with an adult contrary to Section 11A of the Sexual Offences Act in which he was alleged to have intentionally touched the buttocks and vagina of **PC** with his penis against her will.

2. The Appellant pleaded not guilty and the case went to full trial during which 3 witnesses testified for the prosecution. At the conclusion of the trial, the Appellant was convicted of the main charge and sentenced serve 15 years' imprisonment. He was aggrieved by the judgement and now appeals against both conviction and sentence.

3. In his petition of appeal filed on 17th May, 2019, the Appellant set out five grounds which can be paraphrased as follows:-

i. That he pleaded not guilty;

ii. That the evidence produced by the prosecution was shallow and was not adequately linked to the charge to warrant a conviction and the sentence;

iii. That he was not examined by a medical officer to confirm that he was the perpetrator, a fact which he states was a violation of his rights;

iv. That the prosecution failed to call the 4th witness, who was the actual boyfriend of the victim; and

v. That his evidence and defence were unduly rejected without proper consideration and that the charge was defective.

4. The Appeal was canvassed through written submissions. In his submissions filed on 24th November, 2020, the Appellant stated that the he was framed. He denied having given the complainant a lift on his motorbike to Silibwet; that the victim ought to have explained to the court why she did not use her uncle's motorbike; that the complainant did not produce telephone data to verify that indeed they had been in communication prior to the incident and to prove that he was well known to the victim. The Appellant further submitted that the time of the incident stated by the complainant was not credible. He contended that failure by the victim to produce the alleged torn clothes was fatal to the prosecution case. The Appellant questioned the victim's allegation that she called her uncle using someone else's phone yet initially she had her own phone with which she had used to call the Appellant. He submitted that the person whose phone she alleged to have used should have been called as a witness.

5. In addition, the Appellant also submitted that the charge was defective since it did not indicate the exact timings in which the offence occurred; that the victim never identified him by the name Chebochok; that PW4 who failed to appear before court was actually the boyfriend of the victim and not the uncle as alleged, and; that he was wrongfully convicted because he did not operate a *boda boda* as alleged.

6. The Respondents submitted that the elements of the offence being unlawful penetration without consent were confirmed by the evidence of PW1 and PW2. They submitted they were satisfied that the victim was able to identify the perpetrator who was well known to her since they had had prior interactions. On sentence, the Respondents submitted that the same was lawful and should not be disturbed.

7. As a first appellate court, I am mindful of the duty to review the evidence from the records of the lower court, conduct a fresh evaluation and draw my own conclusions. This duty was elucidated by the court of appeal in the case of **Okeno v Republic [1972] EA 32** as follows:

> ***"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court 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 the first appellate court merely to scrutinize the evidence to see if there was some evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"***

8. In this appeal, and from my reading of the grounds of appeal and rival submissions, I consider the following to be issues for my determination:-

i. Whether the Charge was defective.

ii. Whether the ingredients of rape were proved.

iii. Whether there was positive identification of the Appellant, and;

iv. Whether the Appellants' defence was considered.

9. I will begin with the issue of a defective charge. The Appellant in this case complained that the charge was defective because it did not indicate the time when the offence was committed. He submitted that the time of the offence indicated by the complainant in her testimony was not believable.

10. **Section 134 of the Criminal Procedure Code** provides that:-

> ***''Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.''***

11. Further, **Section 214** (2) **of the CPC** provides:-

> ***"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."***

12. There is ample authority to demonstrate that it is not in all cases that a defect in a charge was fatal as to invalidate a conviction since this was curable by Section 382 of the Criminal Procedure Code. In ***JMA vs. Republic (2009) KLR 671*** the court held as follows:-

> ***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."***

13. In **Peter Sabem Leitu vs. Republic, Criminal Appeal No. 482 of 2007 (UR**), the Court of Appeal held that in determining whether there was a miscarriage of justice, the court must determine whether the charge was properly read to the accused, that he understood and that he responded being fully aware of what he was facing from the particulars indicated therein. If this is established to have been properly done, the Accused cannot be prejudiced in any way and a claim of a defective charge based on minor discrepancies cannot stand.

14. In this case, the record shows that the charge was read to the Appellant on 25th September, 2017 in the Kiswahili language with interpretation to the Kipsigis language which he understood. He pleaded not guilty and a plea of not guilty was entered. There is nothing on record to show that he did not understand the charge and the particulars. Secondly, I have looked at the charge sheet and observed the offence is indicated as having been committed on 21.9.2017 without indicating the particular time. However, the complainant (PW1) testified that she was raped at about 8pm. The record shows that the Appellant actively participated in the proceedings and was able to cross- examine all the witnesses. This to my mind shows that the Appellant understood the charge that he faced and defended himself both by cross-examining witnesses and during his defence case. Secondly, while PW1 testified that she was raped at around 8pm, Chief Inspector Nyapara of Bomet police station, crime branch who testified as PW3 stated that the complainant had reported the incident to have taken place at 7pm. To my mind, such a discrepancy was minor and did not visit any prejudice on the Appellant.

15. From the foregoing, and having looked at the entire evidence, I find that the defect in the charge sheet was not material and cannot stand as a ground of appeal since the Appellant was not prejudiced in any way and neither did it lead to a miscarriage of justice. I am fortified in making this finding by the Court of Appeal decision in **Benard Ombuna v Republic [2019] eKLR** whence it pronounced itself thus:-

> ***"In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is***

whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

16. I now turn to the question whether or not the offence was proved. The offence of rape carries with it three elements. There must be intentional full or partial penetration, lack of voluntary consent and the positive identification of the perpetrator.

17. In this case the victim (PW1) testified that on 21st September, 2017, she left her home in Kiptagich to visit her uncle in Bomet. On her way back home, her uncle gave her a ride upto Silibwet where he advised to take a boda boda that he knew. She called the Appellant whom she knew and he arrived after 20 minutes and shortly they were on their way to Kiptagich. Somewhere on the way the Appellant stopped at a market centre to take supper in a local hotel after which they proceeded. PW1 further told the court that on the way, at a place called Mau, the Appellant stopped the motorbike and told her that it had a problem. On disembarking, the Appellant held her by the throat and dragged her into the bush, ripped her clothes, thrust her onto the ground and had sex with her for about 15 minutes.

18. The victim further testified that the Appellant thereafter refused to complete the trip and threatened to return her to Silibwet. Fearing to be abandoned in the dark forested area, she agreed to go back with him. On reaching Mugango centre, he told her that he was taking her to his house. She escaped to a well-lit place where she requested a stranger to give her his phone so that she could call her uncle. She called her uncle who picked her up in 20 minutes and took her to Longisa hospital where she was examined and treated. In the morning, she went to the police station where she was given a P3 form which she took back to the hospital. The Appellant was later arrested among the boda boda riders at Silibwet stage.

19. PW2 was Julius Magut 22nd September, 2017. According to his evidence captured in the P3 form (Exhibit3) and laboratory results (Exhibit2), he found bruises in the labia minora and presence of spermatozoa.

20. The PW1's evidence that she had forced sex is believable and is corroborated by the medical evidence produced by PW2. There was sufficient evidence to show lack of consent on the part of the complainant. She vividly narrated to the court how the Appellant deceived her that the boda boda had broken down and on disembarking threw her on the ground in an isolated part of the road at a place called Mau. PW2 testified that he found the tissue around PW1's anterior neck bruised and tender which supports her testimony that she was held and choked by the neck. The act of stopping at an isolated part of the road near a forest in the night was a calculated move to put fear into her. Throwing her down and ripping her clothes was an act of coercion and violence. The lack of consent therefore was proved beyond doubt.

21. The third and critical element of the offence is the positive identification of the perpetrator. The Accused in this case agrees that the victim was raped. He however submits that he was not medically examined and therefore there was no evidence linking him to the act. That there was no way of determining whether he was the offender.

22. It is true as submitted by the Appellant that no medical examination was conducted on him and no DNA was extracted. The question for consideration is whether failure to subject the Appellant to a medical examination and to a DNA analysis was fatal to the prosecution case. However, there is no law which requires that a perpetrator of a sexual offence must be medically examined and spermatozoa extracted for DNA in order to prove the offence. Section 36 of the SOA which the Appellant must have had in mind in his submission, is not couched in mandatory terms. This is because, other identifying evidence can achieve the same purpose. In **Martin Nyongesa Wanyonyi Vs. Republic [2015] eKLR**, the court stated as follows:-

"...it is evident that subjecting an accused to a medical examination to prove that he committed the offence is not a mandatory requirement of law...."

23. In **Mark Oiruri Mose v Republic, (2013) eKLR**, the Court of Appeal stated gave the rationale that ***"……. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed…."***

24. In this case the complainant testified that she had interacted with the Appellant before, during, and after the incident. From her evidence it is clear that this was a case of recognition. The principles to be applied by the court in dealing with such evidence were clearly stated in **R vs. Turnbull & Others 1976 3 ALL ER 549,** where the court stated that:-

"Recognition may be more reliable identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened but the poorer the quality, the greater the danger."

25. In the case of ***Peter Musau Mwanzia vs. R (2008) eKLR*** the Court of Appeal stated that:-

"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence can recall very well having seen him earlier on before the incident."

26. In this case, the complainant testified that she knew the Appellant as someone who had given her a ride before the date of the incident. She had called him to give her a ride back home from Silibwet. They stopped on the way when the Appellant had supper at a local shopping

centre. They rode towards Mau and after the incident even turned back together. To the mind of the court, that was sufficient time for the complainant to recognize the Appellant as the perpetrator. Secondly, the circumstances of the arrest of the Appellant rule out any possibility of mistaken identity. Once the report was made to the police, the complainant accompanied the police to Silibwet and he was found at the boda boda stage from where he was arrested. I am therefore satisfied that he was not mistaken and that his identification as the perpetrator was free of error.

27. The Appellant complained that the prosecution failed to call the 4th witness one Philip Ngetich whom he alleges was a boyfriend of the complainant and not her uncle as she indicated. However, **Section 146** of the **Evidence Act** allows the prosecution not to call a superfluity of witnesses. The section provides:-

> ***"No particular number witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

28. In **Bukenya v Uganda (1972) EA 549,** the predecessor court of appeal stated that:-

> ***"Where crucial witnesses are not called, the court is entitled to draw an adverse inference on the prosecution's case."***

29. In this case however, I have looked at the Appellant's submission on why he thought one Philip Ngetich was a crucial witness. He is the one who was said to have been visited earlier by the complainant. He was also the same person who was alleged to have picked her after her ordeal. It is therefore true that he would have confirmed to the court whether he if truly escorted the complainant to the hospital. While this would have added weight to the prosecution case, failure to call the said witness did not change the fact of rape proved by the complainant's testimony and medical evidence. I do not consider that the witness was material at all. Further, the record shows that here was willingness on the part of the prosecutor to call the said witness but that the witness declined to attend court even after the prosecutor had been granted an adjournment. I am satisfied that the ingredients of the offence were proved and therefore the failure of the prosecution to produce the additional witness was not fatal to their case.

30. The Appellant stated in his grounds of appeal that the trial court did not consider his defence. I have considered the Appellant's defence. The appellant gave an unsworn statement in which he told the court that he was a teacher and that he received a call to go to Silibwet police station. That he was arrested when he got there and taken to Bomet from where he was taken to prison. The Appellant was under no duty to prove his innocence. However, it was in his interest to give a defence that would cast even the least of doubt in the prosecution case. He did not do so and neither did he call any witness to show that he was not a boda boda rider. He did not even suggest an alibi to distance himself from the allegation that he was with the complainant on the material date or give a defence to dispute the fact that the complainant knew him before the date of the incident. Considered against the prosecution evidence, I find that the Appellant's defence does not in any way cast doubt on the prosecution case.

31. The Appellant was sentenced to serve 15 years in prison on the main count. **Section 3 (3) of the Sexual Offences Act** provides that, ***"A person guilty of an offence under this section is liable upon conviction to imprisonment for term which shall not be less than ten years but which may be enhance to imprisonment for life."***

32. In **Wycliffe Wangusi Mafura Vs Republic (2018) eKLR,** the court of appeal stated thus with respect to mandatory minimum sentences under the SOA: -

> ***"We also said in William Okungu Kittony's case (Supra) that the decision of the Supreme Court in Muruatetu's case has immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence rehearing in any matter pending before those courts. Accordingly, since this appeal had not been finalised, this court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed."***

33. I have therfore reconsidered the sentence in this case. I observe that the Appellant had not said much in mitigation and neither had the court called for a presentence report. I however note that the Appellant had told the court that he came from a poor family which depended on him. The prosecution had also confirmed that he was a first offender. Taking all these factors into consideration, I reduce the sentence to 7 years' imprisonment. The term shall run from the date of conviction and sentence, being 8th May, 2019.

Judgment delivered, dated and signed at Bomet this 15th day of March, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant, Mureithi for the Respondent and Kiprotich (Court Assistant).