REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 90 OF 2019

BETWEEN

TITUS MUGAMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania

Principal Magistrate's Court Criminal No. 1819 of 2013 by

Hon. P.M.Wechuli (SRM) on 17th December, 2017)

JUDGMENT

Background

1) **TITUS MUGAMBI** (***Appellant***) has filed this appeal against conviction and sentence on a charge of rape contrary to section 3(1) (a) and (c) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006 (***the Act***). The offence was allegedly committed between on 06th October, 2013 against **EGJ**.

2) The prosecution called 4 (four) witnesses in support of the charges. **PW1 EGJ**, the complainant stated that on the material day at about 2.00 pm, she was going home from church. She recalled that she was passing by Appellant's farm when Appellant upon seeing ran hurriedly walked where she was, dragged her into a nearby bush and raped her. It was her evidence that the incident was witnessed by Appellant's neigbour one Cecilia Karambu and one Muriira. She reported the matter to police, was examined and issued with a P3 form subsequent to which Appellant was arrested and charged. **PW2 JULIUS MURIIRA** stated that he saw Appellant walking hurriedly towards Nchiru and one Karambu informed him that Appellant had raped the complainant. **PW3 GEOFFREY MUTHOMI MURITHI** a clinical officer examined the complainant and on the basis of the torn hymen concluded that she had been raped. He tendered complainant's P3 form as PEXH. 1. According to the witness, the complainant's undergarments were stained with blood. The complainant's complaint was investigated by **PW3 SGT AGNES IKIMBA** who caused Appellant to be charged.

3) In his sworn defence, the Appellant denied the offence and stated that complainant had framed him.

4) *In a judgment* dated *17th December, 2017, the A*ppellant was convicted and sentenced to serve 10 years' imprisonment.

Appeal

5) Dissatisfied with the sentence, the Appellant lodged the instant Appeal mainly on the grounds that the prosecution case was not proved and that an eye witness to the alleged offence was not called as a witness.

6) The state submitted that prosecution case was proved and urged that the appeal be dismissed.

Analysis and determination

7) The Court of Appeal in the case of **Gabriel Kamau Njoroge v Republic [1987] eKLR** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms: -

> **"….As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect….."**.

8) One Cecilia Karambu who was allegedly an eye witness and the one who informed PW2 that Appellant had raped complainant was not called as a witness to explain the basis on which he implicated the Appellant.

9) At the close of the prosecution case therefore, the complainant was the only witness to the alleged rape incident. Appellant denied the offence. There being no corroboration to the allegations of rape, conviction could only be founded on the basis of section 124 of the Evidence Act, that the complainant victim of sexual offence was, for reasons to be recorded was telling the truth as to the allegation of offence.

10) I have carefully considered the P3 form presented by **PW3.** His finding that the complainant was raped was based on two issues.

11) The first one was that the complainant's underpants were stained with blood. The investigating officer does not appear to have seen the said undergarments which would have been essential to this case nor were they tendered as an exhibit. Consequently, the finding by the trial magistrate that complainant had proved that she had heavily bled after the act was against the weight of evidence.

12) The second issue is that the complainant's hymen was broken. Having noted that the complainant was a 23-year-old adult, it was imperative on the prosecution to lead evidence to demonstrate whether this was her first sexual encounter but this was not done. Further to the foregoing, it is trite that a broken hymen is not prove of sexual assault. In **PKW versus Republic [2012] eKLR**, the Court of Appeal observed that:

> **"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."**

13) From the foregoing, I find that the trial magistrate erred when he accepted the clinical officer's evidence that the broken hymen was corroborative evidence of rape.

14) It has been alleged that the Appellant was found in the act by one Karambu. Of interest to note is that Karambu was not called as witnesses allegedly because she had been threatened by Appellant which he denied.

15) Given the seriousness of the offence that Appellant was charged with, it would have been prudent to call Karambu to confirm the events of that day. This is not a case where the court would simply invoke the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya and admit the uncorroborated evidence of the complainant as truthful whereas there is evidence out there which the prosecution failed to avail.

16) The prosecution's failure to call the said Karambu who allegedly found the Appellant in the act leads the court to make an inference that her evidence, if adduced would have been adverse to the prosecution case. See **Bukenya & Others v Uganda [1972] EALR 549 at 551**.

17) In the end, I find that the prosecution case was not proved beyond any reasonable doubt and Appellant ought not to have been convicted.

18) Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. It is so ordered.

DELIVERED AT MERU THIS 04TH DAY OF OCTOBER 2021

WAMAE. T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki