REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 32 OF 2018

NICHOLAS WANYOIKE NG'ANG'A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate Hon. Khatambi Y.

delivered on 9th of March 2018 in NAKURU CM Criminal Case No. 1134 of 2013

Republic v Nicholas Wanyoike Ng'ang'a**.)**

JUDGMENT

1. The Appellant was charged before the Nakuru Chief Magistrate's Court with one count of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 The particulars of the offence as per the Charge sheet were that on the 12th day of May 2013 at [particulars withheld] "B" in Nakuru North District within Nakuru County in association with James Murage Muthui intentionally and unlawfully caused his penis to penetrate the anus of SN without his consent.

2. After a fully-fledged trial, the Trial court convicted the Appellant of the lesser but cognate offence of rape and sentenced him to 10 years Imprisonment as stipulated in the law.

3. The Appellant being dissatisfied with the conviction and sentence and have appealed to this court. The grounds of appeal are that:-

a. The Learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant herein when there was no or no sufficient evidence to justify the conviction and sentence

b. The Learned Trial Magistrate erred in law and fact in finding that there was sufficient evidence to convict and sentence the Appellant and she further erred in law and fact by refusing to consider all the evidence before her.

c. The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant and hence arrived on the wrong decision

d. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Complainant's evidence which was tendered through an intermediary required corroboration if it were to be relied upon in convincing the Appellant

e. The Learned Trial Magistrate erred in law and fact when she failed to seriously consider the defence tendered by the Appellant

f. The Learned Trial Magistrate erred in law and fact in failing to consider submissions made on behalf of the Appellant

g. The entire judgement, conviction and sentence were arrived at on considerations of wrong principles

4. In the court below, the following evidence emerged. The prosecution called 3 witnesses in total, in support of its case. PW1 was the Complainant. He is an adult with intellectual developmental challenges. This was readily obvious to the Court. After the Court conducted voir dire after its own investigations, the Learned Magistrate concluded that the Complainant did not understand the meaning of oath and could not be sworn. The Court also concluded after only brief testimony that the Complainant needed an intermediary to testify. The Court appointed the mother of the Complainant as the intermediary.

5. Through the intermediary, the Complainant stated that he knew both Accused Persons (the Appellant and his Co-Accused by the name, James Murage Muthui). Although the charge was gang rape, he proceeded to tell the Court that it was the Appellant alone who did "tabia mbaya" to him at their home [particulars withheld] Gathoni. He was specific that there were only two of the in the house – the Appellant and himself and explained that the Appellant put "the thing" for urinating in his backside. He also said that he developed pimples at the back and was unable to walk after that due to the pain.

6. The Complainant also insisted that the Co-Accused, James Murage Muthui was not present and that the incident happened at the Appellant's home.

7. Francis Macharia testified as PW2. He is a conductor at the matatu stage where the Complainant was a tout (by the Complainant's own rendering). Mr. Macharia told the Court that on 13/05/2013, he was at work when he noticed that SN had difficulties walking. On inquiry, the Complainant told him that he had been "defiled" (that is the word appearing in the trial transcript). Mr. Macharia says that the Complainant told him that it was the Appellant and the Co-Accused who did that to him. He took the Complainant to the Chief who referred them to Bahati Police Station. He then escorted the Complainant to the Hospital for treatment and examination.

8. The last Prosecution witness was the Investigating Officer, PC Juma Kisera of Bahati Police Station. He had taken over investigations from PC Karen Miheso who went on transfer. PC Miheso had handed over the exhibits of the case together with the Police file. Unfortunately, PC Kisera did not know much about the case and was unable to trace the doctor who had examined the Complainant. However, with the stipulation of counsel for the Appellant, the P3 Form filled by the doctor was admitted to evidence.

9. The P3 Form noted that the Complainant had "septic spots in the anal region and a tear in the 3 O'clock." He also had "pus discharge on the anal region."

10. In his sworn testimony, the Appellant denied committing the offence. He offered that he was at work on the day he is alleged to have committed the offence – that is on 12/05/2013. He testified that he was working as a guard at Lavington Security between 6:00am and 6:00pm on that day. He presented two alibi witnesses. Philip Lang'at is his co-worker at Lavington Security. He testified that he handed over the site he was guarding at 6:00am on 12/05/2013 to the Appellant. The task was to guard a borehole. Lang'at says he went home and then relieved the Appellant again at 6:00pm that evening. He did the same the next two days. He testified that they used to prepare a handover report and long in and out but that the book was collected by the Company.

11. The Appellant's mother, Mary Waithera Ng'ang'a testified as DW3. She testified that 12/05/2013, the day the Appellant is accused of having committed the offence, was a Sunday. She lives in the same compound as the Appellant. She told the Court that went to church and came back home at noon. She remained at home from that time until nightfall. She testified that the Appellant was not at home and had gone to work at Lavington Security the whole day. She was resolute that the Complainant never went to their home that day.

12. The Learned Trial Magistrate was persuaded that the Appellant was positively identified as the perpetrator and believed the Complainant's story in Court that he was raped by one person not two. She, therefore, acquitted the Co-Accused and convicted the Appellant. In doing so, she dismissed the alibi defence as unconvincing. She ruled that "it is evident that the DW2 (Appellant's co-worker) was not with the Accused Person the entire day and could thus not account for his actions and or whereabouts between 6:00am and 6:00pm." As for DW3 (the Appellant's mother), the Learned Trial Magistrate ruled that "it is not clear what time she arrived home" and that she "did not account for the [Appellant] whereabouts from the time they parted way until 12:00am…."

13. In the appeal, the Appellant's counsel, Mr. Waiganjo raised three principal complaints. First, he raised the concern that the Court erred in relying on the sole uncorroborated evidence of the Complainant when such evidence was given through an intermediary. In this regard, Mr. Waiganjo cited Section 31 (10) of the Sexual Offences Act and the decision in ***Julius Mutungi V Republic Criminal Appeal 86 of 2011*.** Mr. Waiganjo further submitted that the Court did not warn itself of the dangers of relying on such uncorroborated evidence.

14. Second, Mr. Waigonjo submitted that the evidence provided by the Complainant was unreliable anyway and should not have been sufficient to convict. The Appellant further stated that the evidence of the Complainant was contradicted by the evidence of PW 2. Further, that the Medical Doctor was not called for cross examination of his report.

15. Third, Mr. Waiganjo complained that the Learned Trial Magistrate fell into error when considering the alibi evidence of the Appellant because she shifted the burden of proof to the Appellant when she stated that the witnesses did not fully account for the whereabouts of the Appellant.

16. The duty of this Court, as a first appellate Court, is to re-evaluate the evidence and come to independent findings on law and facts – in the firm awareness that this Court did not hear or see the witnesses as they testified (see ***Okeno v Republic* [1972] EA 32**).

17. I have now considered the evidence with a keen evaluative eye as required as a first appellate Court. There are twin issues raised by the Appellant which, in my view, make the conviction herein unsafe. The first one is the treatment given to the testimony of the Complainant who was declared a vulnerable witness owing to intellectual disabilities. The law provides that such evidence must be corroborated if it is to sustain a conviction. That is the textual purport of section 31(10) of the Sexual Offences Act. The Learned Trial Magistrate considered the issue of corroboration but instead referred to section 124 of the Evidence Act in making a finding that no corroboration was required. With respect, that was a misdirection. The proviso to Section 124 of the Evidence provides that a Trial Court may convict on the uncorroborated evidence of a minor if the Court is persuaded that the minor is telling the truth. It does not apply to persons declared vulnerable witnesses under section 30 of the Sexual Offences Act who have to testify through an intermediary as was the case here. For the latter, there is a requirement of corroboration.

18. In the present case, there was hardly any corroboration to the evidence of the Complainant. What is more is that, unfortunately, his evidence ended up being at variance with what he had told PW2 in the immediate aftermath of the incident: he had told him that he was sodomized by two people but in Court he insisted that only the Appellant was present and did it. To exacerbate the gaps, neither the doctor

who first examined him nor the original Investigating Officer was available to testify. Those two could possibly have reinforced the evidence by giving testimony of first report.

19. The unreliability of the evidence of the identity of the perpetrator wrought by lack of corroboration is made worse by the fact that the Learned Trial Judge also misdirected herself on the analysis of the alibi defence. Once an Accused Person introduces an alibi which is, on its face, plausible and reasonable, it is incumbent upon the Prosecution to displace it. At no point does an Accused Person assume the responsibility of proving that the alibi is, in fact, true. The burden of proof never shifts to the Defence. The Accused Person only bears the burden of production in order to move forward.

20. In ***Kiarie v Republic [1984] KLR*** the Court of Appeal held:-

> An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons.

21. Similarly, in ***Victor Mwendwa Mulinge V R, [2014] eKLR*** the Court of Appeal rendered itself thus on the issue of alibi:

> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

22. In the present case, the Appellant produced two witnesses. His Co-worker (DW2) testified that the Appellant relieved him from work at 6:00am on the day the offence is supposed to have happened. The witness then took over back from the Appellant at 6:00pm the same day. Once the Defence produced this evidence, which is not eminently unreasonable, it would have been for the Prosecution to demonstrate either that the testimony was untrue or that the Appellant left his place of work during the day in order to commit the crime and then reported back. Although the Defence of alibi came late, the Prosecution was at liberty to utilize section 309 of the Criminal Procedure Code to call rebuttal witnesses.

23. The same can be said about the evidence of the Appellant's mother, DW3. She testified that she came from church and remained in the compound which she shared with the Appellant the rest of the day. She did not see the Appellant or anyone in the compound during that time. Yet the Complainant said that the incident happened at the home of the Appellant. It was incumbent upon the Prosecution to displace this alibi evidence. I do not think it did so.

24. The upshot is that the conviction in this case was unsafe. Consequently, the appeal herein is allowed. The conviction arrived at and sentence imposed are hereby quashed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held in custody.

25. Orders accordingly.

Dated and Delivered at Nakuru this 16th day of January, 2020

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JOEL NGUGI

JUDGE