REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 4 OF 2018

DAVID CHERUIYOT KURGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the senior Resident Magistrate Hon. R. Amwayi delivered on 14th January 2019 in Molo Sexual Offences Case No. 03 of 2018.)

JUDGMENT

1. The appellant was charged with the offence of **Rape contrary to Section 3(1) as read with Section 7 of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 1st of January 2018 in Kuresoi South Sub-County within Nakuru County caused his penis to penetrate the vagina of **JCB** a person with mental disability.

2. The alternative charge was committing an **indecent act with an adult contrary to Section 11 (A) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 1st of January 2018 in Kuresoi South Sub-County within Nakuru County the accused intentionally touched the buttocks/breasts/anus/vagina of **JCB** with his penis against her will.

3. The appellant denied both the main and alternative charges and the case proceeded for hearing with the prosecution calling 3 witnesses in support of their case while the appellant in his defence gave unsworn statement without calling any witness.

4. By the judgment delivered on 14th January 2016 the trial magistrate found the appellant guilty of the main charge. Convicted and sentenced him to 15 years' imprisonment. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, he filed this appeal through a Petition of Appeal dated 21st of January 2019 and challenging the conviction and sentence on the following grounds: -

i. The learned trial magistrate erred both in law and in fact by failing to find that the evidence adduced was inconsistence and contradictory;

ii. The learned trial magistrate erred both in law and in facts by failing to find that the medical evidence adduced was insufficient to corroborate the charges;

iii. The learned trial magistrate erred in law and in fact by failing to appreciate that there were crucial exhibits that were never adduced in court;

iv. That the learned trial magistrate erred in law and in facts by failing to appreciate that the appellant defence was cogent and believable;

v. That the learned trial magistrate further erred in law and in facts by failing to appreciate that the prosecution case was not proved to the required standards of beyond reasonable doubt.

5. The state opposed the prosecution through its state counsel. On 18th of June 2020 the matter proceeded for hearing. The appellant adopted his filed written submissions which were send by an email while the state counsel for the prosecution gave their oral submissions.

APPELLANT'S SUBMISSIONS

6. The appellant restated his grounds of appeal

PROSECUTION'S SUBMISSIONS

7. The state counsel, **Ms Rita Rotich** on behalf of the state submitted that the appellant was sentenced to 15 years for the offence of Rape on 14th January 2019. On the issue of identification PW1 who was the intermediary to complainant stated she knew the appellant as **Kurgat** and was a neighbour. He stated that on the date of the incidence he saw the appellant zipping up his trouser within the compound and the complainant was missing. She said she immediately took the appellant and locked him in the house and thereafter called village elder popularly known as *nyumba kumi* who arrested him. In his report, PW2 the clinician noted that the appellant was the same person who was brought to the hospital with the complainant on the date of the examination.

8. The state counsel further stated that PW3 the investigation officer identified the appellant in open Court as the person who had been brought to the station by the complainant and the family and he was identified before the arrest.

9. On penetration, the state counsel submitted that PW1 said she found the appellant zipping his trouser and thereafter found the complainant without her underwear and PW2 the clinician observed discharge outside the genitalia. She noted there had been semen in the vagina which was prove of penetration. She submitted that P3 form, treatment and clinic notes, PRC form were produced and that the complainant was mentally impaired confirmed by mental assessment report produced in Court as exhibit 5; that she suffered mental retardation which was not curable. The prosecution urged the Court to dismiss the appeal.

DETERMINATION AND ANALYSIS.

10. I will first start by appreciating the duty of a first appellant Court as set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

> **"The first appellate Court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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 Court's findings 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 v. Sunday Post, [1958] EA 424.)"**

11. I am however minded of the fact that unlike the trial Court, I never got the opportunity to take evidence first hand and observe the demeanour of witnesses. For this I give due allowance.

12. In view of the above, I have perused and considered evidence adduced before the trial Court. I have also considered submissions herein. I will start by capturing summary of evidence adduced before the trial Court.

13. I note from the record that in view of the victim's mental state as evidenced by medical report dated 26th January, 2018 which showed she suffered from mental retardation, making her a vulnerable witness, the prosecution made an application under **Section 31(1)(c) of the Sexual Offences Act** to have the mother of the complainant testify through her. The application was allowed and she testified through her mother, PW1.

14. PW1 testified the complainant developed mental illness when she was still young and therefore cannot talk. She testified that on the 1st January, 2018 she testified she had left her daughter preparing beans and went to her neighbour to borrow salt, on coming back she did not find the complainant where she had left her and started calling her by her names. It is when she saw **Kurgat** waking up in the maize plantation and zip up his trouser. She took him and locked him up in the house and she called *nyumba kumi* members who took the appellant to the police station. The complainant then came to the door without her inner wear. She positively identified the appellant in Court and stated there was no grudge between them and the incident took place at 2:00 pm in broad day light.

15. PW2, the clinical officer on examination of the complainant found that that the outside of her genitalia was wet with whitish discharge, no blood, and a torn hymen with old scar. He testified the complainant had been pregnant before and was on contraceptive. He concluded that she was raped.

16. PW3 the investigating officer, testified that he interrogated the appellant who admitted committing the offence while drunk and said due to the mental status of the complainant she could not consent to act of sexual intercourse.

17. In his defence, the appellant gave unsworn testimony; he denied having committed the offence. He stated he was passing near the complainant's home taking food to a child when PW1 found him near their home. PW1 inquired from him what he had done to her daughter but he denied having done anything since he was just passing by.

18. I wish to consider the following issues: -

i. Whether ingredients for the offence of rape were sufficiently proved

ii. Whether sentence imposed was harsh and excessive.

i. Whether ingredients for the offence of rape were sufficiently prove beyond any reasonable doubt.

19. The appellant submitted that he was convicted and sentenced without the prosecution tendering sufficient evidence to secure the conviction; that the prosecution failed to produce in Court some crucial exhibits in the case and the medical evidence adduced was not sufficient to corroborate the charges; that the prosecution's case was marred with discrepancies, contradictions and inconsistencies and the appellant was convicted and sentence without the prosecution proving their case beyond any reasonable doubt.

20. Section 3 (1) of the **Sexual Offences Act** provide as follows: -

> **"(1) A person commits the offence termed rape if--**
>
> > **a. he or she intentionally and unlawfully commit 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."**

21. From the above, for offence of rape to be proved besides penetration prosecution have to prove that no consent was obtained from the victim. In the case of **Republic vs. Oyier (1985) KLR pg 353,** the Court held as follows:-

> **"The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.**
>
> **To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**
>
> **Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."**

22. In respect to this case, there is no doubt that the victim did not have the capacity to consent due to mental challenge as shown by mental assessment report produced in Court. Having found that the next issue is whether the appellant had carnal knowledge of the complainant. The mother said he found appellant come out of the maize plantation zipping his trouser; then she saw the victim who had no pant; and on examination by the clinical officer semen was found on the outside of her vagina. From the foregoing, there is no doubt that the complainant was raped and there was no other person at the scene, it was only appellant present and was zipping his trouser clearly confirming that he was just from the act of raping the complainant. There is no doubt that the complainant was raped by the appellant.

23. On submissions that evidence was contradictory, in **Dickson Elia Nsamba Shapwata & another V. The Republic, Cr. App No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> **"In evaluating discrepancies, contradictions and omissions, it is undesirables for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."**

24. It is my considerable view from the record of appeal, if there were any inconsistences and contradictions as alleged by the appellant the same were not prejudicial to the appellant as the prosecution clearly presented their evidence before the trial Court.

25. On submission that the Court did not consider his defence, I note that in his unsworn defence the appellant denied committing the alleged offence, he stated on that day he was just passing near the complainant's home and when PW1 found him there she asked him what he had done to her daughter and he said he had done nothing he was just passing. The trial Court found that from the appellant defence he admitted he was at the crime scene with the complainant when PW1 came. From the above there is no doubt that appellant's defence was considered but in his defence the appellant placed himself at the scene of the incident.

26. On production of documents, I note that documents relevant to the case were produced. There is no doubt that the prosecution case was proved beyond any reasonable doubt.

ii. Whether sentence imposed was harsh and excessive.

27. The trial Court sentenced the appellant to 15 years of imprisonment. As provided by **Section 3 (3) of the Sexual Offences Act.**

> **"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."**

28. The trial Court has the discretion to impose a sentence it deems fit equivalent to the offence committed.

29. I note that the sentence imposed was higher than the minimum by 5 years. I have however considered the fact that the appellant was a first offender and he stated that he had children in school. I note that the appellant took advantage of the vulnerability of the victim and

deserved deterrent sentence. Am however of the view that the sentence was harsh and excessive and I am inclined to reduce to 10 years' imprisonment.

30. FINAL ORDERS

1. Appeal on conviction is hereby dismissed.

2. Appeal on sentence is allowed and sentence reduced to 10 years' imprisonment

3. Sentence to run from the date of sentence before the trial Court.

Judgment dated, read and delivered at Nakuru via zoom This 9th December, 2020

RACHEL NGETICH

JUDGE

In the Presence of:

Court Assistant – Jeniffer

State Counsel – Rita

Accused in person