REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 145 OF 2016

CHARLES KIBUNJA MWARERI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Principal Magistrate Hon. V. Wakumile

delivered on 22nd August, 2016 in NAKURU CM Criminal Case 1563 of 2015

Republic v Charles Kibunja Mwareri)

J U D G M E N T

1. The accused person Charles Kibunja Mwareri is charged with offence of **Rape Contrary to Section 3(1) (a) (b) and (3) of the Sexual Offences Act.**

2. It is alleged that on 21st June, 2015 at [particulars withheld] in Njoro District within Nakuru County intentionally and unlawfully caused his penis to penetrate the vagina of FW aged 97 years old without her consent. The charge sheet says there is Count II overleaf but I found none.

3. Plea was taken on 29th June 2015 and appellant pleaded not guilty.

The evidence

4. **FW** was aged ninety seven (97) years and at the material time she was living alone in her homestead in [particulars withheld] Village. She could recall that in January 2015 when the land was about to be prepared for planting the appellant approached her and requested to harvest the grass on her land. She allowed him to do so, though he never returned to say he had left. After that she saw him in June, on a Sunday as she came from church, she met the appellant who greeted her and asked her whether she could remember him. She told him she could, she could remember him as the person who had harvested the grass. They chatted for a while, then he requested for the job of uprooting tree stumps from the shamba. She told him that she could not negotiate the payment terms for such a job. She directed him to her son in law's house. She proceeded to the house where she relaxed, then decided to make lunch. About 6.30 p.m. she went out to fetch charcoal. It is then she spotted the accused in the maize shamba next to her house. She asked him whether he had been to her son in law's house. In response he asked her for "Ugali", and suddenly grabbed her by her legs and forced her to the ground. The charcoal spilt and since her head was partly outside the door he pulled her. She screamed but he blocked her mouth held her neck and removed her clothes and raped her then left.

5. She did not do anything that night save to sleep. The following day she reported the matter to her neighbours, who in turn alerted the daughter.She was taken to hospital, treated, and discharged. She recorded a statement and identified the accused at the police station after he had been arrested. She also identified the accused in court during the trial.

6. On cross examination she said that they were alone when she allowed him to harvest the grass. That on the ill-fated day, she had seen him twice. It was 6.30 p.m., there was light, including moonlight, she saw him well. Once inside her house she did not raise any alarm because she was embarrassed.

7. **PW2** was the Assistant Chief Mboriga Sub Location **Joseph Rukingi**. On 24th June 2015 about 5.00 pm he learnt that the accused had been arrested by a mob who were about to lynch him. He and his colleague went to the scene and rescued him from a very hostile mob, they took him to the police station Naishi. It was alleged that he had raped PW1.

8. **PW3 Dr. Thomas Matara** of Nakuru Provincial General Hospital testified on behalf of Dr. Nyatika who examined the complainant. The complainant had alleged rape by a known assailant. She was examined on 26th June 2015 but had already washed her clothes. She had injuries on her neck, labia majora, and foul smelling discharge, blood and pus cells in her urine, no semen detected but there was rape. She had been treated at Lari Health Centre and issued with treatment card which was also produced together with P3 and Post Rape Care forms. The accused was also examined on 25th June 2015 but nothing significant was found. His P3 and PRC forms were also produced.

9. **PW5 No. 37102 PC Joseph Matere** of Naishi Police Station testified that the complaint was made on 22nd June, 2015 by the complainant. He recorded her statement and escorted her to hospital. The accused was brought in by members of the public, he re-arrested him and escorted him to hospital for examination.

On cross-examination he said he never visited the house of the accused.

10. Placed on his defence the appellant gave an unsworn statement of defence. He said he was forty six (46) years old. On 28th June 2015, he was stopped by *boda boda* riders who asked him whether he used to cut grass at [particulars withheld]. They were about fifty (50) of them. They took him to complainant's house. That the complainant identified another man who was released but he, was taken to the police station. He said he saw her from the time when he was arrested by boda boda riders. On cross examination he said he moved into that area in 1978, and had known the complainant's son since 1990.

11. In the judgment delivered on 22nd August, 2016 by **Hon. V. Wakumile Principal Magistrate,** the accused was found guilty of rape, convicted and sentenced to serve twenty (20) years imprisonment.

12. Unhappy with the conviction and sentence he filed an appeal and amended Grounds of Appeal dated 19th February 2019 together with his written submissions. The grounds were;

> **i. That the trial magistrate erred in law and fact by relying on the evidence that were very inconsistent and contradictory to each other.**
>
> **ii. That the trial magistrate erred in law and fact by not finding that the appellant wasn't properly identified.**
>
> **iii. That the trial magistrate erred in law and fact by relying on the medical evidence that were incredible.**

His position was that the evidence was inconsistent, there was no proper identification and the medical evidence was incredible.

Submissions

13. Regarding the evidence he argued that the date of arrest of the appellant was not known, was it 24th June 2015, 29 June 2015, relying on **Section 163 (1) (c)** he argued that these inconsistencies ought to be resolved in his favour.

14. He also argued that he was not properly identified because the prosecution did not lead evidence as to the intensity of the light and the ability of the complainant to identify the accused person. That the only reason he was arrested is because he had cut grass on her shamba at one time. That the medical evidence showed that she was sent to hospital on 23rd June 2015 and examined on 29th June 2015. That the fact that there was no evidence of any male specimen on her indicated there was no rape. That there was nothing to connect the injuries on the complainant to the accused person.

15. In additional oral submissions the appellant submitted that the investigating officer ought to have visited the scene that the charcoal ought to have been produced as evidence. That it was 6.30 p.m. and the light in the maize shamba could not have been sufficient to identify the suspect, and there is no evidence as to what the complainant did after the incident.

16. In response Ms. Wambui for the state submitted that, the complainant made the report on 22nd June, 2015, the appellant was arrested on 24th June, 2015. That the omission on the charge sheet of the date of arrest was not prejudicial the appellant in any way. On identification that there was sufficient evidence that accused was well known to the complainant. That it was a case of recognition as the complainant had spoken to accused earlier. She identified him at the police station and in court.

17. That the medical evidence was consistent with the complainant's evidence, injuries on neck, labia, blood and pus cells. Complainant explained why she never did anything about the rape that night.

18. The prosecution was of the view that the offence was proved and urged that the conviction and sentence be upheld.

Analysis and Determination

This being a first appeal the court is obligated to re assess and reevaluate the evidence and draw its own conclusions. In **Okeno vs Republic (1972) EA 372** it was stated**;**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can***

it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."

The issues for determination are

i. Whether the evidence inconsistent, contradictory and incredible.

ii. Whether the appellant was properly identified.

19. At the material time the complainant was a 97 year old woman. The trial magistrate observed that she moved around easily without any assistance. She did not have any eye sight problem and easily picked out the accused person from other accused persons in the dock, and she did not wear glasses, so he believed her when she said her eye sight was good. He found that the complainant was a truthful witness by the manner in which she testified and being a very senior citizen he, was convinced she had no reason at all to accuse the appellant falsely. Thatthe appellant was known to her, and the appellant confirmed that he was known to the complainant's family.

20. I have considered the evidence of the complainant vis a vis the appellant's submissions. The complainant knew him and the appellant knew her. They were not strangers. On the material date they met when she was from church. They spoke. In the evening about 6.30 p.m. She saw him just next to her house and she spoke to him. She asked him whether he had already been to her son in law's place. That takes a moment speaking to someone while facing him directly. He, in response asked for *ugali*, and she saw and heard him. Before she could do anything else he had grabbed her and pulled her to the ground and inside her house where he raped her and left. Hence in terms of identity, it was not dark. It was 6.30 p.m. and even the moon was out. They spoke to each other before the accused suddenly pulled her down. There was in my view all the time and opportunity for the complainant to know who she was speaking with and the issue of mistaken identity does not arise. The trial magistrate relied on **Anjononi & Others v. Republic (1976) I KLR** on recognition. In that case the Court of Appeal held;

***"…..Recognition of an assailant is more satisfactory, more assuring and reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or other. We drew attention to the distinction between recognition and identification in*Siro Ole Giteya v R (UR)"**

In **Siro Ole Giteya (4R)** the Court of Appeal held'

"…where the evidence is based on identification the court should closely examine the circumstances in which the identification by each witness came to be made.."

21. Caution in the identification of accused person is to be exercised at all times so as not to send an innocent person to jail. This was the Court of Appeal in **Borris Ken Solomon v Republic [2017] eKLR** where the Court of Appeal restated this principle reciting the "*famous Blackstone's ratio*" by the jurist William Blackstone who in 1965 stated "*better that ten (10) guilty persons escape than one innocent suffer."*

The court went on further to re-cite the Turnbull Guidelines on identification in **Regina v Turbull & Others [1977] QB 224** adopted in **Reuben Taabu & Others v RepublicCriminal Appeal Numbers 208, 209, 480 of 1978.**

Hence courts are wary to convict on contested identification evidence.

22. The circumstances of this case were not about identification of the assailant but knowledge of the assailant making it a case of recognition. The complainant was aware of the person she was talking to.

23. Regarding penetration there were bruises on the majora, puss and blood in the urine. This cannot be said to be incredible evidence. The Dr. examined the complainant. The injuries attest to the use of force.

24. On dates, the incident happened on evening of 21st June, 2015 she reported to police on 22nd June 2015, and on the same date she attended the local health centre where the blood, discharge and bruises were noted. She was examined for the post rape care form and here injuries and tenderness of the neck were seen. The P3 was issued on 22nd June 2015 and she was sent to the hospital for filling of P3 on 23rd June 2015, but it was filled and signed on 29th June 2015. This clearly adds up and there is nothing contradictory or inconsistent in the same found nothing incredible about that because the evidence in the three documents was consistent. The appellant's P3 was also filled on 29th June 2015 and he was found to be normal, though he was referred for examination on 24th May 2015. I found nothing inconsistent/incredible about the medical evidence. The appellant having been arrested three days after the incident, nothing significant could have been found on him. However from the complainant she had bruises on both labia. Appellant argued she could have scratched himself, and the court asks, why? Why would a 97 year old woman injure her genitals so as to implicate an innocent 45 year old man? The appellant gave no basis for this speculation that the complainant was actually out to get him, for what? The blood and puss cells plus the bruises on labia and tenderness on neck were clearly consistent with the complainant's description of what happened. Hence the evidence came together to establish that there was sexual intercourse, forceful penetration without consent, hence rape was proved.

25. In the circumstance I found that the conviction was safe.

26. The appellant was sentenced to twenty (20) years imprisonment. **Section 3(3)** provides that a person guilty of rape is liable upon conviction to imprisonment for a term which shall not be less than ten (10) years but which may be enhanced to imprisonment for life.

27. Upon being convicted the prosecution submitted that the accused was a first offender. His mitigation was that he was a first offender. On that alone, the trial magistrate sentenced the appellant to twenty (20) years imprisonment. There was no explanation as to why the trial magistrate found it necessary to give the appellant a sentence that was beyond the recommended minimum.

28. It is no longer tenable that a sentence is simply handed down. The court is expected to give reasons for its sentence, as that is what at the end gives our criminal justice the credibility it deserves. It removes the usual feeling of the public that certain people get long sentences for no apparent reasons while others get away with light ones for the reasons other than they deserved the same. It is only fair and just to consider both the aggravating and mitigating factors while sentencing a person and herein come handy the ***Sentencing Guidelines***.

29. Calling upon the **Francis Karioko Muruatetu** case, it is only just to re-look at the appellant's sentence. True, he did an abominable thing to rape a person old enough to be his grandmother. However there was no physical violence, use of weapons or vicious threats. From the evidence on record, it appears that all he wanted at that moment was to satisfy his sexual urge, which he did, and left the complainant. Why he chose the elderly lady, we will never know as unfortunately we do not carry out investigation as to the motives for sexual assault. I do not think it is just enough to leave it at this, in such a case as this it would have been necessary to go into the reasons why the appellant could have done such a thing, how else do we expect to rehabilitate such persons when we do not know why they do such things.

30. Be that as it may, just as the Swahili say, "*Mgala muuwe lakini haki yake mpe"*, the accused deserved to have what he deserved under the circumstances of the offence. As a first offender and without aggravating circumstances, he deserved the sentence recommended.

31. In the circumstances I find, save for the sentence no reason to disturb the conviction. The conviction is sustained.

32. The appeal succeeds on sentence only. The sentence of twenty (20) years imprisonment is set aside and substituted with seven years (7) years imprisonment with effect from 30th August, 2016.

Dated, delivered and signed at Nakuru this 9th day of April,2020.

Mumbua T. Matheka

Judge

In the presence of;

Edna Court Assistant

Appellant .....

Respondent .....