REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 79 OF 2019

REPUBLIC.....APPELLANT

VERSUS

KELVIN KAREO.....RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 242 of 2015 of the Senior Principal Magistrate's Court at Kilifi Law Court-R. K Ondieki, SPM dated 6th June, 2019)

Coram: Hon. Justice R. Nyakundi

Alenga for the State

Dennis Kinaro & Co. Advocates for the Respondent

JUDGMENT

The respondent was charged with Rape contrary to Section 3(1) (a), (b) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 19th day of April, 2015 at Ngala Estate in Kilifi Township within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of **JW** without her consent. He was also charged with an alternative charge of Committing an Indecent Act with a woman Contrary to Section 11(1) of the sexual Offences Act No. 3 of 2016.The particulars of the offence were that on the 19 th day of April, 2015 at [Particulars withheld] Estate in Kilifi Township within Kilifi County caused his genital organ, penis to come into contact with the genital organ, vagina of **JW.**

Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following grounds:

1) That the learned trial magistrate erred in law and fact by not appreciating that the offence indeed took place.

2) That the learned trial Magistrate erred in both law and fact by disregarding the whole evidence tendered by (PW1) .

3) That the learned trial Magistrate erred in law by not appreciating that the accused was positively identified by the victim both at the crime scene and on the dock.

4) That the learned trial magistrate erred in law and fact by not appreciating that the accused was not a stranger to the victim and was known to her long even before the commission of the offence.

5) That the learned trial magistrate erred in law and fact by failing to analyze the prosecution evidence and find out that it was so direct and unshakable.

6) That the learned trial magistrate erred in law and fact by not appreciating the proviso to Section 124 of the Evidence.

7) That the learned trial magistrate failed to comprehend the fact that prima facie, the whole of the judgment is devoid of any tangible analysis of evidence and is therefore unjust and totally wrong.

Background

(PW1) JW told the court that on the 19th day of April, 2015 she was at home and the respondent came to their home and asked her to join her for her birthday at Highway Bar. She stated that later in evening, she came back with **Juliet Manaseh** and told her that **Juliet** would join them for celebration. At about 11pm, they left with them to De Coffee Club at Titanic but didn't enter inside but decided to go to Highway Bar via a tuktuk.

She informed court that they asked for drinks, she asked for alcoholic drink and in the process, they started dancing. She also informed court that when they were taking a tuktuk from Titanic, the respondent **(Kareo)** gave the co-accused Kshs.50/- but he did not accompany them.

She told the court that they celebrated but, in the process, the respondent came later to have a conversation with them but he was not part of the celebration team. They later left the club for her home.

She further informed court that there was another man who assisted her to walk out of her seat to a bodaboda and to go to her parent's house. Upon being dropped at her house, apparently the bodaboda did not enter inside.

Her testimony was that when they reached their house, they found respondent outside their house. That is when they left Highway Bar and the respondent **(Kelvin)** was ahead of them. That it was the co-accused who opened the door, and the three of them, namely the complainant, **Anne** and **Kelvin** entered the house.

She stated that she went to her bedroom and vomited. The co-accused hugged her and left. She said that she heard the door being closed but did not know who was closing it.

She further stated while asleep, she heard someone undress her, set apart her left leg the respondent was lying on top of her. Thereafter with his penis inserted into her vagina. That it was the respondent she saw and no other person. Thus she was able to clearly identify through the source of light from electricity.

Her testimony was that she resisted but he overpowered her. She did not know what happened thereafter and when she woke up, she saw the appellant leave the room with the door being closed and the motor bike being driven away. She further stated that she examined her private parts only to discover that she had been penetrated by the respondent.

She stated that it was **Eugene** whom he asked to open for her. She also stated that the door was closed by the respondent. She further informed court that the co-accused person **(Anne Njoki)** told her that she closed the door from outside and gave the keys to the respondent to open for her when she wakes up.

That the respondent has never seduced her in the past. **Eugene** later took her to the home of **Anne** where she met her and Juliet. She stated that it was disclosed to her that the respondent had raped her. **Juliet** told her that **Anne** had given respondent the keys to her house. She said that she took a knife and started to look for respondent. However, she did not find him, consequently she decided to go to the house of **Anne**.

She later went to Kilifi Police Station and recorded a statement who later referred her to Kilifi District Hospital where she was examined by a doctor. She was issued with a Post Rape Care Form dated 29th April,2015, a P3 Form both filled on the 25th of September, 2015.

She identified the respondent as the one in the dock as well as **Anne** as the culprits. She stated that she had a grudge with respondent and bad blood with the co-accused over small issues until the day when she was invited to her birthday celebration.

On cross examination by the respondent, she informed the court that she saw the respondent enter Highway Club and sit at the counter of the bar. She stated that the bodaboda belonged to another person. Upon re-examination, the complainant insisted that they were not dropped home by the respondent.

(PW2) Dr. Noor Mohamed informed court that he has been working at Kilifi County Hospital for two and a half years. He stated that the complainant was sexually assaulted by a person known to her and that the injury was harm. Upon examination, she had vaginal infection but there were no spermatozoa seen.

(PW3) No. 66446 CPL Philip Dzombo attached to Kilifi Police Station stated that on 20.04.2015 while in the office, the complainant reported that she was raped after a drinking spree. She informed **(PW3)** that she was raped by the respondent. She recorded her statement and referred her to hospital. Thereafter, the P3 Form was filled and with that the respondent was arrested and charged with the offence.

On cross examination by **Mandi Advocate**, **(PW3)** stated that the offence was committed on the nights of 18th and 19th April, 2015. That the complainant was referred to the hospital on 19.04.2015 but the P3 Form shows that she went to the hospital on 26.04.2015. According to the P3 Form, there were no injuries noted. The PRC Form was filled on 29.04.2015. **(PW3)** also confirmed that there was a witness who saw the respondent take the keys of the complainant but was never traced to be bonded as a witness.

At the close of the prosecution case, the trial court found that a prima facie case had been established and the respondent was placed on his defence. He elected to give a sworn statement.

The respondent informed the court that on 20.04.2015 at about 7:30pm, he was at Titanic Building situated in Kilifi when he was approached by the complainant, **Anne** and another person. They asked him to drop them at some place. He declined and they went away. He stated that he worked on his bodaboda business until 9:30 p.m before leaving for home. He took his dinner at a hotel and proceeded to Highway Bar to watch football. He told the court that he took some drinks. He further stated that one **Kimani** approached him and informed him that there was a customer outside in need of his services and once he got outside, he met **Anne** and the complainant. The complainant had a black out and **Anne** was trying to lift her up but was unable to. That is when **Kimani** assisted **Anne** to lift the complainant to place her on his

motorbike. He also told the court that **Anne** requested him to drop her at her mother's house. **Anne** took the complainant into the house and locked the door with a padlock and came out. That this was about 3:45 a.m

His further testimony was that after this he took **Anne** back to Highway Bar. **Anne** later asked him to take her home and that this was about 4:50 a.m. He later went home and slept. Later that day, his mother called and informed him that the complainant had been raped. The respondent was arrested by the police two weeks later and taken to Kilifi Police Station. He was held in the cells and later arraigned in court for an offence he has no knowledge of or its occurrence.

Upon cross examination by the prosecution, the respondent admitted that **Anne** was a friend of his but they were not close with the Complainant. That he was never invited for her birthday. He denied carrying them to the club but he however went to Highway club nevertheless. The complainant was in the company of **Anne.** He further admitted to having seen the complainant in 2014 when she used to come to their eatery to get food. He also confirmed that he found **Anne** and the complainant at Highway Bar. He carried the complainant as a pillion passenger to her home and that she was completely drunk. He insisted that he remained outside the house as **Anne** took the complainant to bed. He stated that he never had the key to the house and neither did he open the complainant's house. He also said that he never saw the door clearly because he remained outside. That it was an ordinary house and not a flat. He also informed court that he never went to school with the complainant. He never made advances towards the complainant and that he was not really drunk since he was watching football.

Submissions

Appellant's written Submissions.

The appellant filled written Submissions on 31st August, 2020 in support of their appeal. It was the appellant's submission that the prosecution had proved its case beyond reasonable doubt. It was their case on appeal that the Learned trial Magistrate misdirected himself as to the law and facts relating to the identification of the respondent. Learned prosecution counsel placed reliance on the Authority of **Wamunga v Republic (1989) KLR 424 at 426**, to buttress the legal proposition on recognition of the respondent.

It was also the appellant's submission that the Learned Magistrate failed to consider in total the application of Section 124 of the Evidence Act. It was their submission that in Sexual Offences cases the sole evidence of the victim is sufficient to prove the case of the prosecution beyond reasonable doubt.

Respondent's Written Submission.

The respondent opposed the appellant's Appeal by the written submissions filed on 3rd September, 2020. On his behalf by Learned counsel **Mr. Kinaro.** The respondent submitted that upon hearing and analyzing the evidence, the Learned trial Magistrate was right in finding that the defence raised doubt in the prosecution case to warrant an acquittal under Section 215 of the CPC. It was his submission that where there is doubt in a criminal trial, the doubt ought to be resolved in favor of the accused.

Mr. Kinaro also submitted that the Learned Magistrate correctly evaluated the evidence of the victim and found the same was shaken by the sworn testimony of the respondent. That the crucial witnesses named by the victim were never called to corroborate the evidence tendered by the victim.

Mr. Kinaro also submitted that the Learned trial Magistrate was right in finding that **Anne** locked the door and left the scene. How the door was opened and respondent allegedly found in the house was never explained. Whether the respondent was allegedly locked in the house or how he gained access into the house was mere speculation.

He urged the court to come to the same conclusion as the trial court that there was ample evidence in support of the acquittal of the respondent. He relied on the case of **DPP vs Nyaga Nthia Mbarinyo and another (2016) e KLR.**

Analysis and determination

In criminal cases before a trial Court one of the fundamental duty of the Court is to establish whether the burden of proof and standard of proof has been discharged beyond reasonable doubt against an accused person. The issue of proof is a matter of evidence**. In R v Subordinate Court of the First Class Magistrate at City Hall {2006} EA 330 it was held that:**

> ***"When a person is bound to prove the existence of any fact it is the Law that the burden of proof lies on that person."***

The general provisions on the legal and evidential burden is to be found in Section 107, 108 and 109 of the Evidence Act. It is trite Law that the state or the prosecution in criminal cases has the burden of proof to prove the existence of certain facts that the accused is guilty contrary to the right on presumption of innocence under Article 50 (2) (a) of the Constitution. The state has to discharge any given issue in an offence framed against an accused to create a doubt in the mind of the Court that he cannot be entitled to a right of presumption to innocence**.** In **Woolmington v DPP {1935} AC 462 Lord Sankey** stated in the following terms:

> ***"But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the wees of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty."***

Having stated that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it so as to come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR.**

I now resort to the Court of Appeal remarks in **Okeno v R [1972] EA 32, 36:**

> ***"An appellant on a first appeal is entitle to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya vs R [1957] EA 336] 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 (Shantial M Ruwala v R [1957] EA 570]. 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's findings and draw its own 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, see Peters v Sunday Post [1958] EA 424."***

I have considered the grounds of appeal, the respective submissions, and the record and the only issue for determination is whether the prosecution proved its case against the respondent.

The respondent was charged with the offence of rape contrary to Section 3 (1) of Sexual Offences Act. Section 3 of the Sexual Offences Act provides as follows:

> ***a. The intentional and unlawful penetration of the genital organ of a male person to a female genital organ.***
>
> ***b. The absence of consent or where consent is obtained by force, threat, intimidation, fraud or false pretence of any kind.***
>
> ***c. That the accused person was positively identified and placed at the scene.***

It is trite Law that the offence of rape is committed where a person has committed an act which causes penetration to the complainant, intentionally, without obtaining consent from the complainant or the consent was involuntary. The onus of proving the necessary ingredients of the offence of rape resides with prosecution as it's in any other criminal case.

Whether the penetration was proved?

In the quest to establishing the act of penetration, I resort to the evidence of the complainant and that of the clinical officer. The complainant **(PW1)** told the trial court that on the material date after spending time at Highway Club, another man (who is not mentioned by name) assisted her to walk out of the seat and to a boda boda to be dropped home. It was the testimony of the Complainant that she had taken alcoholic drinks at the Club. On arrival at home, she went to her bedroom where she vomited. It was also her testimony that she heard the door being closed but did not know who closed it. She also was not able to recollect whether the people she was with left the house.

The complainant also testified that while asleep she heard someone undress her, and being penetrated subsequently into her vagina. she also informed court that she did not know what happened thereafter. She later asked one **Eugene** who was outside to open for her. It lingers in the mind of this court that probably **Eugene** knew who had closed the door and one wonders why the prosecution did not attempt to call him as a witnesses bearing in mind that both **Eugene, Kimani** and **Juliet** were central in completing chain of events on causation; and perpetrator.

(PW2) on the other hand only testified to the effect that upon examination, the complainant had vaginal infection and there were no spermatozoa seen.

Whether identification was proved?

The principles to be followed are well settled in the case of **Cleophas Otieno Wamunga vs R [1989] KLR 424,** as follows:

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a greater extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification."***

It is trite that there is need for careful scrutiny of identification evidence before basing a conviction on it. This principle was espoused in the dicta from the case of **Abdullah Bin Wendo vs Rex 20 EACA 166** in the following manner:

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

The evidence of the complainant is not clear, the complainant told the court that it was respondent who raped her and at the time she woke up, she saw him walk out of the scene. This court is persuaded to believe the trial court that there was no evidence that she reported to the

police all particulars of the perpetrator. Similarly, the complainant knew respondent and it was not difficult to give full particulars of him for purposes of avoiding dock identification.

In the present case, the respondent was arrested two weeks later and was only identified by the complainant in the dock. Additionally, it is evident from the charge sheet that the respondent was arrested two weeks after the alleged offence and not on the day of the offence. Going by the complainant's testimony, the respondent was known to her and there was not tangible evidence to rule on identification, and placing him at the scene of the crime.

As reflected above, there is doubt upon the complainant's identification evidence when tailored to the particular circumstances of this case. Thus, there existed special circumstances like, the intoxication of the complainant, the terms and effect of it in perceiving, hearing, feeling, stability of cognitive senses relating to positive recognition of her perpetrator. It is one thing whether the evidence of a single identifying witness is admissible and completely another thing whether he or she ought to be believed when heard before the trial Court.

Analytically, the prosecution had been tasked in the Court below to satisfy the criteria that: First, the complainant had been sexually penetrated. Second, that the cause of penetration was intentional and unlawful, therefore criminal in nature. Third, that the respondent committed the act.

Although, the Law is settled that penetration can be proved without a medical report specifically for this case, it was necessary for corroborative evidence to be availed by the prosecution. Given that the sexual act was not consensual, the medical evidence remained a critical piece to unravel the puzzle of this crime. As the crucial witnesses were also left out by the investigating officer without any justifiable cause, it did weaken the probative weight to be accorded the testimony of the complainant.

Notwithstanding, the proviso under Section 124 of the Evidence act **Wigmore** on Evidence, 3rd Edition had this to say on the need for corroboration as a necessity in sexual offences:

> ***"The unchaste mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface, the narration is straight forward and convincing. The real victim is however, too often in such cases is the innocent man, for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale."***

This principle on corroboration by **Learned Author Wigmore** is significant in my view given such possibilities that may exist in the realm of sexual offences between the victim and the suspect. Although the legal provisions under Section 124 of the Evidence sets the record straight, there should be restraints in apportioning criminal liability solely on a single identifying witness of the victim, unless it's a clear cut case of compatibility evidence. The logic for this legal proposition and form rests on the assumption that practical challenges exist in sexual offences were the Courts to impose a legal limitation upon itself to require corroboration as a threshold issue. **Glanville Williams** in his article on corroboration – **Sexual Offences [1962] C.R.M. L. R. 662** weighed in on the vital role of corroboration in sexual offences. He stated as follows:

> ***"Sexual offences are peculiarly subject to the danger of these charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girls refusal to admit that she consented to a sexual act of which she is now ashamed."***

As this case shows, the requirement of corroboration may have produced a completely different dramatic outcome of the incident. The complainant testimony was eclipsed for lack of corroboration.

In reality, corroboration of the complainant's evidence in sexual offences is not mandatory, but in practice Courts should always endeavor to look for it before warning itself of the danger of convicting on uncorroborated evidence of the complainant. The mere fact that sexual offences are committed within the privacy of the home or a scene chosen by the perpetrator with stringent surroundings of access imposes a higher scale of scrutiny by the Courts before placing reliance on a single identifying witness.

Such fears were expressed in the case of **Willoughby [1988] CR Appeal R 91, 93** where the Judge stated as follows:

> ***"The wisdom of the ages in the Courts (has shown that there are very great difficulties and dangers in regard to sexual crime. The reason is this, that almost, no direct witnesses, and complaints can give false or merely mistaken evidence for different reasons. Sometimes they can deliberately invent an occasion, on others they may shield somebody they do not wish to be found a culprit, they may exaggerate or fantasize, and it is not always easy for the defendant to prove as it were a negative."***

Applying the facts of this case to the above principles, I draw the following inferences. In the instant appeal, it's clear from the record that the narrative of the incident was based on the version of the complainant with that of the respondent. It may be possible that the complainant was sexually penetrated but both the medical evidence and her own testimony remain unresponsive as to the act of sexual intercourse. There is no cogent or credible evidence that the respondent had been with the complainant during that time of the alleged offence. There is always a legitimate expectation that proceedings of this nature would cover issues like underclothing condition, whether they were forcibly removed or torn, whether the complainant suffered injuries to her private parts during the alleged coitus. In combination with other elements of the evidence, provides a solid base to believe the complainant's evidence as sufficient to proof the facts in issue on penetration.

This is a case it would have been dangerous to convict without corroboration. It would be a totally unjustifiable discourse to agree with appellant counsel that the Learned trial Magistrate did not evaluate or weigh properly the evidence on record and that incident wrongly acquitted the respondent. Its surprising, that the prosecution failed to put into perspective the complainant's mental condition to perceive things in view of the fact that she had been drinking hard alcoholic drinks for the whole night which an analogy of impairment of Judgment could not have been farfetched. The criticisms of the Learned trial Magistrate decision by the appellant counsel is not well founded and the

obligatory of the trial Court was to do justice by acquitting the respondent.

The first two ingredients constitute the *corpus delicti.* Searching for a more detailed measure as asked by the appellant, one finds that the elements of the offence remained in the realm of unknown and more specifically to connect the respondent inconsonant with the complainant's story. That the respondent had the opportunity to commit the crime, was to stretch the imagination of the trial Court too far than outlined in the Law on criminal adjudication.

In sum, then, it remained a possibility that the complainant was raped but with the aspect of identification the designated guidelines in **Turnbull case** finds the complainant testimony non-responsive for a positive identification to be held as credible and cogent to convict the respondent.

This is a case where the presumption of innocence should not be allowed to give way to the emotional outrage of the complainant so as to convict the respondent on thin evidence by the prosecution. After this second bite at the cherry to require this Court to reverse the acquittal would be to impose an impracticable burden on the prosecutor tasked with the responsibility to sufficiently seek a conviction which defeats the sense of logic or justice.

For those reasons, the appeal is dismissed in its entirety for want of merit.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 AND DISPATCHED VIA EMAIL ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Mugambi for the victim

2. Mr. Dennis Kinaro for the appellant

3. Mr. Mwangi for the DPP