REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO. 15 OF 2018

SAMSON MUNGAI MBURU ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. M. Kinyanjui – SRM dated 29th March, 2017 at the Senior Principal Magistrate's Court at Kandara in Criminal(Sexual Offences)Case No. 11 of 2016)

JUDGEMENT

1. Samson Mungai Mburu (appellant) was charged before the Senior Principal Magistrate Court, Kandara with **Rape** contrary to **Section 7** of the **Sexual Offences Act No. 3 of 2006**. The particulars of which were that on the 21.4.2016 at Kagumo Village, Kandara, in Murang'a County he caused his penis to penetrate the vagina of MNM, a person with mental disability.

2. He faced an alternative count of an **indecent act with an adult** contrary to **Section 11(A)** of the **Sexual Offences Act.** That at the said time and place he touched the vagina of MN with his penis against her will.

3. He denied the charge and was tried and in a judgement dated 29.3.2017 he was found guilty and convicted on the main charge of rape and sentenced to 10 years imprisonment.

4. Aggrieved by both the conviction and sentence, the appellant lodged this appeal and raised 7 grounds in his petition of appeal namely;

1. **The learned trial magistrate erred in law and facts by failing to observe the age of the appellant during sentencing.**

2. **The learned trial magistrate erred in law and facts by failing to observe that the entire prosecution case has not been discharged as required by the Law.**

3. **The learned trial magistrate erred in law and facts by failing to observe that the conviction and sentence was not secure and safe in accordance with the Law.**

4. **The learned trial magistrate erred in law and facts by failing to observe mitigating circumstances and factors were not considered during this exercise, thus; that the appellant was remorseful, seeking leniency, 1st offender, reformed, seeking another chance among other mitigating aspect as required by Law.**

5. **The learned trial magistrate erred in law and facts by failing to observe the time spent in custody as enshrined in Section 333(2) of the Criminal Procedure Code.**

6. **The learned trial magistrate erred in law and facts by failing to observe relevant issues which were not fully considered.**

7. **I wish to adduce more issues when I will be furnished with copy of the trial court proceedings and I wish to be present during hearing and determination of this appeal.**

5. The Petition was canvassed by way of written submissions filed by the appellant and an oral response at the hearing by Mr. Waweru for the DPP.

6. I have considered the submissions on record. I have had due regard to the record of the lower court, specifically, the evidence adduced.

7. This being the first appellate court, I am alive to the duty of this court to re-evaluate the evidence afresh and reach my own conclusion based on the same. In doing so, I will have to factor that I never saw nor heard the witnesses. This is in line with the decision in **Okeno Vs Republic 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."*

8. PW 1 testified through an intermediary and stated that she knew the appellant before. She had gone to fetch water when the appellant caught her and took her to a sugar plantation and raped her. He removed her pant and raped her without her consent.

The appellant gave her sugarcane when he finished. PW 1 reported the matter to PW 2. PW 1 was taken to Gaichanjiru and Kandara hospitals. Reports from both hospitals were tendered in evidence.

9. It was PW 2's evidence that the complainant returned home carrying sugar cane and with dirty clothes. She reported that the appellant had raped her. The appellant is a neighbour. PW 2 reported to their mother who took the victim to hospital. On examination of the complainant, PW 4 found that the hymen was broken and she was experiencing pain which PW 4 attributed to freshly broken virginity. He confirmed there was penetration. The medical report from Gaichanjiru hospital shows that she had a torn dress, hymen was broken and victim was in pain.

10. The appellant's defence in an unsworn statement stated that on 21.4.2016 he left with his driver to work where they were selling fruits at Ruiru. He went home but was arrested at midnight. He indicated he had no grudge against the family of the complainant but later in the defence suggests a grudge arising from destruction of his crops by the children of the complainant's family.

11. KN testified that the appellant is his cousin. He recalled that on 20.4.2016 he ferried the appellant on his bike from home to N. He dropped him at 7.00 a.m.

On cross examination, he said he saw the appellant on 21.4.2015 at about 6.10 – 6.15 a.m.

12. I have applied my mind to the material on record. The prosecution's case is based on the evidence of a single identifying witness PW1, 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****."*

13. Having reviewed the evidence of the trial court, I am satisfied that the complainant ably communicated to the court through an intermediary. **Section 31(10)** of the **Sexual Offences Act** provides as follows;

> **"S 31(10)** *A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."*

14. In our instant case, the evidence is corroborated by the findings of the medical examination that was conducted soon after the incident. There was evidence of penetration and the complainant's organ was still painful at examination. PW 1 testified that it is the appellant who raped her. The incident took place in broad daylight. The appellant was a neighbour to the complainant. He was known to the complainant before. The identification, indeed recognition of the appellant presented no difficulties. Am satisfied that the complainant was raped and she identified her assailant as the appellant, her neighbour.

15. In his defence, the appellant narrates events of 20.4.2016 stating he left home for work at Ruiru. His witness talks of events of 21.4.2016 saying he dropped the appellant at N at 7.00 a.m. This alibi evidence is contradictory. Even ignoring the discrepancy in dates mentioned, the fact that the appellant was dropped at N at 7.00 a.m. by DW 2 means that the appellant still had the opportunity to travel back home.

16. The appellant prevaricated in his defence initially stating there was no grudge between him and the victim's family and yet again at the tail end of the evidence stating that there was a grudge over the destruction of his crops by children of the complainant's mother.

17. Having considered this defence in totality, I am satisfied that the trial court was correct in finding that the defence evidence was contradictory.

18. Am alive to the fact that the burden of proof lay on the prosecution to prove its case beyond reasonable doubt even if the accused was to opt to remain silent.

19. The ingredients that needed proof were penetration, identification and age of the victim.

20. As regards penetration, the medical evidence on record is overwhelming and is conclusive that the complainant was penetrated.

21. Was the appellant properly identified? From the evidence the identification in this case is hinged on recognition of the appellant by the complainant. 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.)"*

22. The appellant was a neighbour to the complainant and well known to her. The incident was during the day. The identification, indeed recognition of the appellant was proved.

23. Though the evidence of the complainant is not corroborated by any other direct evidence, I note that her testimony was sufficient within the exception in **S 124** of the **Evidence Act**. I am satisfied she told the truth. No evidence to the contrary has been proffered to show that she had any motive to frame the appellant.

24. As regards sentence, I note from the sentencing remarks of the trial court that the trial magistrate bound herself to the mandatory minimum sentence provided under the Sexual Offences Act.

25. The ground has shifted with the advent of the Supreme Court decision in the **Muruatetu Case**. The Court ought to have exercised discretion in sentencing.

26. With the result that the appeal on conviction lacks merit and is dismissed. The appeal against sentence succeeds and I proceed to set aside the sentence of 10 years imprisonment imposed and substitute thereof a sentence of 6 years imprisonment to run from the date of sentence by the trial court.

Dated, Signed and **delivered** at **Murang'a** this 11th day of **November, 2020**.

A.K NDUNG'U

JUDGE