IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 82 OF 2019

CORAM: D. S. MAJANJA J.

BETWEEN

DAVID MWITI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. O. Wanyaga, SRM at the Magistrates Court at Maua dated 16th May 2019)

JUDGMENT

1. The appellant, **DAVID MWITI,** was charged in association with two co-accused with the offence of gang rape contrary to **section 10** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on 21st August 2016 at [particulars withheld]Location in Igembe South Sub-county within Meru, he in association in others caused his penis to penetrate the vagina of MK without her consent.

2. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and to come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32**). The evidence presented before the subordinate court was as follows.

3. The complainant, MK (PW 1), testified that she was at home on the night of 21st August 2018 at about 9.00pm. The appellant came into the house and greeted her. He then put off the tin lamp whereupon the other assailants came into the house, covered her face with a lesso, fondled her, bit her ears and pulled her breasts. They removed her underpants and then repeatedly raped her. She could hear their voices and could tell they were three assailants. She testified that the appellant went to the police and stated that he had left two people in the house. She also stated that she knew the appellant and had seen him many times prior to that day.

4. The clinical officer who produced the P3 medical form and the Post Rape Care (PRC) Form, PW 2, testified that he examined PW 1 on 27th August 2016. He confirmed that PW 1 was seen at the hospital on 22nd August 2016 and her clothes were blood stained. She had multiple laceration wounds on the face, neck and scalp. The front part of her chest was swollen and tender. The upper left limb had multiple human bite marks. Both thighs had human bite marks. He assessed the injuries as grievous harm. On genital examination, he noted a visible tear around the perineal area. Laboratory examination showed blood in the urine. He concluded that PW 1 was raped.

5. The investigating officer, PW 3, testified that she interviewed PW 1 on 23rd August 2016 and she identified the appellant as one of the assailants. She issued the P3 medical form and later charged the appellant and his co-accused.

6. In his sworn defence, the appellant denied the offence. He stated that he knew the complainant as he used to see her at the local shopping centre. He denied going to her home on the night of 21st August 2016.

7. Gang rape is provided for under **section 10** of the ***Sexual Offences Act*** which states;

> *Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.*

8. The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in **Section 3(1)** of the ***Sexual Offences Act, 2006***;

A person commits the offence termed rape if –

(a) He or she intentionally or unlawfully commits an act which causes penetration with his or 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.

9. From the evidence I have outlined, I find that the prosecution proved the essential elements of the offence of gang rape. The testimony of PW 1 was direct, clear and consistent on her ordeal on the material night. She narrated how she was attacked in her house and raped by more than one person. The act of penetration took place without her consent and was accompanied by violence inflicted on her. Her testimony was corroborated by the medical evidence of PW 2 that showed she had multiple bruises and bite marks on her body and a tear in the perineal area of the vagina.

10. The central and key question raised by the appellant in this appeal is whether he was the assailant since the incident took place at night in circumstances that would be unfavourable for positive identification.

11. The trial magistrate cautioned himself on the issue of identification by relying on the case of ***Maitanyi v Republic*** **[1986] KLR 196** where the Court of Appeal sets out what constitutes favourable condition for positive identification by a single witness as follows:

> *Although the lower courts did not refer to the well known authorities* ***Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166*** *followed in* ***Roria vs Rep (1967) EA 583,*** *it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-*
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> > *"Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."*

12. The court is obliged to test the evidence with care but in the case of ***Anjononi & Others v Republic*** **[1980] KLR 59**, the Court of Appeal recognised that the evidence of recognition of a suspect is more assuring and reliable that the identification of a stranger but it nevertheless must be examined because mistakes can also be made. At all events, such evidence and recognition must be watertight to justify conviction.

13. This was a case of recognition rather than identification of a stranger as PW 1 testified that she knew the appellant from the village, a fact admitted by the appellant in his defence. He came into PW 1's house while the tin lamp was on and greeted her. The light of the lamp, the proximity of interaction and prior knowledge are all factors that lead me to conclude that the possibility of mistaken identity was excluded from the totality of the circumstances. The testimony of PW 1 was buttressed by the fact that she reported and named the appellant as one of the assailants.

14. There was no suggestion to PW 1 in evidence that she was motivated by spite of ill will against the appellant and his defence being a mere denial could not withstand the weight of positive evidence of the prosecution implicating him. I therefore find and hold that the appellant is the person who in association with other persons raped the complainant. I affirm the conviction.

15. The minimum sentence for the offence of gang rape under **section 10** of the ***Sexual Offences Act*** is not less than 15 years which may be enhanced to life imprisonment. It is now clear that mandatory minimum sentences are unconstitutional following the decision of the Supreme Court in ***Francis Karioko Muruateru & Another v Republic*** **SCK Pet. No. 15 OF 2015 [2017] eKLR** and subsequent decision of the Court of Appeal in among other cases ***Christopher Ochieng v Republic*** **KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR.**

16. The trial magistrate imposed a sentence of 25 years on the basis of the fact that the appellant attacked the complainant who was an elderly woman. While I agree the offence was serious, there is need to be consistent in sentencing bearing in mind the tariff imposed by statute and sentences imposed for offences like murder and manslaughter. I therefore find the sentence of 25 years excessive and reduce the same to 12 years' imprisonment.

17. In conclusion, I affirm the conviction and the appeal is only allowed to the extent that the sentence of 25 years' imprisonment is quashed and set aside and substituted with a sentence of **twelve (12) years' imprisonment** to run from **27th August 2018**.

DATED and DELIVERED at NAIROBI this 14th day of MAY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.