**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 28 OF 2018**

**ISMAIL MALATA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal against the conviction and sentence in the Chief Magistrate's Court at Garissa**

**in Criminal Case No. 834 of 2016 delivered by Hon. J. J. Masiga (SRM) on 17th May 2018)**

**JUDGEMENT**

1. The appellant herein was charged with three counts and an alternative count. In Count I, the appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code.

2. The particulars of the offence are that on the night of the 30th day of September 2016 at about 23.00 hours at [particulars withheld] Shopping Centre, Mororo Location within Tana River County, while armed with a knife, the appellant robbed Duncan Mwenda of Kshs.2,500/= and one mobile phone make Tecno valued at Kshs.3,000/=, and at or immediately before or immediately after the time of such robbery used threats to the said Duncan Mwenda.

3. In Count II, the appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code.

4. The particulars of the offence are that on the 1st day of October 2016 at about 01.00 hours at [particulars withheld] Shopping Centre, Mororo Location, Tana North Sub-County within Tana River County, while armed with a knife, the appellant robbed EM Mbuvi of Kshs.1,000/= and a mobile phone, make Itel valued at Kshs.2,500/= and or immediately before or immediately after the time of such robbery used threat to the said EM.

5. In Count III, the appellant was charged with rape contrary to section 3(1) (b) (b) as read together with section 3(3) of the Sexual Offences Act No. 3 of 2006.

6. The particulars of the offence are that on the 1st day of October 2016 at about 00.00 hours at [particulars withheld] Trading Centre, Mororo Location, Tana North Sub-County within Tana River County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of EM without her consent.

7. In the alternative to Count III, the appellant was charged with the offence of indecent act with an adult contrary to section 11(2) of the Sexual Offences Act No. 3 of 2006.

8. The particulars were that on the 1st day of October 2016 at about 00.00 hours at [particulars withheld] Trading Centre, Mororo Location, Tana North Sub-County, the appellant willfully and unlawfully touched the breasts and genital organ namely vagina of EM.

9. He pleaded not guilty and matter went into full trial. After prosecution case the appellant was put on his defence and the appellant on the other hand opted not to give any evidence. He chose to let the court decide his fate.

10. He was convicted and sentenced to life imprisonment.

11. He was aggrieved by the conviction and sentence thus lodged instant appeal vide grounds in petition -

**i. That the trial magistrate erred in law and facts by failing to consider that the charge sheet is defective contrary to section 134(1) of the CPC.**

**ii. That the trial magistrate erred in law and facts by failing to consider that the allegations of rape were fabrications without iota.**

**iii. That the trial magistrate erred in law and facts when he convicted the appellant on the basis of contradictory evidence contrary to section 163 of the Evidence Act.**

**iv. That the trial magistrate erred in law and facts when he relied on the prosecution's shoddy investigations to convict him.**

**v. That the trial magistrate erred in law and facts by failing to consider his defence which was cogent enough to rebut the prosecution's case.**

**vi. That the trial magistrate erred in law by failing to inquire, examine and carefully analyze the evidence adduced by the prosecution which was not enough to establish the burden of proof before convicting him under section 109 and 110 of the Evidence Act.**

**vii. That the trial magistrate erred in law and facts by failing to consider that there was no first report made neither parade conducted to ascertain the truth.**

12. Parties were directed to file submissions. Only appellant filed the same.

13. After going through the evidence on record and submissions, I find the issues are –

***a. Was charge defective?***

***b. Whether the prosecution proved its case beyond reasonable doubt?***

***c. Was sentence excessive or unconstitutional?***

**ANALYSIS AND DETERMINATION**

14. The above points taken on appeal can be disposed as below after having had the advantage of reading through the short record of the trial court in its entirety and after re-evaluating the whole record and reaching my own conclusions as I am required to do as a first appellate court. See ***Okeno vs Republic [1973] E.A 32; Pandya vs R [1957] EA 336, Ruwala vs R [1957] EA 570.***

15. On the first issue, section 382 of the Criminal Procedure Code provides, in material part that, ***"…….no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."***

16. The proviso to section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

17. Hence, here, I must ask myself when it is appropriate to find that charge sheet is fatally defective. Our case law has given crucial pointers. Two cases are pertinent: the case of ***Yosefa vs Uganda [1969] EA 236*** – a decision of the Court of Appeal and ***Sigilani vs Republic [2004] 2KLR 480*** – a High Court decision by **Justice Kimaru**. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. ***Sigilani vs Republic [2004] 2KLR*** held:

**"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to specific charge that he can understand. It will also enable an accused person to prepare his defence."**

18. As shown above, nowhere did appellant point out the defectives during trial which could warrant this court interfere with conviction. The charge sheet contained elements of the offences charged very clearly.

19. With regard to prove of offences charged to the required standard, I have gone through the evidence by the prosecution and the appellant's submissions on record.

20. As it were, the appellant was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code, one count of rape contrary to section 3(1) (a) (b) as read with section 3(3) of the Sexual Offences and in the alternative indecent act with an adult contrary to section 11(2) of the same Act. I will first determine the robbery with violence charges.

21. Section 296 provides as follows:

***"296(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***

***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death."***

22. It follows that, to be able to sustain a conviction in the offence of robbery with violence, the following elements have to be proved:

***a. The offender must be armed with a dangerous or offensive weapon or instrument or;***

***b. The offender is in company with one or more person or persons or;***

***c. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other personal violence on any person.***

23. The testimony of the two complainants was that, at the time of robbing them the appellant had a knife. They both positively identified the appellant as the person who robbed them.PW1 testified that on the material date she stayed with the appellant from 9.00pm to 2.00am, and therefore, she could not forget his appearance.

24. Whereas PW3 testifying that he had known him earlier the fact that he stayed with him for more than an hour on the material date notwithstanding.

25. The knife used weapon by appellant was recovered from the appellant and produced in court as exhibit 2 by PW5. Indeed, pw1 and 3 testimonies corroborated each other and the recovery and production of the knife as an exhibit corroborated both their testimonies.

26. The appellant on the other hand did not give any evidence controverting the fact that he robbed the complainants, and at the time of the said robbery, he was armed with a knife.

27. By all means, a knife is a dangerous or offensive weapon within the meaning of section 296(2) of the Penal Code. Therefore, I agree with trial court finding that the prosecution proved the two counts of robbery with violence beyond reasonable doubt.

28. Turning to the Count III, section 3(1) (a) (b) of the Sexual Offences Act provides as follows:

**"3(1) A person commits the offence termed rape if –**

**i. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organ;**

**ii. The other person does not consent to the penetration; or**

**iii. The consent is obtained by force or by means of threats or intimidation of any kind."**

29. Whereas section 3(3) of the same Act provides:

**"(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 10 years but which may be enhanced to imprisonment for life."**

30. Section 3 is self-explanatory on what consist of the main elements of the offence of rape; therefore, the court needs not belabor the point. In her Testimony PW1 narrated how the appellant took her to his house, remove his clothes and hers, asked to lie down and lift up her legs then raped her.

31. The appellant did not offer any evidence whatsoever to the contrary.

32. In his conclusion, PW4, the Clinical Officer was of the opinion that there had been sexual activity since dead spermatozoa were found in PW1's genitals.

33. After prosecution case the appellant was put on his defence but he opted not to give any evidence. In the absence of any evidence to the contrary and in the absence of any serious challenge to the testimony of PW1 inevitably the testimony of PW4 and the documents produced by him corroborate the testimony of PW1.

34. Therefore, I find that the prosecution proved the offence of rape against the appellant beyond reasonable doubt. Thus, court finds that there is no merit on appeal against conviction.

35. On sentence the trial court-imposed life sentence I respect of the offences charged. The appellant complains same to be excessive. There were no records produced in respect of the appellant thus treated as a first offender. I agree same sentence was excessive and I will adjust the same thus appeal on sentence is meritorious.

36. The court finds no merit in appeal and makes the following order;

*i. The appeal on conviction is dismissed and it is affirmed.*

*ii. The appeal on sentence is allowed and thus set aside and same is substituted as follows;*

*a. In counts 1 and 2 the appellant is to serve 15 years imprisonment each;*

*b. In count 3 the appellant will serve 10 years.*

*c. The sentence to run concurrently from the date of conviction 17th May 2018.*

**DATED DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF APRIL 2020.**

**.....**

**C. KARIUKI**

**JUDGE**