REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.205'B' OF 2017

(Appeal Originating from Nyahururu CM's Court Adult Cr.No.2314 of 2014 by: Hon. A.P. Ndege – P.M.)

GEOFFREY NJOGU GACHANJA.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

Geoffrey Njogu Gachanja, the appellant, was charged with the offence of Rape Contrary to Section 3(1)(a)(b)(c) of the Sexual Offences Act.

The particulars of the offence are that on 22/9/2014 in Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of **AWN**. The appellant faced an alternative charge of committing an indecent act contrary to Section 11(A) of the Sexual Offences Act.

The particulars of the charge are that on 22/9/2014, at [Particulars Withheld] , intentionally and unlawfully caused his penis to come into contact with the vagina of AWM.

The appellant having denied the offence, the matter proceeded to full hearing after which the appellant was found guilty, convicted and sentenced to serve 10 years imprisonment on 20/11/2017.

Being aggrieved by both the conviction and sentence, the appellant filed this appeal citing 13 grounds in the petition of appeal filed in court on 22/11/2017 which the firm of Waichungo Advocate took over. At the hearing of the appeal, Mr. Waichungo, counsel for the appellant condensed the grounds into 3 broad grounds namely:

a. Lack of proof in support of the allegation that the appellant caused his penis to penetrate the vagina of the complainant;

b. Lack of medical evidence to corroborate the evidence of the complainant;

c. Lack of evidence to support the offence of rape.

Mr. Waichungo, counsel for the appellant filed submissions which he highlighted.

On the first broad ground, counsel submitted that the person who testified as PW1 was recorded as ***AWN*** whereas the charge sheet recorded the complainant as ***AWM*** and hence the two are two different persons as the discrepancies in the names were not explained; that even if the complainant is the person named in the charge sheet, her evidence was false because PW1 did not explain how she knew the applicant's house and whether it was her first time there; that she was raped about 9.00 a.m. as soon as she arrived at the house and that the appellant left the house till 3.00 p.m. when she saw the Chief and his Assistant Chief coming only to enter and find her reading a book; she was then taken to Mairo Inya Chief's Office and after somebody slapped her is when she recalled what had happened; that she never made any noise or raised alarm yet the house was in a plot which had other occupants. PW2, the Assistant Chief confirmed having found PW1 in the appellant's house relaxing; that PW1 did not complain of having been raped to the Chief, the Assistant or the Police who went to her rescue; that the idea of rape was just introduced to PW1 by the Chief; that PW1 was then locked up at the police station for 2 days before she disclosed what had happened.

It is counsel's submissions that a girl of PW1's age should have been able to report the rape immediately, instead of being locked up; that the complainant may have told the people what they wanted to hear, that she was raped. It was counsel's submissions that the offence of rape

was made up when the chief suggested to the complainant that she was raped.

In addition, counsel added that PW1 had even lied to the police that she was under age but while in court, she gave her correct age of birth.

On the second ground of lack of medical evidence, it was submitted that the complainant was taken to the hospital on the same day but the Doctor found a missing hymen but there were no external injuries and the lab tests revealed no spermatozoa; that the evidence of PW3, Dr. Karimi did not corroborate the evidence of penetration.

Counsel relied on the decision of ***Benard Ochieng Okomo v Republic H.Cr.A.14/2011*** where the court found that the Doctor had not found any injuries to the genitalia and no opinion from the Doctor whether there was rape. The court found that in absence of corroboration, the court could not solely convict on the complainant's testimony.

The same decision was applied in ***Stephen Lokala v Republic H.Cr.A.90/2006***; that there was no evidence that the complainant felt pain and the findings by the magistrate that the complainant cried and shed tears from pain had no basis; that the medical report did not support the fact of penetration which is one of the ingredients of rape.

On the 3rd issue of consent; counsel argued that no sexual act took place between the appellant and PW1 but if the court were to find otherwise, then the sexual act was with the consent of PW1; that things only went awry when the two were discovered and PW1 was forced to confess; that PW1 stayed in the house, cooked Chapati and then started to read and never attempted to escape. It was submitted that though PW1 said that she feared, it was not specific and the trial magistrate invoking Section 43(2) that the appellant had authority and power over PW1 was without basis and that was an extraneous matter. Counsel relied on the decision of ***Nathan M Aringa Ruibi v Republic Cr.App.7/2012 (Nyeri)*** where the court held that it is the duty of the court to decide all cases based on evidence and credibility of witnesses and that complainants in sexual offences are not exempt.

The counsel urged this court to quash the conviction, set aside the sentence and acquit the appellant.

Ms. Rugut learned counsel for the State opposed the appeal and urged that the charge was proved to the required standard.

As regards the differences in the names in the charge sheet, the evidence and documents, counsel submitted that the charge was filed by police but the names the complainant gave in court are the correct ones.

Counsel submitted that PW1 did not raise any alarm when she was defiled because she feared for her life; that the trial court had the chance to see PW1 testify and believed her testimony and under Section 124 of the Evidence Act, her evidence was sufficient to sustain a conviction.

This being the first appeal, it behoves this court to re-look at all the evidence tendered before the trial court, analyze it and make its own findings and draw its own conclusions. The court will of course bear in mind that it neither saw nor heard the witnesses testify. ***See Okeno v Republic (1972) EA 32***.

The prosecution called a total of three witnesses. PW1 AWN', a student at [Particulars Withheld] Secondary School said that she had been sent home for fees from school on 22/9/2014 at about 9.00 a.m. She had no bus fare. She knew the appellant who hailed from Mairo Inya, having been introduced to him by her mother PW1 went to ask for help from him as he had earlier shown her his house. He welcomed her to his house, held her hands, invited her to have tea which she declined and after about 5 minutes, he grabbed her took her to his bedroom, pinned her down with his left hand and with the right hand inserted his penis in her vagina. Due to fear of losing her life, she did not scream; that she felt pain and though he was insisting for more, she declined because she was in pain; that the appellant bathed, left and locked the door from outside. She remained in the house till 3.00 p.m. when the chief and his assistant went there, entered the kitchen, the bedroom and main room and found her reading; that they were with the appellant; she was taken to Mairo Inya where she was interrogated and she would not talk till somebody slapped her and she remembered what the appellant had done and she explained. She was issued with a P3 form and then taken to Hospital. She was detained at Mairo Inya Station Police for 2 days and later released.

PW2 Fredrick Kabiro, Assistant Chief Mairo Inya Sub-Location was on duty on 22/9/2014 when he was informed that a school girl was locked up in a man's house. He was led by the informer to Geoffrey Gachanja's (the appellant) house which was locked with a latch from outside but there was no padlock. He called the chief. They entered after the appellant opened for them and found the girl seated in the sitting room, reading and wrapped in a Leso and without a blouse. They found her with a Mt. [Particulars Withheld] Secondary School uniform; that PW1 told then that she had been sent home for fees, had no fare and passed by the appellant's house for fare. She told them that she was 17 years old and had known the appellant through the mother; that she denied having been raped but later accepted after interrogation.

PW3 Dr. Joseph Karimi of Nyahururu County Hospital examined both the complainant and the appellant. He found that the appellant was a psychiatric patient on drugs; he did not find anything of concern on the appellant.

As regards the appellant, the Doctor did not find any physical injuries. The hymen was missing. There were injuries on the genitalia, no spermatozoa were seen and the Doctor could not determine the freshness of the tear of the hymen and there was no evidence of violence.

When called upon to defend himself, the appellant gave an unsworn statement in his defence. He stated that he was in his house at 9.30 a.m. when MW knocked at his door and claimed to be looking for school fees but he had no money. He told her to go back to school but she refused. She asked him to buy for her flour to make Chapati which he did. He left and returned to the house about 3.00 p.m. He saw a missed call from the Chief and went to Chief's Camp who asked if there was a school girl in his house and he explained what had happened. They went to his house with police, found PW1 in the house and the girl was asked if she slept with him; that she was slapped until she confessed that she slept with him. He escorted her to police station and gave her fare to go home.

I have given the evidence and submissions due consideration. I think it is necessary to deal with the issue of the identity of the complainant first.

Whereas the particulars of the charge indicated that the complainant was AWM the complainant in her testimony, gave her name as **AWN'**. **Mr. Waichungo** submitted that the contradiction in the names was not resolved and therefore it is not known whether PW1 was the proper complainant. I note that during the hearing of the case and even the defence, this discrepancy was never alluded to despite the fact that the appellant was represented by counsel. The appellant did not deny that it is DW1 who came to his house. In the P3 form whose particulars of the complainant were filled by the police, the surname used was M. The PRC form only captured the names of AW. Whether the case that was not an issue before the trial court and yet it should have been raised then. Further PW1 and the appellant knew each other. PW1 is AW.

I believe and find that the last name of '***N'*** and ***'M'*** were made in error which did not go to the root of the charge. AW was before the court and appellant identified her as such. The proper complainant was before the court.

The offence of rape is provided for under Section 3(1) of the Sexual Offences Act.

It provides as follows:

> **"3(1) a person commits the offence of 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' the meaning assigned to it under Section 43 of this Act."**

Section 43 of the Sexual Offences Act reads as follows:

> **"(1) An act is intentional and unlawful if it is committed—**
>
> **a. In any coercive circumstance;**
>
> **b. Under false pretences or by fraudulent means; or**
>
> **c. In respect of a person who is incapable of appreciating the nature of an act which causes the offence.**
>
> **(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is-**
>
> **(a) Use of force against the complainant or another person or against the property of the complainant or that of any other person;**
>
> **(b) Threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or**
>
> **(c) Abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act."**

To prove an offence of rape, the prosecution has to prove the ingredients of penetration, lack of consent on the part of the victim and of course, the identity of the perpetrator.

In the instant case, PW1 and the appellant knew each other. PW1 testified that her mother introduced her to the appellant. The appellant in his defence, admitted to PW1 having gone to his house and asked for fees. She was not a stranger to him.

The two issues to resolve are whether there was penetration or lack of consent.

Section 2 of the Sexual Offences Act defines penetration as "***penetration***" means "***the partial or complete insertion of the genital organs of a person into the genital organs of another person***".

In PW1's narration, no sooner had she entered the appellant's house than the appellant grabbed her, pushed her to the bed and inserted his genital organ into hers forcibly. She said she felt pain but did not scream or raise any alarm. This is despite the fact that the appellant's house is on a plot with several other houses and a shop nearby. Though she said that she feared for her life, she never told the court that the appellant ever threatened her in any way. The fear was baseless. Although the magistrate observed that the complainant shed tears in pain but that was not part of the Lower Court record. The finding of the complainant shedding tears was conjuncture.

PW1 was treated at Nyahururu County Hospital on 23/9/204 as per the Outpatient Treatment Notes. **Dr. Karimi (PW3)** relied on the

findings in the outpatient notes and the history given. The Doctor did not find any tears or physical injuries on PW1's body or genitalia. The hymen was missing but it was not a recent tear, and of course the court takes note that a hymen is not necessarily torn in a sexual act. It may not have been there at all or was torn by other means.

If indeed PW1 was forced into a sexual act as per her narration of the events, it is likely that there would have been evidence of force, e.g. bruising or swelling in her genitalia on the next day. Although the trial court believed the complainant's testimony that she took part in a forced sexual act, I find PW1's testimony unconvincing as to the events leading to the appellant's eventual arrest and charge for rape.

This brings me to the question ***whether the prosecution proved that there was lack of consent;***

It is very surprising that even though the appellant left the house, soon after the alleged act, PW1 never attempted to look for means of escape from the appellant's house or call our for help. PW1 said that she realized there was another door that had not been locked when the chief arrived. She had done nothing towards freeing herself from the appellant's house. She attributed that fact to fear of her life. However, nowhere in her testimony did she say that the appellant had threatened her nor did she disclose the reason for her fear.

Further to the above, PW1 went ahead, cooked Chapati when the complainant was away and thereafter relaxed as she read her story book. PW2 narrated the state in which they found PW1 ***"The girl was reading in the room……she had removed her blouse and wrapped a lesso….."***.

In cross-examination, PW2 replied to some questions as follows: ***"we found the girl while resting – relaxing. She appeared not to be in any form of stress. She did not appear to have become forced into sex or sexual activity a few minutes before."***

To make matters worse, on being questioned by the chief, PW1 denied having been involved in a sexual act with the appellant until she was slapped. This is what she said:

> **"I was interrogated first I could not talk. Another person slapped me there. I felt pain. I remembered what the accused had done to me."**

If indeed PW1 had been raped and needed help to be rescued from the appellant's house, then she should have reported to the chief and PW2 even before she was asked about what had happened, whether she had been raped. PW1 had to be slapped to remember to state that she had been raped. The complainant's conduct, on being found in the appellant's house is not in tandem with one who had just gone through a traumatic rape ordeal. PW1 is not a child. She was about 20 years by then, having been born on 22/6/1995. PW1's testimony is not entirely truthful.

The trial court invoked Section 43 of the Sexual Offences Act and found that the appellant had power or authority over the complainant, who was a desperate school going girl in need of bus fare and abused that power. I do not believe that was the case here. First of all, once the appellant allegedly finished the act, he left the house and PW1 did nothing to rescue herself. If indeed the appellant had power over the complainant once PW2 and the police arrived, PW1 should have reported her ordeal. PW1's conduct all through only goes to show that she voluntarily went to the appellant's house and if at all she engaged in a sexual act with the appellant, it was voluntary. She may have come up with this story because being a school girl, her escapades had been unearthed.

Under section 124 of the Evidence Act, if the court believes the complainant to be a truthful witness, the court must state the reasons for so believing. In the instant case, there were no cogent reasons given for the court to believe PW1.

In the end, I find that the prosecution did not prove beyond any doubt that PW1 was involved in a sexual activity with the appellant and if there was any such activity, then it is very likely that it was with PW1's consent.

The result is, I quash the conviction and set aside the sentence. The appellant is set at liberty forthwith, unless otherwise lawfully held.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***15th*** day of ***July,*** 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut for the State

Ms. Wanjiru Mureithi holding brief for Mr. Waichungo for the appellant

Soi – Court Assistant

Appellant - present