REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A.C. Mrima, J.]

CRIMINAL APPEAL NO. 18 OF 2019

WICKY OWUOR ODIDA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. R. K. Langat Senior Resident Magistrate in Rongo Magistrate's Criminal Case No. 5of 2019 delivered on 25/02/2019)

JUDGMENT

1. The Appellant herein, **Wicky Owuor Odida**, was arraigned before the trial court on 21/01/2019. He was charged with the offence of **Rape** contrary to **Section 3(1)(a)(b)(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that '*on 14th day of January 2019 at [particulars withheld], intentionally and unlawfully caused his penis to penetrate the vagina of JDN without her consent*.' The Appellant was charged in the alternative with committing an indecent act with an adult contrary to **Section 3(II)(a)(b)3** of the Sexual Offences Act No. 3 of 2006. The Appellant denied both counts and a trial was ordered.

2. The prosecution called six witnesses in a bid to prove the charges. **PW1** was a Clinical Officer from Rongo Sub-County Hospital. The complainant testified as **PW2**. She was **JDN**. One of the complainant's grandchildren testified as **PW3**. He was **KO**. A village elder one **Ardow Otieno** testified as **PW4. PW5** was the investigating officer one **No. 56625 PC Lenaline Kerubo** attached at Kamagambo Police Station. **PW6** was another Clinical Officer from Homa Bay County Teaching and Referral Hospital. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for PW2 whom I will refer to as '**the complainant'**.

3. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to remain silent. Thereafter the court rendered its judgment on 25/02/2019 where the Appellant was found guilty of the offence of rape and was convicted. He was sentenced to 30 years' imprisonment.

4. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal by filing a Petition of Appeal through *Messrs. Odondi Awino & Company Advocates* on 20/03/2019. He challenged the entire judgment and sentence on the following 6 grounds: -

(1) The learned trial magistrate erred in law and fact by finding that there was evidence to support the charges against the Appellant as set out in the Charge Sheet.

(2) The learned trial magistrate erred in law and fact by finding that the charges against the Appellant as contained in the Charge Sheet were proved beyond reasonable doubt.

(3) The learned trial magistrate erred in law and fact by relying on the uncorroborated evidence of the complainant to arrive at a conviction of the Appellant.

(4) The learned trial magistrate erred in law and fact by placing weight on the evidence of the complainant without any assigning any reason as to why he believed the single witness with regard to identification.

(5) The conviction of the Appellant was against the weight of the evidence adduced.

(6) The learned trial magistrate erred in law and fact by failing to appreciate that the Appellant is a first offender and went ahead and meted out a sentence of 30 years imprisonment.

5. Directions were taken and the appeal was disposed of by way of oral submissions. The Appellant's Counsel submitted that the identification of the Appellant was doubtful. He contended that the circumstances did not favour a positive recognition of the assailant as the Appellant. He also contended that the trial court did not even warn itself in relying on the evidence of identification by a single witness. Counsel also submitted that even the sentence was manifestly excessive for a first offender.

6. The Appellant's Counsel relied on the Court of Appeal decisions in **Malindi Criminal Appeal No. 27 of 2016 Safari Yaa Baya vs. Republic (2017) eKLR** and **Nairobi Criminal Appeal No. 24 of 2000 Paul Etole & Another vs. Republic** (unreported). He also relied on the High Court decision in **Kisii Criminal Appeal No. 215 of 2006 Thomas Mogesi Boke vs. Republic** (unreported) in buttressing his submissions.

7. The appeal was opposed by the State through **Mr. Kimanthi**, Learned Senior Principal Prosecution Counsel. Counsel submitted that the charge of rape was proved as required in law and that the Appellant was properly identified as the perpetrator. Counsel also submitted that the court handled the aspect of single identifying witness correctly such that there was no miscarriage of justice. Counsel also argued that the sentence was lawful and reasonable. The State prayed that the appeal be dismissed.

8. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of rape or alternatively those of the offence of committing an indecent act were proved and as so required in law; beyond any reasonable doubt.

10. The starting point is how the offence of rape is described in law. **Section 3** of the **Sexual Offences Act No. 3 of 2006** (hereinafter referred to as **'the Act')** defines **'rape'** as follows:

> **(1) A person commits the offence termed rape if –**
>
> > **(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**
> >
> > **(b) the other person does not consent to the penetration; or**
> >
> > **(c) the consent is obtained by force or by means of threats or intimidation of any kind.**
>
> **(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.**
>
> **(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.**

11. From the foregone the ingredients of the offence of rape include *proof that the victim was not a minor, proof of penetration, proof of the perpetrator* and *proof that the consent was not freely given*. On looking at those aspects in this judgment, this Court shall consider each of them singly. I must however confirm that the evidence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

(a) On the age of the complainant:

12. The age of the complainant was not contested in this appeal. There is the evidence of the complainant's age as 85 years at the time of the alleged offence. The Appellant was hence not a minor in law.

(b) On the issue of penetration:

13. The trial court rightly handled the definitive part of penetration. The Court was guided by the provisions of the **Sexual Offences Act** (hereinafter referred to as '**the Act'**) and two Court of Appeal decisions.

14. The trial court's analysis yielded that it is not necessary that medical evidence be availed to prove penetration. As long as there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

15. In demonstrating this ingredient, the complainant stated as follows: -

> ***.... He also raped me. He lifted my lights** (sic) **and placed it behind my neck like a cow and he took the blanket and bed sheet and stuffed in my nose and mouth. He wanted me not to shout. He did it in the bed. I was helpless. He raped me…….***

16. PW6 attended to and examined the complainant the morning after the alleged incident. PW6 noted puss, epithelial cells and red blood cells in the urine. The cervix was lacerated and there was bleeding in the vagina. She filled the Post Rape Care Form.

17. PW1 also examined the complainant three days post the incident. She also perused the treatments notes and the Post Rape Care Form filled in by PW6. PW1 also confirmed that the cervix was lacerated. PW1 also conducted a laboratory high vaginal swab and urinalysis tests.

The results showed the presence of puss cells, red blood cells, yeast cells, epithelial cells and spermatozoa. PW1 filled in the P3 Form. She produced it in court.

18. The complainant was old enough to know what she meant by saying she was raped. She was a grandmother to PW3. It is not likely that she was mistaken on what happened to her. Going by the definitions of **'rape', 'penetration'** and **'genital organs'** in **the Act** coupled with the evidence of the complainant, PW1 and PW6 as well as the contents of the P3 Form and the Post Rape Care Form, this Court is satisfied that indeed penetration was proved in the circumstances of this case.

c) <u>On whether the appellant was the perpetrator:</u>

19. The Appellant vehemently denied any involvement in the alleged offences.

20. I have carefully gone through the evidence on record. The incident occurred at night. The complainant testified that it was drizzling and windy. She had placed a plastic item on the outside of the window. She heard someone touching the wooden window and the plastic item fell. She woke up. The person broke the window as the complainant watched. The window pane fell and the person entered into the house through the window.

21. The person had a phone whose flash light was on. The person came close to the complainant. The complainant asked the person whom the person was and why he was disturbing her all the time. Without responding the person punched the complainant on the right check and also hit her on the rib cage. The complainant fell on the bed. According to the complainant the person spoke to her as he assaulted her. He said that he had been looking for her for long.

22. The complainant contended that she recognized the assailant as the Appellant through his voice and visually by the aid of the phone light. When the assailant left through the same window the complainant screamed. PW3 and other two other grandchildren to the complainant swiftly responded.

23. In this matter the aspect of identification is by way of recognition. That is because the complainant contended that she knew the assailant and recognized his voice. The mode was both visual and voice recognition.

24. I will first deal with the aspect of visual recognition. Evidence on the identification of a suspect, even in cases of recognition, must be carefully tested as the converse may easily cause miscarriage of justice. Courts have clearly laid down applicable principles in such cases. The Court of Appeal in the case of **<u>Wamunga vs Republic (1989) KLR 426</u>** stated as under: -

> ***It is trite law that 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 conviction.***

25. It was also held in **<u>Nzaro vs Republic (1991) KAR 212</u>** and **<u>Kiarie vs Republic (1984) KLR 739</u>** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

26. In **<u>R –vs- Turnbull & Others (1973) 3 ALL ER 549</u>**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***... 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? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

27. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **<u>Douglas Muthanwa Ntoribi vs Republic (2014) eKLR</u>** in upholding the evidence of recognition at night held as follows: -

> ***On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -***
>
> > *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...***

28. Again the Court of Appeal in **<u>Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)</u>** had this to say on the evidence of recognition at night: -

> ***We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no***

doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

29. I have already reiterated the evidence of the complainant on recognition. For clarity, the incident took place at night, it was raining and dark. The complainant alleged to have heard the assailant while he was still outside her house. She heard the wooden window broken. She however did not raise any alarm. When the assailant was eventually inside the house, it is alleged that he used his phone light to see. *There was no evidence on the intensity of the light.*

30. The complainant further stated that the assailant used the phone light to see inside the house. If that is the case, then how did the complainant see the assailant? *There was no evidence on how the light shone unto the face of the assailant to enable the complainant see the assailant.*

31. There is further evidence that the attacker did not immediately talk to the complainant. The complainant was instead attacked ruthlessly and pieces of blanket and bed sheet stuffed into her mouth and nose. The complainant fell, was helpless and in pain.

32. A question therefore lingers in my mind. The complainant screamed immediately the attacker left her house. PW3 and two other grandchildren responded swiftly. If so, why did the complainant scream as she heard the window being broken and someone pulling himself inside her house? It is possible the complainant was asleep and did not know how the assailant gained access into the house. She must have been woken up by the sudden attack on her.

33. A careful scrutiny of the evidence on visual recognition leaves a trail of unanswered answers. I find that evidence unsafe to rely on.

34. I will now deal with the issue of voice recognition. The way a court is to handle evidence on voice identification is now well settled. Extreme care is peremptory to ensure that the following conditions are met, which conditions were discussed by the Court of Appeal in the **Safari Yaa Baya** case (supra) being that: -

(a) It was the accused person's voice;

(b) The witness was familiar with it and recognized it;

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

44. The Court of Appeal had also previously held in **Karani vs. R (1985) KLR 290** and **Choge vs. R (1985) KLR 1** that even few words like '*break her legs*' sufficed.

35. The complainant stated that the assailant talked to her after he had assaulted her. The assault was sudden and serious. By that time, the complainant conceded, she was helpless and had her mouth and nose stuffed. It was also raining. The complainant said that the attacker told her that he had been looking for her for a long time.

36. It is a fact the complainant knew the Appellant well. It is also a fact that they used to talk. However, the circumstances under which the alleged words were spoken were too difficult for positive recognition. I cannot certainly find that the complainant was able to identify the voice as that of the Appellant's in such a state of affairs. The complainant was placed under very extreme threat to her life and may not have been able to recognize the voice. I am hence not convinced that the recognition of the voice alleged to be that of the Appellant was without any error. I now find and hold that the voice recognition in this case was likewise unreliable.

37. Having so found, there is therefore no evidence connecting the Appellant with the unfortunate events that visited the complainant. The conviction as well as the sentence cannot stand.

38. The upshot is that the appeal is allowed. The conviction is quashed and the sentence of 30 years' imprisonment set-aside. The Appellant shall forthwith set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 10th day of February, 2020.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Awino Odondi, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant