REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 73 OF 2017

PAUL MBIU GACHERU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable J. N. Nthuku – Senior Resident Magistrate, delivered on 24th August 2017 in Nakuru Chief Magistrate's Court Criminal Case No. 3380 of 2015)

JUDGMENT

1. The Appellant, Paul Mbiu Gacheru, was arraigned before the Chief Magistrate's Court charged with a single count of rape contrary to Section 3 of the Sexual Offence Act No. 3 of 2006. The particulars alleged that on the 21st day of November, 2015 at Rigogo Farm Solai in Nakuru North District within Nakuru County, the Appellant, unlawfully and intentionally committed an act of inserting a male genital organ (penis) into the female genital organ (vagina) of LMK without her consent, a woman aged 94 years which caused penetration.

2. An alternative charge facing the Appellant was committing an indecent act with an Adult contrary to Section 11 of the Sexual Offences Act No. 3 of 2006. The particulars as to place, time and victim are the same as those in the main charge.

3. The Appellant denied the charges triggering a fully-fledged trial in which the Prosecution called six witnesses. Upon being put on his defence, the Appellant gave an unsworn statement. The Learned Trial Magistrate returned a verdict of guilty on the main charge and sentenced the Appellant to thirty years imprisonment.

4. The Appellant is aggrieved by both the conviction and sentence. He has appealed to this Court. In his filed Amended Grounds of Appeal, he listed the following as his points of dissatisfaction with the judgment of the Trial Court:

> *1. That the learned trial magistrate erred in law and fact by convicting the Appellant yet failed to appreciate that the complainant did not testify.*
>
> *2. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not discharge its duty of disclosure as provided by law.*
>
> *3. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution case was not proved to the required standard of reasonable doubt.*
>
> *4. That the learned trial magistrate erred in law and fact by failing to appreciate that the provisions of Section 211 of the CPC were not adhered to.*
>
> 5. *That the sentence meted in relation against the appellant is manifestly excessive in relation to the evidence adduced and mitigation tendered.*

5. In the Court below, the following evidence emerged. The Complainant was unable to testify because, at age 94, she was suffering from age-related dementia. She was stood down as PW1 and a report filed to demonstrate her age-related disability. It was, therefore, left to the other Prosecution witnesses to establish the case beyond reasonable doubt.

6. The Principal witness was Lucy Wanjiku Kamau. She testified as PW2. She recalled that on 21/11/2015 at around 11:00pm, she and her husband heard screams coming from the direction of the Complainant's house. They recognized the voice as the Complainant's who is an immediate neighbour. They rushed to her house. They found the door locked. However, they noticed a big hole dug on the mud wall. They

heard the Complainant continuing to shout: "*Unanifinya kifua sana! Utaniua*!"

7. Lucy told the Court that she started screaming as well to attract the attention of other neighbours. They also made phone calls to the village elder. She came after a short time. The village elder ordered whoever was inside the Complainant's house to come our or else the crowd would pull down the door and go get him. That was when, Lucy testified, the Appellant emerged from the house. Lucy did not know him before then but she clearly saw him and identified him on the dock as the person who came out of the house of the Complainant. Lucy testified that as he came out he had not even had time to fasten the buttons of his trousers. The crowd pounced him; initially beating him up before arresting him and tying him up.

8. A little while later, testified Lucy, a matatu came and some in the crowd boarded and accompanied the Complainant to the Police station and then to the Hospital.

9. Elizabeth Nyambura's narrative mirrored that of Lucy as well. Elizabeth is 60 years old and testified as PW3. She is also a neighbour to the Complainant and Lucy. She testified that she, got a call from Lucy and ran to the Complainant's house. She is the Village Elder Lucy spoke of. Elizabeth told the Court that when she got to the Complainant's house, she noticed the big hole in the mud wall of the Complainant's house. She shone the torch she was carrying inside and she clearly saw and recognized the Appellant whom she knew from before. Elizabeth testified that she called out:

> "*Mbiu, what are you doing in Muthoni's house*?"

10. Elizabeth testified that she ordered the Appellant to come out of the house and when he hesitated, she threatened that the young men would bring down the door and find him inside. That is when, Elizabeth told the Court, that the Appellant came out. He was then detained and taken to the Police where he was re-arrested.

11. Elizabeth was quite categorical that she identified the Appellant at the scene and that she has known him since the Appellant's birth.

12. Both Lucy and Elizabeth testified that when they went inside the Complainant's house after the Appellant came out, they found the Complainant inside the house groaning in pain. Both testified that they found her lying on the ground on her side in obvious pain.

13. The other person who rushed to the scene on the night of 21/11/2015, was Johana Mburu. He is Lucy's husband. His testimony was basically the same as Lucy's: he heard the screams and, together with Lucy, they rushed to the Complainant's house, finding the door locked – but noted a hole in the wall. He testified that he heard the Complainant complaining about pain in her chest bu heard a man inside the house ordering "panua miguu!". Like Lucy and Elizabeth, Johana testified that other neighbours came as well and the Appellant was flushed out of the house and arrested. They then found the Complainant inside the house lying on the ground in pain. Johana testified as PW4.

14. PC Caroline Too from Solai Police Station was the Investigating Officer in the case. She testified as PW5. She was informed by her OCS that there was a suspect at Bahati Police Station on 22/11/2015. She proceeded to Bahati Police Station where she found both the Complainant and the Appellant. She re-arrested the Appellant and then began investigations in the case. Among other things, she visited the scene where she saw the hole in the wall which she testified was big enough for a man to fit in. She then recorded statements and made a recommendation that the Appellant be charged.

15. The final witness was David Mbugua, an Assistant Clinical Officer at Bahati Sub-County Hospital. He testified as PW7 on behalf of Dr. Karanja who examined the Complainant. He told the Court that Dr. Karanja had been bed-ridden for more than 1 1/2 years by the time of the trial and could not come to Court to testify.

However, he was familiar with Dr. Karanja's handwriting and produced the P3 Form and the PRC Form Dr. Karanja had filled with respect to the Complainant. The P3 Form showed that there was bruising on the genitalia of the Complainant and that the vaginal walls were hyperemic (reddish in colour). The doctor concluded that the injuries were consistent with sexual assault.

16. In his unsworn statement, the Appellant stated that he was framed by Elizabeth and Lucy because he insisted that his (Appellant's) father should be buried in a shamba in Mang'u which his family had a dispute over with his uncle. The Appellant said that it was his uncle who compromised Elizabeth and engineered for him to be arrested and charged with an offence he did not commit.

17. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** **(1957) EA 336**, ***Ruwala vs. R*** **(1957) EA 570**.

18. To obtain a proper conviction for rape, the Prosecution was required to prove three elements:

a. That there was penetration;

b. That the penetration was done without the consent of the Complainant;

c. That it was the Appellant who caused the penetration.

19. In the present case, penetration was proved through the P3 Form which was presented as evidence. The doctor concluded that there was, indeed, penetration. Sorrounding circumstances provided corroboration. They included the evidence of what PW2 and PW4 heard when they arrived at the scene. They clearly heard the Complainant loudly complaining that whoever was inside her house was hurting her. Finally, the Appellant emerged from inside the house with his trousers still unfastened.

20. This evidence of context and circumstances also clearly demonstrate lack of consent. Although the Complainant was adjudged unable to testify because she was suffering from age-related dementia, evidence of at least two witnesses showed that she did not consent to sexual activity. Both PW2 and PW4 heard the Complainant screaming and rushed to the scene. Then, while there, they heard her complaining that the assailant was hurting her. Finally, when PW2 and PW4 and PW3 went inside the house of the Complainant, they found her lying on the floor groaning in pain. Finally, as all these three witnesses plus the Investigating Officer testified, there was a large hole in the wall which the assailant had used to gain ingress into the Complainant's house. It is obvious that the Complainant had not consented to the sexual activity.

21. Finally, on identification of the Appellant as the perpetrator, this is as close a case as one can get to direct evidence by third parties in a rape case: the victim raised alarm and three of the witnesses who testified answered. They went to the scene. The assailant was still inside the house. The village elder (PW3) called out on the person who was inside to come out. After a few threats, the person came out. The person who came out was the Appellant. He was seen by the crowd that had gathered at the scene. In particular, he was seen, and apprehended right there at the scene by PW2, PW3 and PW4. He was then handed over to PW5 who re-arrested him. The Appellant came out of the house with his trousers still unfastened since he was threatened that the crowd would flush him out if he did not come out voluntarily. PW3 knew him before the incident and called him by name at the scene. Hers was evidence of recognition. There is absolutely no chance at all that there was misidentification.

22. In view of the categorical evidence in the case, the conviction was safe.

23. Was the sentence of thirty years imprisonment excessive? I do not think so. Although the Appellant was a first offender, the offence here was an aggravated one. First, the victim was ninety-four years old. She was a fragile elderly lady. Second, the Appellant used force to subjugate the elderly victim and hurt her in the process. Third, the Appellant forcibly broke into the house of the victim. There is no doubt that the Appellant is a dangerous offender and a long custodial sentence is called for. The thirty (30) years imprisonment imposed by the Learned Trial Magistrate was justified in the circumstances.

24. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of thirty (30) years imprisonment is affirmed.

25. Orders accordingly

Dated and delivered at Nakuru this 16th day of April, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the

Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Ms. Rita Rotich, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Other authorized personnel and representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.