REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 25 OF 2019

MOO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the judgment, conviction and sentence in Siaya Principal Magistrate's Court Criminal Case No. 31 of 2018 delivered by Hon T. M. Olando, SRM on 5/3/2019)

JUDGMENT VIA SKYPE

1. The Appellant **MOO** was charged before the Principal Magistrate's Court at Siaya in Sexual Offence Case No. 31 of 2018 with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. Particulars thereof are that on 14th August March 2018 at Ojwando jointly with others not before court intentionally and unlawfully caused their penis to penetrate the vagina of ***LA*** (full name not to be disclosed for publication) aged 22 years by use of force. The appellant also faced the alternative charge of indecent act contrary to Section 6(a) of the Sexual Offence Act No. 3 of 2006.

2.The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.

3. The trial magistrate, Hon. T. M. Olando, SRM, after hearing the four prosecution witnesses and the testimony of the appellant in defence found the appellant guilty of the offence of gang rape contrary to Section 10 of the Sexual Offence Act No. 3 of 2006 and sentenced him to serve 15 years imprisonment.

4. Aggrieved by the said conviction and sentence the appellant initially filed grounds of appeal both against conviction and sentence but subsequently filed an amended petition of appeal against the sentence of 15 years imposed upon him that was based on three grounds as follows:

> *a) That the trial court and prosecution did not dare to consider the circumstances that surrounds the impact of the offence to its nature.*
>
> *b) That the evidence in (sic) record from the expert and the sentence imposed is weighty and harsh.*
>
> *c) That* ***I beg this honourable court to drive itself to Article 50(2) of the Constitution and Section 329 of the CPC.***

5. The appellant also filed written submissions in support of his appeal. In the said submissions, the appellant submitted stated that the ordeal took place during night hours and under disco dance and influence of alcohol circumstances in which both parties were not very sure of what transpired. The appellant submitted that PW1, the complainant herself was a drunkard and was not aware of what really happened to her hence found herself out of memory as was confirmed by PW2's testimony.

6. The appellant further submitted that the proof and evidence on record did not support the charges brought against him and further that the medical evidence and findings exonerated him from the act as the examination analysis revealed an attempted Rape.

7. The appellant further submitted that the prosecution did not prove the alleged crime beyond reasonable doubt as required by section 107 of the Evidence Act and as stipulated in the case of **Ricky Ganda v Republic of South Africa**.[no citation given].

8. The appellant further urged court to consider that the alleged crime was committed under the influence of alcohol and in the fog of youth and reduce the weighty and harsh sentence imposed by the trial court. He further submitted that the period he has already served in jail had greatly contributed to the change and reform attitudes as wrong doer before law and thus seeks a non-custodial sentence. The appellant relied wholly on his written submissions at the oral hearing.

9. In opposing the appeal, the Respondent represented by Mr. Okachi Senior Principal Prosecution Counsel submitted that the prosecution proved beyond reasonable doubt that the appellant committed the offence that the complainant was found to have sustained the injuries in her genitalia although the Clinical Officer stated that there was attempted rape. Further, that the Clinical Officer confirmed that the offence took place. Counsel submitted that the evidence of PW1 was well corroborated. On sentence, counsel submitted that the same was lawful.

10. This being a first appeal, this court is obliged to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither saw nor heard the witnesses as they testified. **See Okeno V Republic [1972] EA 32.**

11. Revisiting the evidence before the trial court, **PW1 LA** testified that on 14/8/18 they had gone to a disco together with Josephine Adhiambo, Tobias and Dadi and that as they were sitting in a pub, M went and gave her some alcohol which she took and she began to fill dizzy.

12. She stated that at 4 am, M the accused /appellant herein went and put her on a motorbike and when her friend tried to stop them they assaulted her friend. That they then took her to a bush and the three people raped her. Her friends followed her and found her and took her to hospital and later she reported the incident to Kogelo Police Station.

13. In cross examination, she reiterated her evidence in chief and stated that she knew the accused very well since he was her uncle and that they come from the same village. That the accused grabbed her when she was not very drunk

14. **PW2 JOSEPHINE ADHIAMBO** testified that they had gone to a disco together with the complainant and they went into a bar where the appellant joined them and gave the complainant Linet some alcohol. That when they entered a disco, at 4 am the appellant went with two other people and they took LA and put her on another motorbike and sand witched her in between them and they drove away and that the appellant said that they were taking LA to her home. PW2 then followed them and found LA along the way with her clothes removed. They escorted her to hospital. She stated that she was related to the appellant as a “brother” from home.

15. In cross examination she maintained her testimony in chief and stated that the motor bike belonged to David. She stated that she asked the appellant why he was taking away LA who was his relative yet there were other women at the market and that as she was his relative, other people would not suspect him as it was at 4am.

16. **PW 3 EVANCE ORIENY** a Clinical Officer at Masumbi Dispensary testified that he received LA on 17/8/18 with a history of having been raped by persons known to her. On examining her, he found that she hand changed clothes and had smell of alcohol and appeared drunk but was able to communicate consistently. That on examining her, he found that she had lacerations on the vagina and there was pre-vaginal bleeding indicative of her menses. She was not pregnant but laboratory tests revealed presence of epithelial cells. There were no spermatozoa. He stated that there was an attempted rape. He referred the complainant to Siaya County Hospital for more tests. He filled the P3 form where he concluded that the alleged Act was confirmed happened. He produced the P3 form and Post Rape care Report and lab tests as exhibits.

17. **PW4 NO. 84512 PC MTWIRI ALFRED** attached to Kogelo Police Station testified that 14/11/18 he was handed over the file by PC Kioga. That he was aware of a complaint lodged by Josephine Adhiambo and David Owuor on 14/8/2018, who reported to the station that LA had been found along Ojwando road.

18. He stated that himself and PC Kioga went and found LA who was naked and PC Kioga took her to hospital and on 17/8/18 they arrested MO. He stated that they investigated the case and the two witnesses who were with both the complainant and the appellant identified the appellant to the police leading to his arrest. Further, that the appellant called the two witnesses that he would handle the case in court all by himself so they should not come to court.

19. Placed on his defence, the appellant identified himself as MOO a resident of Ojwando and a bodaboda rider. He gave unsworn statement of defence and stated that on 17/8/18 at 4pm he had taken a customer to Nyangoma from Bondo and he was arrested. He stated that he only learnt later that LA had reported him.

DETERMINATION

20. I have considered the appeal herein as per the amended grounds filed together with the written submissions, evidence adduced by the prosecution witnesses and the appellant in his defence, the written submissions and the opposition to this appeal by the Respondent’s counsel Mr. Okachi.

21. In my humble the following issues flow for determination:

> 1. ***Whether the Prosecution proved the offence of gang rape against the appellant and whether the proof was beyond reasonable doubt;***
>
> 2. ***Whether the sentence of 15 years imprisonment was manifestly excessive in the circumstances.***

22. On whether the prosecution discharged the burden of proving the offence of gang rape against the appellant and whether the proof was beyond reasonable doubt, the evidence PW 1 the complainant was that that the appellant joined her at a pub and gave her some alcohol which made her dizzy and they went into a disco. Later at about 4 am on 14/8/18 the appellant in the company of other men pulled her and sand witched her onto a motorcycle and rode away and gang raped and left her in the bush. She was rescued by her friends and the police who followed her and found her naked.

23. This evidence by the complainant was corroborated by the testimony of PW2 Josephine Adhiambo who testified that they were with the complainant and the appellant at a pub when the appellant gave the complainant some drink and later at 4 am the appellant went with two others where the witness and the complainant were in a disco and they took the complainant and put her on a motorbike and went away with her saying he was taking her to her home. The witness went and informed the police who accompanied her to search for the complainant and they found her in the bush having been raped.

24. PW3 a clinical Officer who examined the complainant on 17/8/2018 confirmed that she had lacerations on the vagina and pre vaginal bleeding. Lab tests showed epithelial cells but no spermatozoa. He filled and produced the P3 form and Posts Rape Care form as well as laboratory tests and results thereof as exhibits.

25. PW4 a police officer at Kogelo Police Station too confirmed that PW2 and David Owuor reported to them at 500am that the complainant had been found raped. He proceeded together with PC Kioga to the scene where they found the complainant naked. His colleague PC Kioga took her to hospital and the appellant was later arrested.

26. The evidence of the complainant that she was to be found in the company of the appellant and two other men was corroborated by PW2 who was with the complainant and who saw the appellant place the complainant on a motorcycle in the company of two other men and take off saying that he was taking her home. Albeit the PW did not see the complainant being raped by the appellant, it is not in doubt that it was the appellant and his friends who were the last people to be seen with the complainant, taking her away on a motorcycle and claiming that they were taking her to her home. She never reached her home. He was found naked on the way and taken to the hospital by PW2 and PC Kioga who visited the scene with PW4 that early morning at 5am.

27. The appellant was a person well known to the complainant who stated the he was her uncle and this was corroborated by PW2 who stated that the appellant and complainant wee related so he could not be suspected for leaving with her. There was evidence from PW2 and the complainant that the appellant gave the complainant alcohol which she took before she went to the disco and was later pulled from there by the appellant and placed on a motorcycle and driven away in the company of two other men.

28. In my humble view, although the appellant denied being with the complainant that night, his defence weighed against the evidence of PW1 and PW2 cannot be believed and there was no indication that the complainant could have framed the appellant with such an offence. There was also no possibility of mistaken identity as the appellant and the complainant were together for most of that night before he pulled her away at 4am.

29. The trial court in the analysis tended to shift the burden of proof to the appellant to challenge the evidence of identification or recognition in cross examination of the complainant by the appellant but this court being a first appellate court has reassessed that evidence and reached my own independent conclusion that there is nothing on record to show that the appellant could have been framed for the offence committed against a relative who lives in the same village as the complainant and PW2. I find that the trial court did not err when he dismissed the defence of the appellant as an afterthought. Furthermore, in his amended grounds of appeal, the appellant only asks this court to consider circumstances under which the offence was committed where both the appellant and complainant were, according to the appellant, intoxicated. An intoxicate person cannot consciously take his relative on a motorbike that he was riding, away from the glare of other people, take her into some bush and subject her to an orgy in the company of his friend. The intoxication excuse is found to be baseless.

30. I find and hold that the identification of the appellant by PW1 and PW2 as the person who left with the complainant on a motorcycle in the company of two other men was not in doubt.

31. **PW 3 EVANCE ORIENY** the Clinical Officer who examined the complainant confirmed that indeed the alleged offence was committed that is the complainant was indeed raped. Although the appellant had issue with the witness saying that there was attempted rape, this court finds that evidence of lacerations of the vagina of the complainant cannot be evidence of attempted rape. That in my humble view is rape.

32. The appellant also stated that both the appellant and the complainant were drunk hence they could not tell what happened. The complainant testified that although she had taken alcohol, as confirmed by PW3 that the complainant was smelling alcohol when she was taken to hospital for examination, she was not very drunk. The complainant vividly explained how she was taken away by the appellant in the company of his two friends and led her into a bush and she was found naked by PW2 and the police officers who rescued her and took her to hospital.

33. Iam persuaded that the appellant and his friend's gang raped the complainant. Accordingly I find and hold that the evidence adduced by the prosecution proved the charge of gang rape. I uphold the appellant's conviction.

34. I must however point out that the amended grounds by the appellant tended to show that the appellant was appealing against sentence alone although that is not very clear hence my earlier analysis of the evidence on whether the prosecution proved the charge against the appellant beyond reasonable doubt.

35. The second issue therefore is whether the sentence of fifteen years imprisonment was manifestly excessive as to warrant interference by this court. The circumstances under which an appellate court interferes with sentence meted out by a trial court.

36. The principles guiding interference with sentencing by the appellate Court were properly set out by the predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor v Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

37. The Court of Appeal further in **Bernard Kimani Gacheru v Republic [2002] eKLR** restated that:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

38. In this case the appellant was charged under section 10 of the Sexual Offence Act No. 3 of 2006**.** The said provision states:

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

39. The said provision provides for *prima facie* mandatory minimum sentence of 15 years imprisonment where the offender is convicted of gang rape and leaves no room for the trial Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. The section deprives the trial court of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances.

40. Whereas the sentence imposed is lawful, nonetheless, such legal provision does not meet the constitutional edict enunciated in the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR, Petition No. 15 and 16 of 2015,** where the apex Court expressed itself thus:

"...If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict."

41. In the South African case of **S v Toms 1990 (2) SA 802 (A) at 806(h)-807(b),** the South African Court of Appeal (**Corbett, CJ)** held:

"The infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

42. In **S v Mofokeng 1999(1) SACR 502 (W) at 506 (d)**, **Stegmann, J** opined that:

"For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."

43. The ***Kenya Judiciary Sentencing Policy Guidelines, 2016*** provide inter alia:

"Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."

44. The Court of Appeal in **Jared Koita Injiri v Republic [2019] eKLR** which was a sexual offence appeal case held that:

"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

45. These authorities do not stipulate that the court ought not to mete out what appears as *prima facie* mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentence.

46. In this case, the appellant took advantage of a relative as he was the complainant's uncle with whom they had been at a disco and drinking. The appellant gave to the complainant alcohol and in the pretext of escorting her to her home, in the company of other men, gang raped her.

47. According to the appellant, this court should be moved by the fact that both he and the complainant had imbibed alcohol and were not in the proper frame of mind. The complainant in her unrebutted testimony stated that her friends had tried to stop the appellant and his counterparts from taking her on his bike but the appellant and his friends fought them off.

48. The prosecution stated that the appellant was a first offender. In his mitigation the appellant stated that he did not commit the offence. However, upon a probation Report being filed, it revealed that the appellant had antisocial behaviour and was rude and never respected authority. He had been threatening and insulting the complainant and his family intimidated her saying should he be jailed and he dies in prison she shall be haunted. The offence traumatised and embarrassed the complainant who is a niece to the appellant.

49. The complainant was aged 22 years whereas the appellant was then 27 years. His co offenders took off and were never arrested and charged with the heinous offence committed against his very own relative. The probation officer found that non-custodial sentence for an adult in a sexual offence was not appropriate. I agree.

50. From his own submissions in support of this appeal against sentence, the appellant is clearly a person who is not in control of his actions. Such a person a danger to the society.

51. In the case **<u>R v Scott (2005) NSWCCA 152</u> Howie J Grove and Barr JJ** stated:

> ***"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."***

52. In **<u>R v Harrison (1997) 93 Crim R 314</u>** it was stated:

> ***"Except in well- defined circumstances such as youth or mental incapacity of the offender…Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed."***

53. The Supreme Court in **<u>Francis Karioko Muruatetu & Another v Republic</u>, Petition No. 15 of 2015,** set out the following guidelines with respect to sentencing:

> ***"[71]…the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) Age of the offender;***
>
> ***(b) Being a first offender;***
>
> ***(c) Whether the offender pleaded guilty;***
>
> ***(d) Character and record of the offender;***
>
> ***(e) Commission of the offence in response to gender-based violence;***
>
> ***(f) Remorsefulness of the offender;***
>
> ***(g) The possibility of reform and social re-adaptation of the offender;***
>
> ***(h) Any other factor that the Court considers relevant."***

54. Having considered the circumstances under which the offence was committed as well as the appellant's defence which was a mere denial, it is my considered view that there is no reason to interfere with the sentence meted against the appellant who took advantage of his niece and gave her alcohol then allowed not only himself but other men to gang rape her. If the appellant could do such a thing to his own relative, what could he have done to a stranger? The Francis Muruatetu case did not outlaw minimum or mandatory sentences. It abhorred the fact that such sentences do not give an accused person the right to mitigate and also deprives the trial court discretionary power to mete out appropriate sentence considering mitigations. In this case the appellant was given an opportunity to mitigate before he was sentenced hence he was not denied any right.

55. Accordingly, I find and hold that the sentence imposed was appropriate in the circumstances and there are no mitigating circumstances to warrant interference with the same

56. In the end I find and hold that the conviction of the appellant was sound and sentence warranted. I uphold the judgment, conviction and sentence imposed by the trail court and dismiss this appeal both against conviction and sentence.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype due to Covid 19 situation

R.E. ABURILI

JUDGE