REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 45 OF 2018

GMN.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. B. M. Kimtai – SRM dated and delivered on the 9th day of November 2018 in the Original Keroka PM Criminal Case No. 56 of 2017}

JUDGEMENT

The appellant was charged with rape contrary to Section 3 (1) (a) as read with 3 (c) of the Sexual Offences Act. It was alleged that on the night of 25th December 2017 in Masaba North Sub-county within Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of CB without her consent.

That charge had an alternative charge of committing an indecent act with an adult contrary to Section 11 (A) of the Sexual Offences Act. In the alternative charge it was alleged that on the night of 25th December 2017 in Masaba North Sub-county within Nyamira County the appellant intentionally touched the vagina of CB with his penis against her will.

The appellant faced a second count of deliberate transmission of HIV contrary to Section 26 (1) (a) Sexual Offences Act. The particulars in count 2 being that on the night of 25th December 2017 in Masaba North Sub-county within Nyamira County having knowledge that he was infected with HIV intentionally and wilfully had unprotected sexual intercourse with CB which infected the said CB with HIV.

The appellant pleaded not guilty to all the charges following which the prosecution called four witnesses. The appellant was subsequently put on his defence and after evaluating the evidence by both sides the trial Magistrate found the appellant guilty on both counts and sentenced him to 20 years' imprisonment on each count.

Being aggrieved the appellant preferred this appeal. His appeal is premised on grounds that (and I am quoting verbatim from the Petition of Appeal): -

> **"My Lordship I beg to the honourable court to launch the mitigation grounds as follows: -**
>
> **1. That I pleaded not guilty to the charge.**
>
> **2. That I was convicted and sentenced to 40 years imprisonment for the offence of rape.**
>
> **3. That, I am just a layman and first offender who was ignorant of both facts and laws hence repentant to the crime I found myself in.**
>
> **4. That I was not examined by medical officer to prove that I committed that offence.**
>
> **5. That, being a young man and a layman man (sic) in matters of the law I pray for a lenient sentence since the term of imprisonment imposed by the trial court is excessive in nature.**
>
> **6. That I pray to be given the benefit of the least punishment prescribed for an offence in article 50 (2) (p) q.**
>
> **7. ……"**

At the hearing the appellant relied on written submissions in which he seems to suggest that the charges were defective firstly in that they were not supported by the evidence and secondly because they gave a misdescription of the offence. In the submissions he also contends that his right to a fair trial was violated and that the prosecution omitted to call crucial witnesses. The appellant further argues that he was not positively identified and wondered how the complainant saw him walking outside if she was seriously injured. He urged this court to re-evaluate the evidence itself and find that he is not the person who committed the offence.

The appeal was vehemently opposed. Mr. Jami, Learned Principal Prosecution Counsel for the respondent submitted that the trial court addressed the evidence of penetration, identification and lack of consent which when weighed against the evidence established there was no need to require the appellant to be medically examined. Counsel submitted that the complainant was 90 years old and that she had given evidence that she found the appellant who was her neighbour on top of her trying to penetrate. He submitted that she recognized him by his voice although it was at night. Counsel further submitted that a medical examination confirmed there was penetration and that corroborated her testimony. He submitted that the appellant conceded he was the complainant's neighbour and that no evidence of bad blood or grudge arose throughout the trial.

Counsel did however concede the appeal on the second count. He urged this court to quash the conviction on that count and submitted that there was no evidence of HIV transmission and the trial Magistrate erred in assuming there was a deliberate transmission of HIV just because PEP was administered to the complainant.

On the sentence for rape counsel submitted that it was within the range provided under the law and was just considering the age of the victim.

As the first appellate court I have a duty to reconsider and evaluate the evidence before the trial court so as to arrive at my own conclusion while making provision for the fact that I did not hear or see the witnesses give evidence **(see Okeno Vs. Republic [1972] EA 22).**

Counsel for the respondent rightly conceded the appeal on the second count as there was no evidence at all that the appellant or whoever the perpetrator was infected the complainant with HIV. Neither in his testimony nor in the medical notes and P3 Form did the clinical officer allege that the complainant was infected with HIV. In the P3 Form on which the trial Magistrate put reliance to make his finding on count 2 the clinical officer states that the complainant was put on PEP because the appellant was under care. He does not state that she was put on PEP because she was found to be infected. The trial Magistrate therefore erred in arriving at the conclusion that he did and needless to say the conviction on count 2 is quashed and the sentence of 20 years' imprisonment set aside.

On the charge of rape my finding is that no doubt the complainant was raped. She woke up to find a man a top of her having sexual intercourse with her. There is also more than sufficient evidence to prove that she did not consent to the act. Be that as it may it is my finding that the identity of the perpetrator was not proved beyond reasonable doubt. This offence occurred at night while the complainant was asleep. Although it was her evidence that she recognized rather than identified her attacker it is possible that she may have been mistaken given that the circumstances were not conducive to appositive identification. Her evidence that there was moonlight in the house was not tested. How could there have been moonlight in the house? This question should have been put to her by the prosecutor. The offence having taken place at night it was encumbent upon the prosecution to prove beyond reasonable doubt that the victim had positively identified her attacker. It was her evidence that the perpetrator spoke when she squeezed his genitals. Again she was not asked what he said and for how long he spoke just to be sure that she had sufficient opportunity to hear the voice and recognize who it was that spoke. It is unlikely that at her age the complainant could have given false testimony that she was raped but the chances that she could have been mistaken as to who raped her are high. I would for the above reasons give the appellant the benefit of doubt and acquit him of the charge.

Accordingly, the conviction on the charge of rape is also quashed and the sentence of twenty (20) years imprisonment is set aside. Unless otherwise lawfully held the appellant should be set at liberty forthwith.

Signed, dated and delivered in open court this 6th day of June 2019.

E. N. MAINA

JUDGE