REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 01 OF 2016

(FORMERLY HCCRA MALINDI NO 86 OF 2011)

OMAR GARISEE BABOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentencing of Hon. J. M. Kituku Resident Magistrate in Garsen Criminal Case No. 104 of 2011 delivered on 29/07/2011)

JUDGMENT

1. The Appellant Omar Ganze Baboya was charged with the offence of rape contrary to **Section 3 (1) (a) and 3(3) of the Sexual Offences Act 2006**. The particulars of the offence were that on 29th day of April 2011 at [particulars withheld] of Ndeza location in Tana Delta District within Tana River County willfully and unlawfully caused his penis to penetrate into the vagina of HAR a woman aged 30 years. After trial he was convicted and sentenced to serve 20 years in prison by the Resident Magistrate court at Garsen.

2. The Appellant was dissatisfied with both the conviction and sentence and has appealed to this court. His grounds of appeal are that the trial court erred in law and fact by convicting and sentencing him without considering that the prosecution did not establish its case; that the prosecution case was contradictory; that he was not given a chance to defend himself; that he was not given the complainant's statement, and; that the sentence was too harsh. The Appellant also stated that he was a first offender and that he prayed for a retrial of his case.

3. The Appellant subsequently filed amended grounds of appeal and introduced the additional grounds that his identification was not safe; that his arrest was not proved, and; that the court did not consider his defence which was reasonable and created doubt on the prosecution case.

4. This being a first appeal the appellant is entitled to a fresh review and analysis of the evidence before the trial court. See **Okeno v R (1972) EA 32.**

5. Both parties filed written submissions on the appeal which I have considered. The issues that arise in this appeal and around which all the grounds of appeal revolve are:-

i. Whether the prosecution proved its case beyond reasonable doubt.

ii. Whether the Appellant was properly identified.

6. The evidence before the trial court was given by 6 prosecution witnesses. The complainant (PW1) testified that she was asleep in her house at around 10pm on the material date when the Appellant entered her house, threatened her with a panga and proceeded to remove her skirt and penetrated her. That she did not scream out of fear but immediately the assailant left, she went and reported to her neighbour one AC who testified as PW2. PW2 told the court that the complainant went to her house and told her that she has been raped. PW2 advised her to await the morning when she could report to her husband and to the authorities. PW2 also told the court that she saw the Appellant leaving the complainant's house a 2nd time at around 4.00am. She said that she had a torch which she shone on him and recognized him. She said that the Appellant was a neighbour and was also a relative.

7. Other witnesses were the Chief (PW4) to whom the report was made the following morning were the complainant's husband (PW3) who accompanied her to the clinic and to the police station, the clinical officer (PW 5) and the investigating officer (PW4).

8. The court found the Appellant had a case to answer. Put on his defence, the Appellant opted to exercise his Constitutional right to remain silent and did not offer a defence. The court then proceeded to consider the judgment which is the subject of this appeal.

9. I will now proceed to re-evaluate the evidence in the light of the grounds of appeal and submissions of the parties. He was not given complainant's statement.

10. The appellant has stated that he was not given a chance to defend himself and has asked for a retrial. I will quickly dispense with the complaint. My perusal of the record shows that when the case came up for trial on 6th June, 2011, the Appellant said he was not ready as he had not been supplied witness statements. The court directed the prosecution to supply the statements and adjourned the hearing to 20th June, 2011. When the case came up on 20th June, 2011 the accused stated that he was ready. The appellant's complaint regarding the statements therefore cannot be true as he did not raise the issue at the hearing.

11. The record also does not support the Appellant's complaint that he was not given a chance to defend himself. It is clear that he cross-examined witnesses. It is also clear that when the court put him on his defence and explained to him his rights under **section 211 of the Criminal Procedure Code** he stated "I will keep quiet. I will leave it to court". I therefore find his complaint that he was not given the chance to defend himself to be without basis.

12. Section 3 of the SOA defines rape in the following terms:-

> **"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"**

13. In addition there must be prove linking the accused to the offence whose identification must be beyond reasonable doubt.

14. The Appellant has submitted that the prosecution case was contradictory. I have carefully considered evidence before the trial court. I find nothing contradictory in the evidence. The complainant stated that she was sleeping in her mud walled, grass thatched house which had a sack for a door and that she was woken up by the Appellant's touch. She saw him holding a panga which he placed over her neck. She did not put up any resistance as the Appellant proceeded to rape her. There was medical evidence in the form of a P3 form [Exhibit No. 2] which showed multiple bruises around the complainant's vaginal walls and that the complainant had been sexually assaulted. The medical evidence was produced in court by Moses Rimba (PW5) a clinical officer at Garsen Health Centre who had examined the complainant on 3rd May, 2011.

15. It is my finding that the medical evidence corroborated the complainant's evidence.

16. The Appellant has submitted that he was not the person who raped the complainant and that he was wrongly identified. He has pointed out that the incident happened at night and that therefore he could not have been identified under those conditions.

17. The Respondent on the other hand submitted that the Appellant was properly identified at the scene and that the trial court addressed the issue at length.

18. There can be no conviction without evidence linking the accused to the offence. Identification is therefore critical. See **Joseph Makau Katana v Republic Criminal Appeal No. 47 of 2015 [2018].**

The prosecution must prove beyond reasonable doubt that it was the Appellant and no one else who raped the complainant.``

19. Evidence of identification in this case was given by the complainant (PW1). She said that she was asleep when the Appellant entered her house. It was around 10pm. She said she could see from the light that streamed into the house through the mud spaces on the walling and that she recognized the assailant by his voice. She said that she knew the assailant. He lived across the river in the same village and when she went to report to PW2 she told her who had raped her.

20. Voice recognition is as good as visual identification and is admissible. The Court of Appeal in the Case **Vura Mwachi Rumbi – V-Republic Criminal Appeal No. 29 Of 2014 [2016] Eklr** held that:-

> **" the case of Choge v R [1985] KLR 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it. See also Karani v Republic [1985] KLR 290."**

21. PW2 told the court that she knew the assailant and when she saw him passing by her house that night she recognized him.PW2 said that she knew the Appellant as he lived in the neighborhood and was also her relative.

22. As submitted by the Respondent the identification of the Appellant was an issue and that the trial court being so aware addressed its mind to the unfavorable conditions obtaining and warned itself in the judgment.

23. The Court of Appeal in **Suleiman Kamau Nyambura v Republic Criminal Appeal No. 5 of 2013 [2015] eKLR** cited **R V Turnbull, [1977] QB 224** where the court gave guidelines on identification and stated that:-

> **"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution[…..]"**

24. In this case the Appellant was known to the complainant. It was more a case of recognition more than identification. She knew his voice. He also spent some time raping her and even after he left he came back again a second time still having the panga. This time around, the complainant escaped to the neighbour (PW2). PW2 testified that she shone her spotlight on him and even spoke to him although he did not respond. I find that the evidence of PW2 was corroborative of that of PW1 and therefore draw the conclusion that even though the circumstances were difficult there was no error in identifying the Appellant.

25. I agree with the learned trial magistrate that the Appellant was properly identified as the panga welding assailant who visited the complainant's house and using the threat of a panga silenced her into submission while he raped her. I dismiss the suggestion that he was framed as no suggestion to that effect was made throughout the trial when he cross-examined the witnesses.

26. A final ground of appeal was that the court did not consider the Appellant's defence. I have carefully perused the proceedings. The trial came to an end on 22nd July, 2011 when the prosecution closed its case. The court ruled that a *prima facie* case had been established. The record shows that the court explained the provisions of **section 211 of the Criminal Procedure Code** to the accused and the Accused response as earlier indicated was "I will keep quiet. I will leave it to the court." It is therefore not true to allege that the trial court did not consider the Appellant's defence as there was none to consider. This ground therefore fails.

27. The Appellant's final ground of appeal was that the 20 year sentence meted to him was harsh. It was his submission that he has served 8 years since his conviction and sentence on 29th July, 2011. At the hearing of the appeal the Appellant pleaded with the court for mercy on the sentence stating that his aged parents depended on him and that he had reformed and had been trained in prison.

28. Sentencing is the discretion of the trial court which discretion is guided by the law where there are statutory sentences and by the principles enunciated in the sentencing guidelines.

29. In **D M W v Republic Criminal Appeal No. 140 OF 2012 [2015] eKLR** Mativo J held that:

> **"Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously."**

30. In the present case, the sentence for rape under **section 3(3) of the Sexual Offence Act** is 10 years which can be enhanced to life imprisonment where there are aggravating circumstances. In passing sentence, the court took into account that the Appellant was armed with a panga and that he went to the complainant's house a second time in the same night. The court was in my view right to enhance the sentence.

31. However, the court should also be guided by the purpose of sentencing as was considered by Mativo J in **D M W v Republic (Supra)** when he pronounced himself as thus:-

> **"I have also considered the purpose of sentencing and the principles of sentencing under the common law which are:-**
>
> **i. To ensure that the offender is adequately punished;**
>
> **ii. To prevent crime by deterring the offender and other persons from committing similar offences;**
>
> **iii. To protect the community from the offender;**
>
> **iv. To promote the rehabilitation of the offender;**
>
> **v. To make the offender accountable for his or her actions;**
>
> **vi. To denounce the conduct of the offender**

vii. To recognize the harm done to the victim of the crime and the community prevent

Guided by the above principles, I hereby reduce the sentence from life imprisonment to forty years. The sentence shall run from the date of conviction by the lower court."

32. The objectives of sentencing are no longer common law principles but are encapsulated in the Judiciary's Sentencing Policy Guidelines at paragraph 4:1. Being guided by the above objectives and in view of the Appellant's plea on reduction of sentence, and considering the circumstances of this case I will temper justice with mercy and reduce his sentence to 12 years imprisonment.

33. In the premises, I uphold the judgment of the trial court and confirm the Appellant's conviction. The Appellant shall however serve 12 years imprisonment from the date of conviction.

Orders accordingly.

Judgment delivered dated and Signed at Garsen on 22nd day of May 2019.

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R.LAGAT KORIR

JUDGE

In the presence of:-

S. Pacho Court Assistant

The Appellant

Mr. Kasyoka for Respondent