



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CR. APPEAL NO. 6 OF 2018**

*(From Original Conviction and Sentence in Criminal Case No. 362 of 2014 of the Principal Magistrate's Court at Wang'uru.*

**ZABLON MUTHIE GACHARE..... APPELLANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

1. The appellant Zebron Muthie Gachare was convicted of the offence of **Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006** and ordered to serve Fifteen years imprisonment by the Principal Magistrate Wang'uru Criminal Case No. 362/2014. The appellant was aggrieved by both the conviction and sentence and filed this appeal which initially raised Six grounds but he filed amended ground raising the following four grounds:-

**a) THAT, the trial magistrate erred in law and fact while basing my convicting with charges which were not adequately proved in view the age of the victim was not indicated on the charge sheet neither birth certificate was nowhere in the evidence thus Section 214 of the Criminal Procedure Code was violated.**

**b) THAT, the trial Magistrate further erred in law and fact while convicting I the appellant with uncorroborated evidence in regards to PW1, PW2 and PW4 testimonies.**

**c) THAT, the trial Magistrate lost direction after being influenced with the whole set of prosecution witnesses, adduced evidence and failed to warn himself with the danger of lying with single evidence of identification by the complainant while convicting I the appellant herein.**

**d) THAT, the trial Magistrate erred in law while rejecting my defence which same was not displaced by the prosecution side as per section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya.**

2. The appellant acknowledged that he was served with the notice that if he proceeds with the appeal the respondent will make an application for enhancement of the sentence imposed to life imprisonment and opted to proceed with the appeal.

3. This is a 1<sup>st</sup> appeal and this court has a duty to evaluate the evidence and come up with its own independent finding. The court however leaves room for the fact that it did not have a chance to see its witnesses when they testified and leave room for that. This was stated in the case of **Okeno –v- R (1972) E. A 32.**

4. The prosecution alleged that on 1/7/2014 at [Particulars Withheld] Township in Kirinyaga County in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of IW without her consent. The brief facts of the case are that the complainant IWK (PW-1-) is a female adult. On 1/7/2014 at around 11.00 Pm she had attended a birthday party of her friend N in [Particulars Withheld] Township. After the party she was escorted upto the gate where she boarded a motorcycle to take her home. On the way the rider stopped and said he wanted to pee. While there two other men emerged from [Particulars Withheld] Hotel. They pushed her off and held her back. They led her inside a house. One man held her hands while the other held her legs. One of the men then had sexual intercourse with her after removing her pant. One man raped her. The two men left and left one man in the house. That man is the appellant. The appellant is the one who had carried her on the motorcycle. The appellant is the one who raped her and the two other men left. The complainant was drugged as she only regained consciousness after the suspects had left. She was locked inside the house.

5. In the morning the complainant saw one lady going to the shops and called her to open for her. The lady screamed and many people went there including the village In-charge. The In-charge broke the door and rescued the complainant. The matter was reported to the police. The complainant was referred to hospital where she was examined and a P3 form was filled. The appellant was arrested and charged.

6. The appellant gave his defence on oath and denied the charge. He testified that on 4/7/14 he went to the house of Mama M for whom he

used to work and he was arrested.

7. I have considered the evidence tendered before the trial court, the grounds of appeal and the submissions. The appellant has faulted the trial court on the first ground on assertion that the age of the victim was not indicated on the charge sheet and no birth certificate was produced. I have considered the ground. The appellant was charged with Gang rape contrary to **Section 10 of the Sexual offences Act**. The Section provides:-

***“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.”***

8. On the other hand the **Act** has defined the offence of rape. **Section 3(1) a, b, & c & (2)**

***“(1) A person commits the offence termed rape if -***

***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.***

***(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.”***

The ingredients of the offence includes committing an act where he or she intentionally and unlawfully causes penetration with his or her genital organs.

9. The other person does not consent to the penetration or the consent is obtained by force, threats or intimidation of any kind.

10. Under the **Section** prove of age is not required. Prove of age is required under **Section 8 of the Sexual Offences Act** which deals with defilement. Under **Section -3-** the presumption is that the person is an adult and the offence is determined, not by the age of the victim but the absence of consent by the victim of the offence.

11. I find that the first ground of appeal is without merits. The prosecution was not under any obligation to prove the age of the victim or to produce the birth certificate.

12. On the 2<sup>nd</sup> ground the appellant submits that the trial Magistrate erred by convicting him on uncorroborated evidence. He submits that there were contradictions as to where the complainant was coming from and where she was picked by the alleged motor bike rider. The appellants submits that the complainant said she was escorted upto the gate because she wanted to report to work the next day. That PW-4-said the complainant was going to visit her friend who had promised to give her a place to sleep. The appellant submits that witnesses who were mentioned were not called as witnesses.

13. From the record PW-1- the complainant testified that she had attended a birthday party of her friend N. She said was escorted upto the gate because she wanted to report to work the following day at the saloon. N and other Four ladies took her upto the gate and she rode a motor bike.

14. I have considered the evidence. I find that there are no contradictions. The complainant did not in her evidence say where she was going. She said she told the rider to take her to [Particulars Withheld]. I note that PW-4- Cpl John Kanjala is the Police Officer who received the report from the complainant. The complainant may have told him where she was going. The alleged contradiction is imagined. I am not able to see any contradiction. In any case not every contradiction will lead to rejection of the evidence of the witnesses. The court will ignore minor contradictions if at all there is any. If there be contradictions which show that the witnesses were not honest it may reject the evidence or require that it be corroborated. The Court of Appeal in the case of **Erick Onyango Odeny -v- Republic** stated that –

***“The alleged contradictions on where the defilement took place does not amount to much when it is borne in mind that the charge and the evidence related to the defilement in appellant’s house -----***

***“Nor do we think much turns on the alleged contradictions on the time of the commission of the offence. The trial court after hearing all the evidence accepted that the offence was committed at about 7.00 Pm in accordance with the evidence of PW-2-. As noted by the Uganda Court of Appeal in Twehangane Alfred -v- Uganda Cr. Appeal No. 139/2001 (2003) UGCA 6 it is not every contradiction that warrants rejection of evidence. As the court put it “with regard to contradictions in the prosecutions case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***

15. The trial Magistrate in his Judgment at page 41 stated – ***“Having considered the complainant’s testimony, I found her to be a credible witness whose testimony was not shaken at all during cross-examination.”*** The trial Magistrate had the advantage of seeing the witness and assessing her demeanour. Having looked at her testimony, I find nothing to fault this finding by the trial Magistrate. Her evidence and

that of PW-4- is devoid of contradictions. I reject the ground.

16. The appellant has also alleged that some witnesses were not called. The nature of this offence is such that the court can rely on the uncorroborated evidence of the complainant if the court is satisfied that she is telling the truth. It is trite that no particular number of witnesses is required to prove a fact. Furthermore, the need to call a witness is gauged on the probative value of that witness or witnesses.

17. The trial Magistrate at Page 42 Line 7-10 of the record stated:-

***“I did not see anything to doubt the complainants’ testimony which was corroborated by that of the Village Elder Mutugi Gichimu (PW-2-) who rescued the complainant from the house of the accused.”***

18. Where the fact is sufficiently proved, failure to call a multitude of witness to prove the fact is not fatal to the prosecution case. **Section 143 of the Evidence Act** provide:-

***“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

19. The Court of Appeal in the case of **A.G.M –v- Republic (2014) eKLR** stated:-

***“We have considered this ground of appeal and we reiterate that the prosecution is not duty bound to call any given number of witnesses Section 143 of the Evidence Act provides that no particular number of witnesses shall in the absence of a provision of law to the contrary be required for the proof of any fact. In Julius Kalema Mutunga –v- Republic Cr. Appeal No. 31/2005 (unreported)***

***This court held that:-***

***As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, example, it is shown that the prosecution was influenced by some oblique motive.”***

20. The appellant has not alleged any oblique motive by the prosecution’s failure to call the said witnesses. Even in their absence, the case was proved to the required standards. The testimony of PW-2- Mutugi Gichimu, a Senior Village Elder was that on 2/7/14 he received a call from Michael Denis that a lady had been locked up in a house. He proceeded to the house and found the complainant. He called the OCS who told him to break open the house and take the girl to Wang’uru Police Station. Then PW-2 was called by Mama Denis telling her that the suspect had returned. PW-2- went back to the scene and found the appellant in the same house. PW-2- took the appellant to the police station. Failure to call those who called PW-2- does not raise doubts as PW-2- went to the scene and confirmed. The ground must fail.

21. The 3rd ground, the appellant submits that the issue of identification left a lot to be desired. He submits that the complainant never gave description of her assailants. That no eye witness was called. I have considered the ground. I find that the complainant identified the appellant in circumstances which favoured a positive identification. In her testimony PW-1- testified that when she was inside the house the appellant switched on the lights. She further stated that where appellant picked her it was not dark as there were security lights.

22. The testimony of the complainant was corroborated by the testimony of PW-2- who testified that after he rescued the complainant he went back to the house where he found the accused and arrested him. From the evidence of the complainant it is clear that there was no possibility of mistaken identity. The appellant was properly identified and was arrested from the scene of crime. The ground is without merits.

23. Finally, the appellant submits that the trial Magistrate did not evaluate the evidence. I have considered the Judgment of the trial Magistrate. No burden was shifted on the appellant. The trial Magistrate stated that the appellant gave a sworn defence and stated how he was arrested. It is a defence in an allegation of rape that the complainant had consented, hence the comment that such defence was not advanced. The trial Magistrate found that the charge was proved beyond any reasonable doubts. There was no dispute on the manner in which the appellant was arrested. I find that the defence of the appellant was rejected as there was overwhelming evidence that he is the one who raped the complainant. The trial Magistrate was right in finding that the charge was proved and rejecting the defence.

24. The appellant had also faulted the evidence of the Clinical Officer. The complainant testified that she was treated at Kimbimbi Hospital. The treatment notes show that it is from Kimbimbi Sub-District Hospital. The P3 form was filled at Nguka Health Centre, PW-3- in cross examination confirmed that he is the one who filled the card as well as the P3 form. Since PW-3- gave evidence and was cross-examined, there is no reason why the evidence could not be relied on. PW -3- found that:-

- The clothes of PW-1- were soiled.

- Bruises on the neck

- Tenderness on the back, chest and upper limbs.

- Redness on the genitalia.

- Blood discharge.

25. These injuries are consistent with the evidence of the complainant and also corroborates her testimony that she was raped.

26. On the issue of the Jean trouser, it appears from the record that the complainant identified it in court when she testified but it was not produced as exhibit. It was marked (P.F F 1-3) at page. Failure to produce it was not fatal.

27. Having evaluated the evidence, I come to the conclusion that there was overwhelming evidence tendered by the prosecution which proved the charge against the appellant beyond any reasonable doubts. The trial Magistrate arrived at the inevitable conclusion, that of guilt of the appellant. I find that the appeal is without merits.

28. The State had applied for enhancement of the sentence to life imprisonment. The appellant when he gave his mitigation in court he said he was Twenty (22) years old.

29. The court imposed the minimum sentence of 15 years. The minimum sentence was provided for mandatorily. I find that considering that the offence is serious, the sentence of 15 years imprisonment was deserved. I find no reason to enhance the sentence and I will therefore not interfere with it. I order that the appeal lacks merits and is dismissed.

**Dated at Kerugoya this 8<sup>th</sup> day of May 2020.**

**L. W.GITARI**

**JUDGE**