REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 36 OF 2018

EDWIN MAIYO KANDIE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence of the Resident Magistrate's Court at Iten (Hon. N.C. Adalo RM) delivered on the 5th day of October 2016 in Iten Senior Principal Magistrate's Criminal Case No.1236 of 2015)

JUDGMENT

[1] This is an appeal that was lodged by the Appellant herein, **Edwin Maiyo Kandie**, against his conviction and sentence in **Iten Criminal Case No. 1236 of 2015: Republic vs. Edwin Maiyo Kandie**, wherein he was charged with the offence of rape contrary to **Section 3(1)** of the **Sexual Offences Act**, **No. 3 of 2006**. The particulars thereof were that on the **5 September 2015** at around 5.00 p.m. in Kipsoen Sublocation within Elgeyo Marakwet County, he intentionally and unlawfully committed an act that caused penetration of his genital organ, namely penis, into the genital organ, namely vagina of **RJR.**

[2] In the alternative, the Appellant was charged with indecent act with an adult woman, contrary to **Section 11A** of the **Sexual Offences Act**; in that on the **5 September 2015** at around 5.00 p.m. in Kipsoen Sublocation within Elgeyo Marakwet County, he intentionally and unlawfully did an indecent act to **RJR** by touching her private parts, namely vagina.

[3] The Appellant denied the allegations against him before the lower court, and after a trial of the facts, in which the Prosecution summoned four witnesses; he was found guilty of the substantive count of rape and was accordingly convicted thereof in a Judgment that was delivered by the Learned Trial Magistrate on **5 October 2016**. The Appellant was, thus, sentenced to 10 years imprisonment. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal on the following grounds:

> **[a]** That the Trial Magistrate erred both in law and fact by failing to note that the case against him emanated from a grudge that existed between the Complainant and his mother;
>
> **[b]** That the Trial Magistrate erred both in law and fact by convicting and sentencing him yet he was not medically examined as required by law;
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> **[c]** That the Trial Magistrate erred in both law and fact by sentencing him based on shoddy investigations;
>
> **[d]** That the Trial Magistrate erred in both law and fact by disregarding his defence statement without giving cogent reasons;

Accordingly, the Appellant prayed that his appeal be allowed, his conviction quashed and the sentence set aside.

[4] The Appellant urged his appeal by way of written submissions, wherein he argued that the Learned Trial Magistrate erred in law and fact in disregarding the clear fact that there existed a grudge between his family and the Complainant; and that this was evident at pages 14, 15 and 16 of the Record of Appeal. He argued that there was no connection between the Complainant's bloodstained pant which was exhibited before the lower court and her leg injury; and therefore that the evidence of **PW4** was only intended to lend credence to the false account furnished by the Complainant. In this regard, his contention was that his defence was not taken into account by the lower court and therefore that the judgment of the lower court contravened **Section 169** of the **Criminal Procedure Code.**

[5] It was further the submission of the Appellant that failure by the Prosecution to summon key witnesses was detrimental to their case and therefore rendered unsafe his conviction and sentence. He mentioned that, whereas **PW2** informed the lower court that she was with her

brother when the Complainant informed them of the incident, that witness was not called to testify. He similarly pointed out that the area chief, **Mr. Kipsoen** was accompanied by **PC Mutinda** and **PC Kendagor** at the time of his arrest, those two witnesses were not summoned before the lower court. He urged the Court to take an adverse view of the omission.

[6] Lastly, it was the submission of the Appellant that no medical evidence connecting him with the crime was adduced before the lower court; and that he was not medically examined to ascertain his involvement. He argued that this was a serious omission on the part of the Prosecution as it is requirement of **Section 36** of the **Sexual Offences Act** that both the Complainant and the accused person be subjected to forensic and other scientific testing including DNA examination, in order to ascertain whether or not the accused person committed the offence.

[7] The appeal was opposed by **Mr. Mulamula,** Learned Counsel for the State. He submitted that the offence of rape contrary to **Section 3(1)** of the **Sexual Offences Act** was proved beyond reasonable doubt and that the Appellant was duly identified by the Complainant as a neighbour. He urged the Court to note that the incident occurred at about 5.00 p.m. and that the Complainant struggled with the Appellant in the course of which her under-pant was torn and leg injured. Counsel accordingly urged the Court to find that the Appellant's defence had been disproved by the Prosecution and to dismiss his appeal.

[8] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am mindful that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. Indoing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."**

[9] Prosecution called a total of 4 witnesses before the lower court in proof the particulars of the charges, the first of whom was the Complainant, **PW1.** Her evidence was that, on the **5 September 2015** at about 5.00 p.m. she was from the farm heading home when the Appellant suddenly emerged from behind her, grabbed her and threw her to the ground; that he overpowered her and had her pinned to the ground and thereupon inserted his genital organ, namely penis, into her vagina, having torn her underwear. She further told the lower court that the Appellant threatened to beat her if she screamed. It was her evidence that in the course of the struggle she also suffered an injury on her foot. She proceeded home and informed her 15-year-old daughter, **FJ (PW2)**, of the incident; and that **PW2** encouraged her to report the matter to the police; which she did and was issued with a P3 Form. She then went to **Iten District Hospital** where she was treated. The P3 Form was thereafter filled and returned to the police station along with her torn and bloodstained underwear.

[10] The Complainant's daughter, **PW2** and told the lower court that she was at home on the **5 September 2015** with her elder brother **T** when their mother returned from the farm with an injury on the leg; and that her mother called her and told her that she had been raped by their neighbour, the Appellant. She confirmed that she encouraged her to go to hospital; and that, after reporting the matter to **Iten Police Station**, she escorted the Complainant to **Iten District Hospital** for treatment.

[11] PC Winnie Kameli (PW3) was the investigating officer in the matter. She was in the office on **5 September 2015** when the Complainant filed her complaint. She issued her with a P3 Form and thereafter visited the scene of crime; and upon completion of her investigations, she charged the Appellant with the offence of rape, adding that he was arrested on **9 September 2015** by the area chief, **Kipsoen**.

[12] The last Prosecution witness, **Luka Kosgei Kiptoo (PW4),** was at the time working as a Senior Clinical Officer at **Iten County Referral Hospital.** He testified that he was on duty on **5 September 2015** when the Complainant, a 53-year-old woman presented herself for treatment on allegations of having been raped by a person known to her. On examination, he noted that her pants were bloodstained and that she had inflammation of the *labia minora* and tenderness on her genitalia which had the presence of blood. He concluded that there was evidence of penetration. He also noted that the Complainant also had a deep cut wound on the right lower limb which was stitched and dressed. He then filled and signed the Complainant's P3 Form which he produced as the **Prosecution's Exhibit No. 1** before the lower court.

[13] In his defence, the Appellant told the lower court that, on the **9 September 2015**, he was at a certain hotel doing some casual work; and that at about 5.00 p.m. some policemen went and arrested him. The next day, he was arraigned before the court on allegations that he had raped the Complainant yet he had not done anything like that. He further stated that the Complainant had his debt of cows and because she did not want to pay, she framed him.

[14] From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, granted the Appellant's Grounds of Appeal as well as the Supplementary Grounds are:

[a] Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of rape to the requisite standard;

[b] Whether the evidence adduced before the lower court proved beyond reasonable doubt that the Appellant was the perpetrator of the offence;

[c] Whether the failure by the Prosecution to call some witnesses was fatal to the Prosecution Case.

[a] <u>On whether the Ingredients of the Offence of Rape were proved</u>:

[15] Section 3 of the **Sexual Offences Act** provides for the offence of Rape in the following terms:

> **"(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.**
>
> **(3) 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."**

[16] Hence, the Prosecution was under obligation to prove its allegations that there was penetration of the Complainant's genital organ and that consent for such penetration was procured by force. In this respect, the Prosecution adduced uncontroverted evidence that, on the **5 September 2015** at about 5.00 p.m., the Complainant was on her way home from the farm when she was accosted and raped. Her account was that the man suddenly emerged from behind her, grabbed her and threw her to the ground; that he overpowered her and had her pinned to the ground and thereupon inserted his genital organ, namely penis, into her vagina, having torn her underwear. She further told the lower court that although she tried to scream, she was threatened with dire consequences. It was also her evidence that in the course of the struggle she suffered an injury on her foot.

[17] There was cogent and uncontroverted evidence that the Complainant immediately informed **PW2** of the incident and accordingly had the matter promptly reported to the police. As a result, she was able to seek immediate medical intervention, about which **PW4** testified. It was thus the uncontroverted evidence of **PW4** that while on duty on **5 September 2015,** the Complainant presented herself for treatment on allegations of having been raped by a person known to her. On examination, he noted that her pants were bloodstained and that she had inflammation of the *labia minora* and tenderness on her genitalia which had the presence of blood. He therefore concluded that there was evidence of penetration.

[18] PW4 further confirmed that the Complainant also had a deep cut wound on the right lower limb which was stitched and dressed. He then filled and signed the Complainant's P3 Form which he produced as the **Prosecution's Exhibit No. 1** before the lower court. There was therefore cogent evidence before the lower court to demonstrate beyond reasonable doubt that **PW1** was raped on the **5 September 2015**, in that there was intentional and unlawful penetration of her vagina without her consent; and that she was subdued by force and threats.

[b] <u>On whether the Penetration was Perpetrated by the Appellant:</u>

[19] In her evidence before the lower court, the Complainant testified that the incident occurred at about 5.00 p.m. or thereabouts; and that since there was a struggle, she had no difficulty at all in recognizing her neighbour the Appellant as the culprit. She immediately informed her daughter **PW2** and mentioned the Appellant by name. She similarly notified **PW3** and **PW4** that she had been raped by a person well known to her. Consequently, the Learned Trial Magistrate who saw and heard the witnesses was satisfied that:

> **"The offence is said to have taken place on the 5th September 2015 at 5:00 pm. It was not dark. There was sufficient light to identify the assailant. According to the complainant, she had fought to free herself but the accused had overpowered her. He covered her mouth when she tried to scream. The offence is said to have lasted for about 20 minutes. The accused and the complainant have known each other for a long time because they are neighbours back in the village. This court has no doubt in its mind, therefore that the complainant positively identified and recognized her assailant as none other than the accused..."**

[20] The Learned Trial Magistrate further paid attention to the fact that the Complainant was the only identifying witness and cautioned herself accordingly in the light of the proviso to **Section 124** of the **Evidence Act.** She thus posed the question, "Did the Court believe the complainant?" and in answer thereto, she stated thus in her Judgment:

> **"The complainant was alone and said no one heard her screams. She fought back and even sustained injuries on her left foot. There were no houses nearby. The accused covered her mouth and overpowered her. She lay down helplessly. This Court had occasion to observe the demeanour of the complainant as she gave her evidence. She was composed and consistent. The cross-examination by the accused did not even shake her evidence or cast any doubt thereto. She had told her daughter what had befallen her and the matter had been reported to the police and she was treated on the same day. For these reasons, I believe her evidence as adduced..."**

[21] Clearly therefore, the trial court gave due consideration to the entirety of the evidence placed before her and came to a conclusion that cannot be faulted, granted the evidence on record. The Appellant's submission that the Judgment of the lower court was in contravention of **Section 169** of the **Criminal Procedure Code**; and that burden was shifted from the Prosecution to the Defence by the Learned Trial Magistrate has no basis, granted that at page 42 the Defence case was equally put into perspective. Thus, upon my re-evaluation of the evidence, it cannot be said that the case against the Appellant was just a fabrication actuated by a grudge between the Appellant and the Complainant.

[22] The Appellant also faulted the Trial Magistrate for convicting him yet he was not subjected to DNA profiling pursuant to **Section 36** of the **Sexual Offences Act.** It is however instructive that whereas **Section 36** of the **Sexual Offences Act** provides for DNA testing, that

provision is not mandatory. In **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA testing uses the word "may". Therefore, the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover, the trial court found material corroboration of the complainant's evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..."**

[23] Similarly, in **AML vs. Republic [2012] eKLR** the Court expressed the view that:

> **"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."**

I therefore find no merit in that ground.

[c] On the failure by the Prosecution to call some of the witnesses:

[24] It is true that in her evidence, **PW2** mentioned that she was at home with her brother, **T**, when their mother returned home on **5 September 2015**. It is equally true that the said **T** was not called as a witness. It is also true that in her evidence **PW3** said that she was with **PC Mutimba and PC(D) Kendagor** when she went and rearrested the Appellant from the custody of the area chief, **Kipsoen.** Those two police officers were also not called as witnesses before the lower court. Hence the question to pose is whether the omission is fatal to the Appellant's conviction.

[25] Section 143 of the **Evidence Act, Chapter 80** of the Laws of Kenya, recognizes that:

> **"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."**

Accordingly, in **Keter vs. Republic [2007] 1 EA 135**, it was held, *inter alia*, that:

> **"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."**

[26] Thus, the obligation of the Prosecution is to only avail such witnesses as are sufficient to establish the charge beyond reasonable doubt, a point aptly underscored by the Court of Appeal in the case of **Daniel Muhia Gicheru vs. Republic Criminal Appeal No. 90 of 2007 (UR)** as hereunder:

> **"The often-trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In BUKENYA AND OTHERS V. UGANDA [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses. That Court, however, qualified that general principle by stating that:**
>
> > **"…. There is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent …. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."**

[27] T aforementioned was not present when the incident took place; and the evidence of both **PW1** and **PW2** was that, when the Complainant confided in **PW2** and told her what had befallen her, **T** was not present. Her evidence was that: **"…When she got home, she called me and told me that Maiyo had raped her. I told her that she should go to hospital…"** In the circumstances, **T** was not a crucial witness in the matter before the lower court. Similarly, having been there with her two colleagues to re-arrest the Appellant, **PW3's** testimony as to the events surrounding the Appellant's re-arrest was sufficient. Indeed, it was her testimony that she was in court both as the arresting officer and the investigating officer. There was no obligation on the part of the Prosecution to call her two colleagues including the driver, granted that the arrest and re-arrest of the Appellant was not in dispute. Accordingly, I take the view that the failure by the Prosecution to call the aforementioned witnesses was not detrimental to the Prosecution case at all.

[28] In the result, I am satisfied that the conviction of the Appellant for the offence of rape contrary to **Section 3(1**) was based on sound evidence. **Section 3(3)** of the **Sexual Offences Act** provides for a sentence of 10 years, which can be enhanced to life imprisonment. The Appellant was sentenced to 10 years' imprisonment. I have no doubt that his conviction and sentence was based on sound evidence and that the sentence was warranted. Accordingly, I find no merit in the appeal. I would dismiss the same in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2019

OLGA SEWE

JUDGE