



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.3 OF 2020.

ERNEST KIPRONO LANGAT.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. SOITA (SRM) DATED 30TH MAY 2019 IN CRIMINAL CASE NO. 3351 OF 2016).

JUDGEMENT.

1. The appellant 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 were that on the 12th day of September 2016 at Tombo area in Molo district within Nakuru County in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of MN Without her consent.
2. The Alternative charge was Indecent Act with an adult contrary to Section 11(a) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 12th day of September 2016 at Tombo area in Molo district within Nakuru county unlawfully and intentionally did cause his genital organ namely penis to come into contact with genital organ namely vagina of MN without her consent.
3. The appellant was convicted and sentenced to 15 years' imprisonment hence this appeal which raises several grounds. Before looking at the same it shall be appropriate at this juncture to summarise the evidence as presented during trial.
4. **PW1** the complainant testified that she was aged 29 years and a mother of four. On the material day at around 2 am she was asleep with her children in her three roomed house when she heard a knock at the door as well as the window. Since her husband was not yet back she thought she was the one.
5. She then opened the door only to be confronted with two people one of them being the appellant. They forced her out of the house and frogmarched her for about one and half kilometres where the appellant who was armed with a sword proceeded to forcefully rape her. His friend who was not arrested was simply standing by.
6. While being dragged out of the house her 10-year-old son managed to raise alarm and the neighbours came who began searching and managed to rescue her. The appellant managed to run away as the neighbours who had torches approached. She was then taken to the hospital where she was examined and treated.
7. She later reported at the police station where she was issued with a P3 form which was filled at the hospital. She said that she managed to identify the appellant using light from her phone and the fact that he used to supply her with milk prior to the incident.
8. When cross examined she said that her home and that of the appellant was about 1 km and that the appellant took her phone away during the struggle. That the appellant was wearing a jacket which was black and brown in colour. She also said that her husband confirmed to her that they were with the appellant at the local bar.
9. **PW2 JOHN GITHINJI** the complainant's 10-year-old son testified that he heard the knock at the door and when her mother opened it he saw the appellant come in and struggle with her. She heard her scream once and then she went quiet. He also started screaming and the neighbours arrived and he told them what had happened.
10. The neighbours managed to bring her mother back and was taken to the hospital. He said that he managed to see the appellant as there was moonlight. He said that he had never seen the appellant before.

11. When cross examined he said that he screamed when her mother was dragged away and that that was the time he managed to see the appellants face.
12. **PW3 PC JOEL KOSGEI** formerly of Molo police station carried out the investigation after the matter was reported at the said station. He recorded witness statements and issued the complainant with the p3 form. He thereafter preferred charges against the appellant.
13. When cross examined he said that it was the complainant who identified him and that his co assailant was still at large.
14. **PW4 RUTH SANDE** a clinical officer from Molo sub county hospital examined the complainant and found that there was no tear on her genitalia but the high vaginal swap had some blood stains and there were spermatozoa. She concluded that the complainant had been raped.
15. When placed on his defence the appellant gave unsworn evidence denying the charge. He said that they were many who were accused but did not know the others. He denied knowing the complainant.
16. When the matter came up for hearing the court ordered the same to be disposed by way of written submissions which the parties have complied.

SUBMISSIONS.

17. The appellant submitted on three grounds of appeal namely the evidence, the appellant's rights under **Section 200(3) of the Criminal Procedure Code** as well as the fact that the conviction was based on a single identifying witness.
18. On the issue of the evidence he submitted that the same was insufficient to have found the appellant guilty since for example the complainant was unable to identify the other person who was with the appellant. That she failed to name the complainant in the initial report made at the police station.
19. He submitted that the circumstances obtaining at the time of the incident was not favourable for identification as it was night. He relied on the case of **GEOFREY KABIMBA V. REP. (2017)** among others.
20. On the issue of **Section 200(3) of the Criminal Procedure Code** he argued that the appellant was not accorded time to recall the witnesses and his request was denied without any basis. He said that the respondent had no basis for objecting the matter to be heard *denovo*.
21. Finally, on the issue of identification the appellant submitted that since the incident occurred at night the condition for identification were not favourable especially having come from a single witness. He urged the court to find merit in the appeal and allow it.
22. The counsel for the respondent on her part agreed with the trial court finding. She said that the argument concerning the starting afresh the matter under the provisions of **Section 200(3) of the Criminal Procedure Code** was well articulated by the trial court which agreed with the state that obtaining witnesses after such a long time was going to be difficult and chances of forgetting was high especially the minor who was 10 years old.
23. She submitted that the evidence of identification was watertight since the appellant was well known to the complainant prior to the incident.
24. On the issue of first report, she submitted that it is not true that the state relied on that issue as it did not feature during the proceedings. She relied on the case of **DAVID MWAMBA & ANOTHER V. REP. C A 24 (2009)**.
25. She denied that the evidence of a single identifying witness alone was relied on by the court but on the contrary there was the medical evidence which clearly demonstrated that the complainant had been raped. She urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION.

26. The court at this juncture is expected to re-evaluate the evidence afresh and reach or arrive at an independent finding taking cognisance of the fact that it was not handling the matter and therefore not able to have seen the witnesses and their demeanour. See **NJOROGE V. REP. (1987)eKLR and, OKENO V. REP. (1972) E A 32.**
27. The issue of whether the complainant was defiled in my view was clearly proven by her evidence as well as that of the clinical officer who produced the P3 form as well as the treatment notes. She was examined barely two hours after the incident. The spermatozoa found in her genitalia must have been from her assailant and not her husband who was not home that night. There were also some bloodstains when high vaginal swap was taken.
28. Regarding the issue of identification, the complainant relied on the light from her phone which she said that she used it when opening the door. She later said that the same was taken away by the assailant.
29. The witness as well stated that she knew the appellant as he had been supplying milk to her. This line of argument was not rebutted by the appellant during trial.
30. It is the conclusion of this court that based on three issues namely, the light from the complainant's phone, the fact that they knew each

other and the time the assailant spent with her of over one hour during the incident are sufficient for the complainant to have recognised the appellant.

31. It is also not in dispute that the complainant was able to recognise the type of the cloth the assailant was wearing that particular night namely a black jacket with black and red colours.

32. The complainant all through seemed to have had conversation with the appellant especially as he was threatening her if she did not accede to his demands.

33. The issues raised by the appellant in his grounds of appeal were not germane in my view. The issue of the trial court not complying with **Section 200 (3) of the Criminal Procedure Code** was not a good reason. This is for the simple reason that the accused simply stated that **“I want the matter to start afresh”** without giving any reasons. The said section states as follows;

34. “Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

35. The aforesaid section provides that one must have cogent reasons so as to benefit from it. It is not enough to state that the matter must begin *denovo* for the sake of it. It is appreciated that this is a right of a litigant when the matter is placed before a new judicial officer. It must however be exercised reasonably and justly taking into considerations the rights of both parties.

36. Further the court does not see any reason suffered by the appellant as looking into the courts proceedings he was able to cross examined PW1 and PW2 sufficiently without any problems. He did not argue that he was denied or impeded in any way.

37. The issue of identification I think has been covered well above. I do not find the evidence by PW2 convincing though that he identified the assailants by the aid of moonlight as he did not venture outside the house. In re-examination however he said that he identified the appellant via the light from her mother’s phone.

38. The issue of the first report made to the police was really hammered as a ground by the appellant. The same as clearly submitted by the respondent was not relied on during trial. The appellant as well did not raise it during trial especially when the investigating officer testified. This should have been raised at that stage where for instance he would have demanded an Occurrence Book.

39. Even then did the issue prejudice the appellant? I do not respectfully think so. The report made to the police although not produced let to the subsequent arrest and charging of the appellant. On cross examination PW3 said that it was the complainant who identified the appellant.

40. For the foregoing reasons, this court does not find this appeal meritorious and the same is hereby dismissed.

Dated signed and delivered via video link at Nakuru this 17th day of June 2021.

H. K. CHEMITEI.

JUDGE.