REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 29 OF 2020

TARIQ ABDUWAHAB..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the conviction and sentence of Hon. P.W. Wasike,

Senior Resident Magistrate in Mandera Criminal Case No. 28 of 2019

delivered on 3rd December 2020)

JUDGEMENT

Background

1. The appellant herein was charged, tried, convicted and sentenced to thirty years' imprisonment for 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 Tariq Abduwahab on the 25th September 2019 at [Particulars Withheld] in Mandera Sub County within Mandera County in association with Ibrahim Adow Aloo intentionally and unlawfully caused his male genital organs to penetrate the female genital organs of **NT** (name withheld) without her consent.

2. Aggrieved by the decision the appellant filed this petition of appeal on 15th December 2020 raising seven (7) grounds enumerated as follows;

a. That the trial magistrate misdirected himself in fact and law by relying solely on the evidence of the victim without corroboration.

b. The learned magistrate misdirected himself in fact and law by convicting the appellant without medical report from the doctor.

c. The learned magistrate misdirected himself in fact and law by not appreciating that the prosecution had not proved its case beyond reasonable doubt without failing to prove the appellant committed the offence.

d. The learned magistrate misdirected himself in fact and law by failing to notice the glaring inconsistencies tendered by the witness,

e. The trial magistrate misdirected himself in fact and law by convicting the appellant without evidence of purported eye witness.

f. The learned Magistrate misdirected himself in fact and law by convicting the appellant based on half-truths.

g. **The learned trial magistrate misdirected himself in fact and law by convicting the appellant yet the date of commission offence as per the charge sheet is different from the date the victim testified the offence was committed**.

3. On 14th June 2021 the court directed parties to canvass the appeal through written submissions. Both parties filed their respective submissions and the same were highlighted on 22nd July 2021.

Submissions

4. In brief the appellant submitted that the trial court erred in failing to consider inconsistencies of the complainant's testimony especially with regard to the identification of the appellant and by the complainants account of both his aunt and uncle being eyewitnesses. The appellant also took issue with the fact that no medical report was produced as evidence. That the investigating officer did not testify nor were the exhibits produced to corroborate the complainant's testimony.

5. He further submitted that failure to produce witnesses cannot be shifted to the appellant. Lastly, that there were discrepancies on the date of the offence in the charge sheet and as stated by the complainant in her evidence. In support of his submissions the appellant's counsel cited the provisions of Section 124 of the evidence Act and the following authorities; The **Court of Appeal in Uganda in Okwang Peter vs Uganda, the Supreme Court of Nigeria in Bakare v State (1987) 1NWLR (PT52) 579.**

6. The Respondent on its part, in brief submitted that the complainant positively identified the appellant and his co-accused because they lived in the same village and during the ordeal the house was lit with a torch hence enabling her to see the two. That the date on the charge sheet and that stated by the complainant i.e., 25th/26th September 2019 is amenable by **Section 323 of the Criminal Procedure Code**. The respondent further submitted that the provisions of **Section 124 and 143 of the Evidence Act** allowed the trial court to convict on the evidence of a sole witness. That the appellants defence was a mere denial and did not in any way challenge the evidence of the complainant in the trial court.

Analysis and Determination

7. As this is a first appeal, the Court is required to reconsider the evidence afresh, evaluate and analyze the same in order to arrive to an independent conclusion bearing in mind that the Court neither saw nor heard the witnesses testify [see **Okeno v Republic [1972] EA 32).**

8. **PW1 the complainant** testified that she was employed by an uncle to the appellant. That on the material day as she was proceeding to buy airtime, she met with the appellant and his co-accused. They held her and took her to a house the two had rented and lived in. The Appellant's co-accused held her down, covered her face and mouth while the appellant forcibly had sex with her. It was her evidence that the co-accused only held her, he did not have sexual intercourse with her. Further she testified that she was able to identify both the appellant and the co-accused by the co-accused's phone torch light. She also knew the co-accused before and knew his voice. Further that she positively identified the appellant and mentioned him to his uncle. It was her testimony also that after the ordeal, the appellant's aunt and uncle came to the scene. The aunt gave her new set of clothes and the next day she was taken to the chief to whom she handed the blood-stained clothes. The chief together with Kenya police reservists arrested the appellant and his co-accused.

9. In cross-examination by the Appellant, PW1 denied having agreed to have sexual intercourse with the appellant. She also denied having married the Appellant but confirmed that she was one month pregnant after being forced to sleep with him once more. In re-examination she told the court that the appellant's aunt had sought to have her married to the appellant without her knowledge and consent and had also sought to engage her in Maslah.

10. Summons were issued to Dr. Ali and the investigating Officer both they failed to appear in court. An arrest warrant was issued against the investigating officer but he was not availed in court. The prosecution out of obvious frustration eventually closed its case. The trial Court found the accused persons had a case to answer and they were placed on their defence.

11. **DW1, the appellant herein** testified that he was not with the complainant on the said day. He did not know the her and that the case was fixed against him.

12. Did the prosecution prove its case beyond all reasonable doubt? The onus of proving a criminal case squarely lies upon the prosecution.

And to prove that the Offence of Gang rape took place the prosecution needed to have proved the following ingredients; -

(a) There was intentional and unlawful act of penetration with one's genital organ

(b) The other person did not consent to the Act

(c) The consent was obtained by force or by means of threat or intimidation of any kind

(d) The act was done in the company of another or others with common intention.

13. The prosecution was not able to attract witnesses in this case. The court learnt that there were interferences with the matter and attempts to compromise the complainant. This was alluded to by the prosecution during the trial to an extent that the Appellants bond was cancelled. This also came out clearly during cross examination of the complainant by the Appellant. Maslah (a local alternative dispute resolution mechanism) was initiated by elders. Maslah is ordinarily a siting of elders from both sides. The victim was an Ethiopian national who was in the hands for years, of the Appellant's uncle whom she worked for. She further testified that the aunt to the Appellant forced her to sleep with the Appellant a second time and to marry him and when put to her by the appellant that she was expectant she confirmed the same was as a result of the second encounter. Two relatives of the Appellant were the first to come to the complainant's rescue and got the Appellant and his co-accused arrested but later got into maslah, made arrangements of a marriage and failed to appear before court. The investigating officer despite a warrant hanging over his head did not attend court neither did the doctor. Therefore, the only evidence before court was that

of the complainant. Both the prosecution and the trial court were frustrated and opted to close the prosecution case. The trial court's concern is captured in the following words of the trial magistrate;

> **"I observe this is one of those very particular cases whereby it appears that the lapses in the criminal justice system have conspired to defeat justice for the complainant. This court must come to the aid of the complainant…..."**

14. There is always need for corroboration of evidence indeed Section 124 of the Evidence Act states that;

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him"**

15. However as relates to sexual offences there is a proviso to the Section as follows;

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

16. In **George Muchika Lumbasi v Republic [2016] eKLR** the court held as follows;

> **A proper reading of the whole of section 124 of the Evidence Act, shows that corroboration is still required on evidence by minors, but not mandatory in sexual offences as long as the witness was truthful and reasons are recorded. And as the long line of decisions has shown, proof in sexual offences can still be achieved through the victim's evidence, medical evidence, circumstantial evidence or a combination of any or all of them. And as stated in *Mukungu's* case (supra). *Corroboration is in effect other evidence to give certainty or lend support to a statement of fact*. In sexual cases, corroboration is necessary as a matter of practice, to support the testimony of the complainant. I am unable to hold that the proviso to section 124 is discriminatory, unconstitutional or that it violates *Articles 25* and *27 of the Constitution.***

17. The Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** stated that:

> **"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result**. (Emphasis added)

18. Further the Court of appeal **Kassim Ali Versus Republic**

Criminal Appeal No. 84 of 2005; -

> **"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence".**

19. The Court has considered the inconsistencies outlined by the appellant and the evidence of the complainant in the trial court. The Court of Appeal in **Philip Nzaka Watu v Republic [2016] eKLR** had this to say on discrepancies, contradictions and omissions:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

20. The complainant testified that the appellant's uncle came to her aid and that the appellant's aunt also came to her aid by bringing her the change in clothing. The Court does not find her evidence being inconsistent in this regard. As to how the uncle and aunt were able to hear her

voice whereas she was held by her mouth. It is evident from the evidence that there was a struggle between her and the assailants.

21. The last infraction was with regard to the date of the alleged offence as stated by the complainant and the date on the charge sheet. The appellant was well aware of what he was charged with and particulars of the offence so that the date of the offence was not in issue at the trial court. Even so the confusion on the date for an illiterate person and in the status in life of the complainant is not far-fetched, it is normal and ordinary. Further the two dates being spoken of are not far apart; the difference was a day. It cannot be said to have been major so as to discredit the prosecution's case.

22. The next issue regards identification of the perpetrator. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court **in Wamunga v. Republic (1989) KLR 424 at 426** had this to say:

> **"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

23. The complainant was categorical that she positively identified the appellant from the torch light that they had shone. She also had the opportunity to identify him as he escorted her to the house. She further positively identified the appellant to his uncle the next day.

Even if this was doubtful from the evidence of the complainant and the line of cross examination by the Appellant, the aftermath of the rape points to the Appellant as the perpetrator. He involved elders for Maslah, secondly, he had sex with the complainant a second time forcefully and she conceived. He also purportedly married the complainant. The Appellant unwisely incriminated himself as he cross-examined the complainant as all this information came out from his line of cross examination. I dentification therefore ceased being an issue.

24. Based on the above the court forms the opinion that the complainant though young, venerable despite all odds was truthful and honest and all but out to defend her rights even when a set of people who were meant to protect her attempted to compromise justice. She was also firm and steadfast in her quest for justice. She was brave and her evidence truthful and believable. The court has equally warned itself of the danger of basing a conviction upon uncorroborated evidence. Also bearing in mind that Section 143 of the Evidence Act does not prescribe number of witnesses necessary.

25. To this end the court finds that the complainant positively identified the appellant and his accomplice, the appellant unlawfully committed the act that caused penetration of the complainant's genital organs and that her consent was never obtained. The complainant's evidence satisfied all the necessary ingredients of the offence.

26. Therefore, the Court finds concurrence with the learned trial magistrate decision as he properly addressed himself on the evidence and the law and came to the right conclusion based on the evidence on record, corroboration by other evidence was not required.

The conviction was proper.

27. Sentencing is discretionary. Indeed, the offence carries a life sentence, the trial court though sentenced the Appellant to 30 years. Considering the dehumanizing act committed on the complainant, the aftermath of forcefully sleeping with her a second time and trying to compromise her by way of *maslah, attempting to marry her forcefully,* gravitates against the Appellant. He is certainly deserving of the sentence meted out.

28. The Appeal lacks merit and is dismissed.

DATED SIGNED & DELIVERED IN GARISSA THIS 18TH DAY OF NOVEMBER,2021

ALI-ARONI

JUDGE