REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 50 OF 2019

SAMWEL SAMBU alias TIONDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. D.K Matutu – PM

dated 24th May, 2019 at the Principal Magistrate's Court at Kilgoris

in Criminal (Sexual Offences)Case No. 8 of 2018)

JUDGEMENT

1. Samwel Sambu alias Tiondo (appellant) was charged with **rape** contrary to **Section 3(1) (a) (b) (3)** and **(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of which were that on the 12/2/2018 at around 7.30 p.m at [particulars withheld] Village, Ol donyo Location in Transmara Sub county intentionally and unlawfully caused his penis to penetrate the vagina of CL by use of force, intimidation and threats by telling her he would kill her if she raised alarm.

2. He faces an alternative count of **indecent act with an adult** contrary to **Section 11(A) of the Sexual Offences Act No. 3 of 2006**. That at the said time and place he intentionally touched the buttocks, breasts and vagina against her will.

3. He faces a second count of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars of which are that at the said time and place he assaulted CL thereby occasioning her actual bodily harm.

4. The appellant was tried and in a judgement dated 24/5/2019, he was found guilty of the main count, convicted of the offence of rape and of a charge of assault. He was sentenced to serve 11 years imprisonment for rape and one year for assault.**5.** Aggrieved by the conviction the appellant vide a petition lodged in Court on 3/6/2019 appealed against the said decision. His grounds of appeal can be summarized as;**1. That he was convicted on insufficient evidence.**

2. The medical evidence tendered was unreliable.

6. The appeal was canvassed by way of written submissions by the appellant which were responded to orally by Mr. Otieno for the DPP.

7. As a first appellate court, I am obligated to re evaluate the evidence tendered and trial and make my own independent findings all along conscious of the fact that I never saw or heard the witnesses and give due allowance in that regard.

8. This legal requirement was well enunciated in the case of **Okeno –vs- R [1972]EA 32** where at page 36 the court stated;

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975]E.A 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; it must make its own findings and draw its own*

conclusions. 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 witnesses, see Peters –vs- Sunday Post (1958)E.A 424."

9. To aid in the re evaluation, a recap of the evidence is necessary. The prosecution's case was that PW 1 (the complainant) was from a posho mill on the 22/2/2018 at about 7.30 pm when she met the appellant who strangled her and fell her down. He removed her clothes and had sex with her. PW 1 was injured on the back and waist.

10. PW 1 was examined by John Kirui, a clinical officer from Angata Health Centre on 13/2/2018. She had bruises on the neck, tenderness and swelling. She had pain on the chest, bruises on the hand and tenderness on the back. There was whitish discharge on the labia. There was no laceration or bruises. The hymen was absent. The clinical officer made a conclusion that she had been raped and assaulted.

11. In his defence the appellant in an unsworn statement stated that on 24/2/2018 at around 9.00 p.m he was at home preparing food for his children. He was arrested by police officers. He denied the offence. He said the doctor established no injuries.

12. I have taken time to consider the evidence on record, the petition of appeal and submissions made.

13. The prosecution's case is based on the evidence of a single identifying witness, PW 1, the complainant.

Section 124 of the **Evidence Act (Cap 80 Laws of Kenya)** provides;

"S 124 *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. The trial magistrate at paragraph 11 of the judgement had this to say;

"11. *Was the alleged victim telling the truth? I have had the opportunity of hearing the alleged victim testify on oath. I have also had the opportunity to hear the defence proffered by the accused together. The alleged victim says the accused assaulted her and raped her. She sustained injuries. Her testimony on injuries is also supported by the clinical officer's report on the injuries. She has been consistent as to what happened. She had no reason or dispute with the accused prior to the offence. She did not consent to the sexual intercourse. I believe her testimony both on identification and on the narrative of the events of the evening in question."*

15. Having re evaluated the evidence; I find that PW 1's evidence was firm and was not shaken even under cross examination. She saw the person who assaulted and raped her. She knew him before. There was light. Her description of the parts of her body hurt in the scuffle is consistent with the findings in the medical report.

16. This being a case of recognition, it breathes more certainty to the fact that the appellant was PW 1's assailant. The difference in approach between identification and recognition was expressed by Madan J.A in **Anjonini and Others –vs- R (1980) KLR 59** at page 60 where he stated;

"This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. The republic (unreported.)"

17. Whereas I am aware that cases of misrecognition may occur, in light of the evidence on record I am satisfied that the recognition in this case was proper.

Though the evidence of PW 1 is not corroborated by any other direct evidence, I note that her testimony was sufficient within the confines of **Section 124** of the **Evidence Act**. I am satisfied that she told the truth. No evidence to the contrary has been led to show that she had any motive to frame the appellant.

18. By the trial court's sentiments expressed at paragraph 11 of the judgement, it is manifestly clear that the trial magistrate properly addressed himself to the evidence and the law and reached the correct findings.

19. I am satisfied that the evidence on record against the appellant is overwhelming proving the charge of rape and the charge of assault. The appellant was thus convicted on the basis of sound evidence and the conviction was safe.

20. As regards the sentence, **Section 3(3)** of the **Sexual Offences Act** provides;

"S 3(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 ten*

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

21. I note the appellant was sentenced to 11 years imprisonment barely above the minimum sentence of 10 years provided in law. The sentence is thus lawful and neither harsh nor excessive.

22. With the result that I find the appeal herein lacking in merit and disallow the same in its entirety.

Dated and **delivered** at **Kisii** this **13th** day of **May, 2020**.

A.K NDUNG'U

JUDGE