REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 205 OF 2019

AZUBU JOSEPH MWITI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence of the Hon. J. Irura (PM) made on 11/11/2019 in Nkubu SO

No. 3 of 2019)

J U D G M E N T

1. On 28/1/2019, **AZUBU JOSEPH MWITI ("the appellant")** was arraigned before the Principal Magistrate's Court at Nkubu charged with the offence of rape contrary to ***section 3(1)(a)(b) (3) of the Sexual Offences Act No. 3 of 2006.***

2. It was alleged that on 24/6/2018 in Imenti South sub county within Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of NK without her consent.

3. The appellant also faced an alternative charge of committing an indecent act with an adult contrary to ***section 11(A) of the Sexual Offences Act.*** It was alleged that on the same day and same place, the appellant intentionally touched the buttocks, breast/vagina of the said NK with his penis against her will.

4. The appellant denied the charge but after trial, he was found guilty, was convicted of the offence of rape and sentenced to 15 years imprisonment.

5. Aggrieved by that decision, the appellant has now appealed to this Court against both the conviction and sentence. He has raised various grounds which can be condensed into five as follows: -

a) That the trial Court erred in failing to find that the prosecution had not proved its case beyond reasonable doubt.

b) That the trial Court failed to note that there was need for DNA test to prove the case against the appellant.

c) That the trial Court erred in convicting the appellant on contradictory, inconsistent and uncorroborated evidence.

d) That the trial Court erred in failing to note that the clinician had relied on a document from a private hospital.

e) That the trial Court erred in meting out the mandatory sentence of 15 years which was contrary to Article 25(c) of the Constitution.

6. This being a first appeal, this Court is enjoined to review and re-evaluate the evidence afresh with a view to making its own independent findings and conclusions. In so doing, the Court must give regard to the fact that the trial Court had the advantage of seeing the witnesses testify. **See Ekeno v. Republic [1972] EA 32.**

7. The prosecution case was that on the material day at about 6 pm, the complainant **(PW1)** was sent by her mother **(Pw6)** to take a pumpkin to the home of the appellant's brother. On her way there, she met the appellant who persuaded her to accompany him to his house so that he could give her a blow drier to take to her mother. When they reached the appellant's house, he locked the door, pulled her to his bed and there was a struggle between them. He tore her skirt and panty and inserted his penis inside her vagina. She screamed for help.

8. **GK (Pw4)** was in her house within the homestead when she heard the screams coming from the house of the appellant. The person

screaming identified herself as the complainant whom pw4 identified as a cousin to her husband. She also screamed thereby attracting the attention of neighbours who came to find out what was happening. The appellant threatened them onlookers with a panga.

9. **Florence Gatwiri (Pw5)** was coming from the market at the material time when she heard screams from the appellant's house. She went there and she found people outside screaming. The complainant was also screaming from inside the appellant's house. The appellant then opened the door and let the complainant out. He had a panga with which he threatened those present. The complainant was wearing a skirt and blouse. The skirt was torn on the side.

10. **LK (Pw6)** who had sent the complainant to the home of the appellant's brother received a call about 7 pm. The complainant told her that the appellant had raped her. She accompanied her brother and husband to the scene. They met the complainant with other people on the way and they reported the incident at the Kinoro Police Post. Thereafter, they took the complainant to St. Anne Mission Hospital for examination and treatment.

11. **Moses Baiyania (Pw2),** a Clinical Officer at the Kanyakine sub-county hospital appeared and produced the P3 Form from that hospital. He also produced the PRC Form which showed that when the complainant was examined, she was found to have laceration and tender swelling on the forehead. The lower lip was swollen. She had bruises and swelling on the right thigh medial aspect. There were bruises and laceration on the external genitalia with a broken hymen which was suggestive of forceful penetrative sexual intercourse.

12. **PC. Daniel Nzioka (Pw3)** investigated the case. That evening, the complainant was escorted to the Police Post by her mother with a complaint of having been raped by the appellant. They had struggled whereby the complainant's under-pant and skirt were torn. He produced them as exhibits. The appellant disappeared after the incident and only resurfaced in January, 2019 when he was arrested by the area chief.

13. When placed on his defence, the appellant gave unsworn evidence. He stated that the area chief arrested him and on 24/1/2019 took him to Gaturi AP Post. The Chief told him that he had been sent by the appellant's aunt to arrest him on a complaint that he had raped the complainant on 25/6/2018. It was the first time he was hearing about that allegation. He was then taken to court where he denied the charge.

14. The appellant filed his submissions on 25/5/2020 which the Court has carefully considered. The prosecution did not file any.

15. The first ground was that the prosecution case was not proved beyond any reasonable as doubt required. The appellant submitted that there was no collaborating evidence with regard to the under-pant and the skirt produced as **PExh 2 and 3.** That the complainant did not identify the colour of the said exhibits. That the evidence of **Pw4** could not be believed as the incident took place at 7 pm and there was darkness. That she could not therefore have what was happening in his house. Finally, it was submitted that the prosecution failed to call two crucial witnesses Kandy and her sister. The case of **Bukenya v. Uganda [1972] EA** and others were relied on in support of those submissions.

16. Under ***section 3 of the Sexual Offences Act***, rape is defined to mean the intentional and unlawful penetration of a person's genital into another's organ without the consent of that other person. It also includes situation where the consent is obtained by force. Accordingly, it was incumbent upon the prosecution to prove that, the appellant intentionally and unlawfully caused his genital organ to penetrate that of the complainant without her consent or with force.

17. The complainant's testimony was that on the material day at about 6 pm, the appellant convinced her to accompany him to his house to pick a blow-drier for her mother. On entering the house, the appellant locked the door and pulled her to bed. They struggled for some time before the appellant tore the complainant's under-pant and skirt. He then inserted his penis in her vagina.

18. The complainant screamed thereby attracting the attention of **Pw4.** The complainant identified herself and **Pw4** screamed and other people including **Pw5** came. The appellant then opened the door for the complainant to come out but he was armed with a panga to keep the people at bay.

19. The complainant was examined on the same day at St. Ann Mission hospital at 10.30 pm. The Post Rape Care (PRC) and P3 Forms that were produced in evidence showed that the complainant had superficial lacerations on the outer genitalia and the hymen was absent. The conclusion arrived at was that there had been deep sexual penetration.

20. Contrary to the appellant's contention, the evidence of the complainant was corroborated by both **Pw4 and Pw5.** While the screams of **Pw4** attracted the neighbours who came to rescue the complainant, **Pw5** saw the appellant open the door for the complainant to come out from his house. He had a panga to keep at bay those present.

21. The examination of the complainant did not reveal the presence of any spermatozoa. That in itself does not displace the fact of penetration. Due to the struggle the two had, it may well be that the appellant was unable to complete his sexual act up-to the point of ejaculation because of the complainant's screams.

22. In the case of **Mark Oiruri Mose v. Republic [2013] Eklr**, the Court of Appeal delivered itself on the issue of penetration in sexual offences thus: -

> ***"Her finding that as there was no evidence of spermatozoa, the appellant could not be convicted of defilement, was with respect, erroneous. As we have stated, all that was required to be proved was not presence of spermatozoa, but penetration of the victim's vagina with the appellant's penis and that was clearly proved".***

23. In the view of this Court, the fact of the appellant stripping the complainant of her under-pant and tearing her skirt was a clear intention to have sexual intercourse with her. He actualized it by the insertion of his penis unto her vagina. The lacerations found on the complainant's

outer genitalia 2 hours later were prove of the said penetration.

24. In this regard, the Court is satisfied that the act of penetration was proved to the required standard by the prosecution.

25. The other aspect that the prosecution was required to prove was that there was no consent and that if there was it had been obtained by force. The complainant stated that she struggled with the appellant for some time before he was able to tear her under-pant and skirt and thereafter insert his penis into her vagina.

26. The medical evidence that was produced showed that the complainant suffered laceration and tender swelling on the forehead, swollen lower lip and laceration on the inner thighs. Such are injuries that are not sustained by a consenting party to a sexual act.

27. Further, the torn under-pant and skirt were clear evidence that there was struggle by the complainant before the appellant was able to penetrate her genitalia. That was clear prove that there was no consent on her part to the sexual act by the appellant.

28. It was the appellant's contention that there was no evidence that the under-pant and the skirt that were produced in evidence as **PExh.2 and 3** were the ones that the complainant was wearing on the material day. That this was because the complainant did not describe their colours.

29. The complainant's testimony when she identified the said exhibits in court was neither challenged not shaken. She identified them as the ones she was wearing on the material day. **Pw3** also testified that those were the clothes that the complainant brought to the station as the ones torn by the appellant during the incident. In addition, **Pw5** stated that when the complainant came out from the appellant's house, her skirt was torn on the side. That contention is therefore without basis.

30. As to the identity of the perpetrator, the complainant narrated how the appellant persuaded her to accompany him to his house. It was still day light at about 6 pm when she went to his house. **Pw4** heard the complainant scream from the appellant's house. **Pw5** not only saw the complainant come out of the appellant's house, but that it was the appellant who opened the door to allow the complainant come out. The complainant was in the house of the appellant alone with no other person. In this regard, it was the appellant who was the perpetrator and there could never have been any mistaken identity.

31. The appellant submitted that the prosecution failed to call crucial witnesses. These were Kendi and her sister who heard the complainant scream. While it is a requirement that the prosecution should at all times produce crucial witnesses, it is not the number of witnesses who matter but the quality of the evidence that the witnesses who are called tender.

32. In the present case, the said Kendi and her sister were said to have heard the complainant scream. The Court believes that their evidence would not have been any different from that of **Pw4 and Pw5** who heard those screams and responded to them. In this regard, the failure by the prosecution to call the said sisters did not affect its case.

33. Accordingly, this Court is satisfied that the prosecution proved the offence beyond any reasonable doubt. Ground 1 is without merit and is dismissed.

34. The second ground was that the trial Court failed to note that there was need for DNA test to prove the case against the appellant. The appellant did not submit on this ground. As a result, he did not indicate why there was any need for DNA.

35. There is no requirement in law for DNA test to be undertaken in order to prove rape. If there is any independent evidence that is able to prove the offence, it is not mandatory for the prosecution to undertake DNA profiling. In the present case, there were no spermatozoa that were noted after the WPM swap was undertaken. The evidence that the prosecution tendered was overwhelming and there was no need therefore for DNA testing. That ground also fails.

36. The third ground was that the trial Court erred in convicting the appellant on contradictory, inconsistent and uncorroborated evidence. Contrary to the appellant's contention, the evidence of the prosecution was not only consistent and corroborative, it was firm and specific in material particular. The appellant did not point out which evidence was contradictory or inconsistent. In this Court's view the prosecution evidence on each ingredient was both consistent and corroborative. That ground is therefore without basis and is dismissed.

37. The fourth ground was that the trial Court erred in failing to note that the clinician had relied on a document from a private hospital. The testimony given was that after the incident was reported at Kinoro Police Post at 9.30pm, the complainant was taken to St. Ann Mission Hospital for treatment and examination.

38. Time is a crucial element in sexual offences. Any delay can compromise the evidence. There was no evidence that there was any public facility that was proximally near and convenient to the complainant which she could have visited.

39. In any event, there is no requirement that a sexual offence victim should only visit a public facility when it is unavailable. All that is required is proper medical attention and recording. In this instance, the victim was properly examined by a medical officer at the private facility and the PRC Form indicates that all that is required to be undertaken to preserve the evidence in such cases was undertaken.

40. The integrity of the complainant's examination and outcome is not in question. In this regard, I find the said ground to be without merit and dismiss the same.

41. The last ground was that the trial Court erred in meting out the mandatory sentence of 15 years contrary to Article 25(c) of the Constitution. That ground is without merit. The minimum sentence provided for under ***section 3 of the Sexual Offences* Act** is 10 years. That

sentence can be enhanced to life if circumstances permit. In the present case, the violent manner in which the appellant violated the complainant, whom he is related to, should have called for a stiffer sentence.

42. In the premises, I find the appeal to be without merit and dismiss the same.

SIGNED at Meru.

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 2nd day of July, 2020.

F. GIKONYO

JUDGE