



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. 73 OF 2018**

**GOTHARD MBUTHIA KIREHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the judgment and sentencing of Hon. J. W. Onchuru (PM)*

*in Lamu Criminal Case No. 179 of 2015 delivered on 8<sup>th</sup> October 2015)*

**JUDGEMENT**

1. The Appellant was charged with the offence of rape contrary to **Section 3 (1) (a) and 3(3) of the Sexual Offences Act 2006**. The particulars of the offence were that on 26<sup>th</sup> day of March 2015 at around 1530Hrs at [particulars withheld] village, Mpeketoni Division in Lamu West Sub-County within Lamu County intentionally and unlawfully caused his penis to penetrate into the vagina of MN.
2. He faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act. The particulars of the offence were that on 26<sup>th</sup> day of March 2015 at around 1530Hrs at [particulars withheld] village, Mpeketoni Division in Lamu West Sub-County within Lamu County intentionally touched the vagina of MN with his penis against her will
3. The prosecution called four witnesses in support of its case. MN. (PW1), the victim, stated that on the 26<sup>th</sup> March 2015 at around 3:30 pm she was at their well when she heard someone telling her “*simama*” (stop). She refused to stop since she did not know the person. According to MN the man grabbed her by the neck, took her past the pond where tied her hands behind her back. He then proceeded to remove her skirt, biker and panty and raped without protection for about 30 minutes. After her attacker had finished, he untied her and warned her not to tell anyone.
4. MN further told the court that she went home and told her sister P what had happened W called the mother. That her mother came and took her to the chief’s office and then to the police. The police referred her to the hospital where she was examined and given medicine. That the next day she started looking for her assailant and she gave a description her assailant to her she was informed that the description fitted the Appellant so they proceeded to his home where they met the Appellant. That they then went to the police and reported.
5. The victim gave a description of the Appellant that he had a gap in the lower jaw and he had dreads. She told the court that on the day of the offence she observed the Appellant for 10 minutes while he was talking to her after he had raped her. She stated she saw the Appellant’s physique and could recognize him. She told the court that it was not her first time to have sexual intercourse.
6. LWM (PW2) was the victim’s sister. She told the court that on 26<sup>th</sup> March 2015 she was at Baharini Shopping Centre when she was called by EN, who informed her that MN had been raped. She rushed home but found that the victim had already been taken to hospital. When PW1 returned from hospital, she informed her that she could identify her assailant. That they both went to Mango area to look for the assailant but they did not find him. The following morning, a neighbour told them that there was a young man fitting the assailant’s description given by PW1 and he gave them his location. They went to the location they were given and found the Appellant who they apprehended and took to Mpeketoni Police Station.
7. PC Judith Kilonzo (PW4) was the investigating officer. She stated that on 26<sup>th</sup> March 2015 she interrogated PW1 who told her that her she did not know her assailant by name but she would be able to identify him as he wore rasta and one of his teeth was missing. That later the Appellant was apprehended and taken to the police station. She took PW1’s statement and charged the Appellant. She visited the scene of the crime and produced a sketch map of the same (P.Exh 4)
8. Stephen Ewoi (PW2) was the clinical officer who examined PW1 and filled the P3 form. He stated that the victim’s vaginal wall appeared

reddish and was moist and wet. That the urine and pregnancy tests were negative. He stated that even though the victim had taken a bath before being examined, there was evidence of penetration. He produced the P3 form (P.Exh1) and the victim's treatment notes (P.Exh2). He also produced the treatment notes (P.Exh3) for the Appellant which showed that the Appellant was not suffering from any disease.

9. At the close of the prosecution case, the Appellant was put on his defence. The Appellant chose to give a sworn statement. He called one witness in support of his defence.

10. He stated that on the 27<sup>th</sup> March 2015, he was at home with a finger injury when three people arrived and asked him to remove the hat he was wearing. That the people then called a lady and asked her if he was the one. That the lady stated that he was not the one. That he was then requested to stand up and the lady was asked again if he was the one. The lady stated that he looked like he was the one. That the 3 people requested him to open his house and the conducted a search. That the lady stated that a vest in the house resembled the one her assailant was wearing when he attacked her. The Appellant told them that it belong to his brother but they forced him to wear it and they took him to the police station.

11. PW(DW2) was the Appellant's mother. She stated that on the material day, the Appellant was sleeping at home since he was sick. That six people including one lady came to their home and on seeing the Appellant asked the lady if he was the one. She said that they warned her that if she said the Appellant was not the one they would not go to any other place. DW2 stated that she tried telling them that he Appellant was sick but they apprehended and took him away.

12. At the end of the trial, the Appellant was convicted and sentenced to serve 10 years in prison.

13. The Appellant was dissatisfied with both the conviction and sentence and filed his petition of appeal on 12<sup>th</sup> September 2018. Subsequently, when the matter was coming up for hearing on the 10<sup>th</sup> July 2019, he filed amended grounds of appeal together with his written submissions.

14. His three amended grounds are that the trial court erred in law and fact by failing to record the demeanour of the prosecution witnesses; that he was not properly identified as an identification parade was never conducted, and; that his defence was not considered.

15. The Appellant's submissions were to the effect that the trial magistrate erred by invoking section 124 of the Evidence Act and relying on the evidence of the prosecution witnesses despite failing to record their demeanour during trial. He submitted that the trial took almost a year to conclude and therefore the trial magistrate would have difficulty in recollecting the demeanour of the witnesses.

16. Secondly, he submitted that he was not properly identified since the police failed to carry out an identification parade upon his arrest. He argued that the victim did not know him prior to the incident and it was therefore important for the police to carry out an identification parade as was laid out in the case of **James Tinega Omwenga vs Rep (2014) eKLR**.

17. The Appellant further contended that there was contradiction between the evidence of PW1 (the victim) and PW4. He stated that PW1 described him as having a gap in the lower jaw while PW4 described him as having a missing tooth on the lower jaw. The Appellant urged that he has a gap on the lower and upper jaw and that his arrest was a case of mistaken identity. In addition, he submitted that PW1 was of doubtful integrity as her the evidence during trial varied her statement in the OB. He relied on the case of **Ndungu Kimani vs Rep (1979) KLR 282** and **Denkeri Kishan Pandya vs Rep Cr. App. No 106 of 1950 EACA**.

18. Finally, the Appellant submitted that the trial court failed to consider his defence which was corroborated by DW2. He urged that his defence raised an alibi as defined in the case of **Saidi vs Rep (1963) EACA**. He argued that on the day PW1 was raped, he was sick and had an injured finger and therefore he had gone to seek medical treatment. He relied on **Sekitoleko vs Uganda (1967) EACA 531** where the court stated that the burden of proving an accused's guilt rested with the prosecution and that it was the duty of the prosecution to dislodge an accused's alibi.

19. Mr. Kasyoka, learned counsel for the Respondent, opposed the appeal in its entirety through oral submissions. It was his submission that the prosecution had proved penetration and the lack of consent, and; that the identification of the Appellant was not in doubt.

20. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, I did not have the benefit of seeing the demeanour 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**.

21. I have considered the grounds of appeal the record and the respective submissions,. The issues that arise in this appeal are:-

- (i) Whether the prosecution proved its case beyond reasonable doubt.
- (ii) Whether the Appellant was properly identified.

22. The 3 elements of the offence of rape that must be proved are: - penetration and that the penetration was unlawful and without consent. There must be prove linking the accused whose identification must be beyond reasonable doubt.to the offence.

23. The victim told the court how on the 26<sup>th</sup> March 2015 the Appellant held her by the neck and pulled to a bush. That he tied her hands behind her back and removed her dress, biker and innerwear before proceeding to rape her for 30 minutes without protection. That the he penetrated her twice. Medical evidence was produced by Stephen Ewoi (PW2) a clinical officer at Mpeketoni Sub-County who had examined

the victim. He produced the P3 form (P.Exh1) which showed the vaginal wall was a little bloody, the vaginal orifice was moist and wet, and; that there was bloodstain on the examining finger. PW2 stated that there was evidence of penetration even though the victim had destroyed evidence by taking a bath before examination.

24. It is my finding that the medical evidence corroborated the complainant's evidence and penetration was proved.

25. On whether penetration was unlawful and without consent, section 42 of the SOA provides that:-

***For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.***

26. Section 43 of the SOA states that:-

***(1) An act is intentional and unlawful if it is committed—***

***(a) in any coercive circumstance;***

***(b)...***

***(c) ...***

***(2) The coercive circumstances, referred to in subsection (1) (a) include any circumstances where there is—***

***(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;***

***(b) ...***

***(c) ... (Emphasis mine)***

27. The evidence of PW1 was that the Appellant strangled her by grabbing her neck and pulled her into a bush. He then tied her hands behind her back, removed her clothes and raped her. After he had finished her warned her not tell anyone about the incident. It is plain that PW1 did not consent to have sex with the Appellant but the Appellant used force. I find that the penetration was unlawful and without consent.

28. The Appellant has submitted that he was not the person who raped the complainant and that he was wrongly identified. He faulted the police for failing to carry out an identification parade.

29. Evidence of identification in this case was given by the victim (PW1). She said that it was around 3pm when she was accosted by the Appellant. She said that she observed the Appellant for about 10minutes when he was talking to her after he had finished raping her and was untying her hands. She said that the Appellant had a gap in his lower jaw and had dreads locks and could recognise the Appellant. She further gave the description of the Appellant to hers neighbours who were able to direct her to his home.

30. Where identification is based on visual identification it is paramount that the court warns itself on the dangers of relying on visual identification. The Court of Appeal in **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** held that:

***“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 a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.***

31. In **R-V-Turnbull, (1976) 3 All ER 551** where the court stated that:-

***“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?....”***

32. In the present case, the offence occurred at 3:30pm in the afternoon when there was sufficient light. The victim stated that she observed the Appellant for about 10 minutes after the ordeal when the Appellant was talking to her. She was in close proximity with the Appellant. It is my finding that the circumstances leading to identification by the victim were favourable.

33. Additionally there are other factors that assist the court to test the veracity of the victim's evidence for instance if the victim was able to give a description of her assailant.

34. The Court of Appeal in *Maitanyi vs. Republic* [1986] KLR 198 observed that:-

***“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid or to the police..... If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description.”(emphasis mine).***

35. On the importance of a first report, the Court of Appeal in *Terekali & Another vs. Republic* [1952] EA 259 pronounced itself that:-

***“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”***

36. As earlier stated in this judgment, PW1 said that she gave the description of the Appellant to her neighbours which led her to tracking the Appellant and arresting him. PC Judith Kilonzo (PW4) said that PW1 had given a description of her assailant that he wore rastas and one of his lower teeth was missing. Guided by the above precedents, it was apparent from the facts of this case that the victim was able to identify the Appellant. There was no risk of mistaken identity.

37. The Appellant contended that failure by the investigators to conduct an identification parade was fatal. The Court of Appeal in *Andrea Nahashon Mwarisha v Republic* [2016] eKLR stated the applicable principle in the following terms:-

***“Identification parades are necessary though not absolutely where the witness purports to identify a suspect did in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in *Kinyanjui & Others v Republic*, (1989) KLR 60: "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion.....” Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect. See *John Mwangi Kamau v Republic* (2014) eKLR.***

***In this case, the offence was not committed in difficult circumstances at all. It was during the day and visibility was not poor. The complainant too spent some time with the appellant at the scene of crime..... In those circumstances, of what evidential value would have been the identification parade? We cannot think of any. To our mind, it would have been superfluous. The identification parade would even have been hampered by want of earlier description by the complainant of any attributes of the appellant. Even if the complaint by the appellant was valid, we are still of the view that given the circumstances under which the identification was made, there was no room for mistaken identity. The complainant had all the opportunity to properly and positively identify the appellant as one of the robbers....”***

38. In the present case, Guided by the above precedent, and as earlier stated in this judgement, the conditions and circumstances of identification were fair. The rape took place at 3.00pm in board daylight. The Appellant deemed not to have been in any hurry as he spent an estimated 30 minutes and the victim was able to take in his physical features which she described to her mother and police. The failure to conduct an identification parade was therefore neither necessary nor fatal.

39. A final ground of appeal was that the court did not consider the Appellant’s defence. In his judgment, the magistrate considered the Appellant’s defence but found that the same was not true. He held that the Appellant should demonstrated that indeed he had been to hospital for treatment and disregarded the defence.

40. I have looked at the Appellant’s defence. He gave an account of the day he was arrested by the victim and other persons. He failed to give an account of his whereabouts on the day of the offence only stating that he was at home as he was sick. His defence did not cast doubt on the prosecution case. It is therefore not true to allege that the trial court did not consider the Appellant’s defence. This ground therefore fails.

41. In the final analysis, I have found no merit in the appeal. I uphold both conviction and sentence. The appeal is dismissed.

42. Orders accordingly.

**Judgment delivered, dated and signed at Garsen this 17<sup>th</sup> day of February, 2020.**

.....

**R. LAGAT KORIR**

**JUDGE**

**In the presence of:**

T. Maro Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent