REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 13 OF 2019

BENARD OPIYO Alias JEMAA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in Butere SRMC Sexual Offence Case No. 10 of 2019

by F. Makoyo, SRM, dated 30/1/2019)

JUDGMENT

1. The appellant was convicted of the offence of rape of a person with mental disability contrary to Section 7 (1) as read with Section 3 (1) (a) and (b) of the Sexual Offences Act No. 3 of 2006 and sentenced to 20 years imprisonment. He was dissatisfied with the conviction and the sentence and filed this appeal. The grounds of appeal are:-

(1) That the trial magistrate erred in law and fact in ignoring the appellant's defence of alibi without proper evaluation.

(2) That the trial magistrate grossly misdirected himself in considering the evidence of a witness who was not a victim.

(3) That the trial magistrate erred both in law an fact in considering incorrect evidence of a witness stating the lady talks and another one stating that the lady does not talk.

(4) That the trial magistrate erred both in law and fact in convicting the appellant on the evidence that did not meet the provisions of Section 36 (2) of the Sexual Offences Act.

(5) That the trial magistrate grossly misdirected himself by considering the evidence without proper evaluation of the first report that said that the perpetrator was physically unknown.

(6) That the trial magistrate grossly misdirected himself by considering the evidence that the appellant was caught red handed with the victim without proof of a photograph.

(7) That the trial magistrate erred both in law and fact in not evaluating the exact date of the act stipulated on the charge sheet that differed from the evidence on record.

(8) That the trial magistrate erred both in law and fact in failing to notice a lady who is able to point on somebody who had sexually assaulted her is not a mental patient.

2. The grounds of appeal were expounded by the written submissions of the appellant. The state did not make a response to the appeal. They relied on the record of the lower court.

3. The particulars of the charge against the appellant were that on diverse dates between 25th and 29th April, 2018 in Butere Sub-County within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of TD (herein referred to as the victim) being a person with mental disability.

4. The prosecution called 5 witnesses in the case – the mother to the victim PW1, the village elder PW2, a clinical officer from Butere Sub-

County Hospital PW3, the area Assistant Chief PW4 and the investigating officer PW5. The mother to the victim testified that the victim was at the material time aged 25 years. That she was mentally challenged. That she disappeared from home on the 24/4/2018 and did not come back. She reported the matter to the village elder PW2 and to the Assistant Chief PW4. On 26/4/2018 she received information that the victim was locked up at the house of the appellant. She passed the report to the village elder and the Assistant Chief. She and the village elder went to the house of the appellant but they did not find anybody. On the 29/4/2018 the Assistant Chief PW4 received a tip off that the appellant was at his brother's house. He, the victim's mother, the village elder PW2 and some youth men went to the home. When they reached the home the appellant saw them and ran away. The youth men chased him. The Assistant Chief found the door to the appellant's house locked from outside. He heard some movements inside the house. He broke the door. He found the victim inside the house. The appellant was brought back by the youth men. The appellant and the victim were escorted to Butere Police Station.

5. PC Chelagat PW5 investigated the case. She escorted the victim and the appellant to Butere Sub-County Hospital. They were examined by a clinical officer. The victim was found with a whitish discharge in her private parts with no lacerations. A laboratory examination revealed epithelial cells. The clinical officer concluded that there was penetration. PC Chelagat escorted the victim to Kakamega County General hospital for mental examination. She was examined by a Dr. Mbiti. She was found to be mentally unstable. The appellant was charged with the offence. During the hearing a clinical officer from Butere Sub-County, Hospital PW3 produced the victim's P3 form, treatment notes and mental assessment report as exhibits, PEx.1 (a) and (b) and 3 respectively. The victim did not testify in the case due to her mental impairment.

6. When placed to his defence the appellant stated in a sworn statement that on the material day he was at his compound when he was attacked by some people one of whom was Charles, the village elder PW2. He ran away but the people chased him and caught up with him. They started to beat him. The Assistant Chief and an administration policeman appeared. The policeman attacked him with a rungu. He lost a tooth. He was taken away. They met with the mother to the victim. He was taken to Butere Police Station. He was informed of the charges of rape. He was charged. He said that the charge was a frame up.

7. In cross-examination the appellant stated that he did not know the complainant before the material day. That he saw her on the way to the police station. That he left his house unlocked. He did not see anybody opening it.

8. In his submissions, the appellant stated that the investigating officer PW5 stated in her evidence that the victim can at times talk and that she pointed out at him at the police station as the person who had sexually assaulted her. That there was then no reason why she did not testify in court. That the police did not organize an identification parade to ascertain whether the complainant could identify him. That there was no evidence that the complainant was removed from his house.

9. Further that the doctor who examined the victim did not testify in the case. That the trial court did not consider his defence.

10. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while at the same time bearing in mind that the trial court had the advantage of hearing and seeing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32** and **Kiilu & Another –Vs- Republic (2005) 1 KLR 174**.

11. The appellant challenged the decision of the trial court on grounds that the victim did not testify in the case; that he was not identified as the perpetrator; that there was no medical evidence to support the charge and that the trial court did not consider his defence.

12. In convicting the appellant of the offence the learned trial magistrate believed the evidence that the appellant had locked up the complainant in his house. He found that the medical evidence proved that there was penetration on the victim and that there was no consent from the victim as she was mentally impaired.

13. The victim's mother stated that the victim was mentally retarded. The village elder PW2 testified that he knew the victim and that she was mentally retarded. The Assistant Chief PW4 also said that he very well knew the victim and that she does not talk. The clinical officer stated that when the victim appeared at the hospital she was mute. The report by Dr. Mbiti also indicated that when the victim appeared before him she was just mute. On examination the doctor formed the opinion that she was mentally unstable. From the evidence of the witnesses who knew the victim and the doctor's report there was no doubt that the victim suffers from a mental disability. The prosecution therefore did prove that the victim was a person with mental disability. The failure of the victim to testify in the case was therefore due to her mental impairment. Her failure to testify was not fatal to the prosecution case.

14. The clinical officer PW3 made a conclusion that there was penetration on the complainant because of presence of epithelial cells in the complainant's urine. Presence of epithelial cells can only prove that there was some friction in the vagina. It is not concrete proof of penetration. The trial court fell into error in accepting the evidence of the clinical officer that there was medical evidence to prove penetration on the complainant. In my view there was no medical evidence to prove penetration.

15. However it is not only medical evidence alone that can prove an offence of rape. The same can also be proved by oral and circumstantial evidence. The Court of Appeal in **AML –Vs- Republic (2012) eKLR** held that:-

> **"The fact of rape or defilement is not proved by DNA test but by way of evidence."**

In **Kassim Ali –Vs- Republic, Msa COA Cr. App. No. 84 of 2005** the court held that:-

> **"(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."**

16. The appellant made reference to Section 36 (1) of the Sexual Offences Act. The section empowers a court to order for a DNA test to be

conducted to ascertain whether or not an accused person has committed a sexual offence. However the section is not couched in mandatory terms – See **Hadson Ali Mwachongo –Vs- Republic (2016) eKLR**. The fact that the provisions of the section were not complied with was not fatal to the prosecution case.

The question then was whether in the absence of medical evidence there was sufficient oral or circumstantial evidence to prove the offence.

17. For an accused person to be convicted on circumstantial evidence the evidence has to satisfy three tests:-

(a) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

(b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

(c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

(See **Abanga Alias Onyango–Vs- Republic, Cr. App. No. 32 of 1990**).

18. PW2 testified that her daughter disappeared from home for 5 days. That she made a report to the village elder PW3 and to the Assistant Chief PW2. The three witnesses testified that they found the complainant locked up in the appellant's house. That on seeing them the appellant ran away. He was chased and arrested.

19. The trial magistrate believed the evidence that the appellant was found having locked up the victim in his house. There is no reason to fault the finding of the trial magistrate on the issue. The appellant's defence on the issue was a mere denial. The fact that the appellant was found having locked up the victim in his house unerringly pointed to a conclusion that he had locked her up there for purposes of sexual exploitation on her. That the appellant ran away when he saw the witnesses was further proof of his guilt. Having been caught by witnesses having locked up the complainant in his house it was unnecessary for the police to organize an identification parade as the perpetrator was known. There was sufficient circumstantial evidence that the appellant raped the victim.

20. The trial magistrate addressed himself to the meaning of consent under Section 43 of the Sexual Offences Act. By dint of Section 43 (4) (e) of the Act a mentally impaired person cannot consent to sex. The victim herein could not consent to sex as she suffered from a mental disability. The charge against the appellant was proved beyond all reasonable doubt. The appellant was rightly convicted of the offence.

21. The upshot is that the appeal is devoid of merit. The same is dismissed in its entirety.

Delivered, dated and signed in open court at Kakamega this 19th day of February, 2020.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mutua for state/respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.