REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 12 OF 2017

JAMES NYASINGA.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. N. Kahara – RM dated and delivered at

Keroka on the 18th day of December 2015 in the original Nyamira Principal Magistrate's Court Criminal Case No. 887 of 2009}

JUDGEMENT

The appellant was sentenced to twenty (20) years imprisonment for rape contrary to Section 3 (1) as read with Section 3 (3) of the Sexual Offences Act. The particulars of the offence were that on 12th July 2009 in Borabu District within Nyanza Province he intentionally and unlawfully caused his penis to penetrate the vagina of PKM a woman aged 21 years.

This appeal is against the conviction and the sentence. The appeal is premised on the following grounds: -

> **"1. That my lords I did not plead guilty to the charge and firmly maintain the same.**
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> **2. That your honour the learned trial magistrate erred in law and fact when maliciously based the conviction on mistake in identity the crime in question was perpetrated at night where the issue of identification was questionable pw 1 she did not at all identified her assailant due to unfavourable condition as the scene of crime and folded circumstances.**
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> **3. That your honour the learned trial magistrate erred in law and fact when miserably based the conviction on flawed evidence merely adduced in court by pw 1 yet the same was invariably doubtful given the fact that medical evidence was extremely unsafe and incredible unworthy to be relied upon by the court of law to sustain conviction.**
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> **4. That your honor the learned trial magistrate erred in law and fact when seemingly drew inference of guilt against me yet pw 1 is evidence and her allegation were not reported to the authority there were no first report made to the authority in respect of the person who had been positively identified by pw 1 on the material day which she alleged to have been offended. Her evidence in court was an afterthought.**
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> **5. That your honour the learned trial magistrate erred in law and fact when seemingly objected by defence without cogent reason as provided by the law Section 169 (1) of the cpc yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution case."**

The petition was canvassed through written as well as oral submissions. I have taken the submissions by both sides into consideration. However, as the first appellate court I also have a duty to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion. I have done so bearing in mind that I did not see or hear the witnesses give evidence and I have been careful to give provision for that **(See Okeno Vs. Republic [1972] EA 22).**

The complainant gave evidence on more than one occasion as she had to be recalled after the trial was taken over by another Magistrate and the appellant exercised his right under **Section 200 (3) of the Criminal Procedure Code** to have the witnesses recalled. On each occasion she vividly narrated how on that fateful day she was headed home at around 7 or 7.30pm when she saw the appellant, who she knew very well, walking in front of her. Since he did not seem to be in a hurry she said hello and passed him. The appellant seemed to have disappeared for some time but she continued walking. After about three minutes she was grabbed from behind and her right hand was twisted. When she tried to resist the man who she identified as the appellant tore her skirt and pushed her to the roadside. He knocked her down, pulled down his trousers and raped her while pulling her braids. After that he insisted he would escort her home and they began walking as he pulled her hair (braids). After a short distance he ordered her to turn around and accompany him back to the place they had come from. She was half

naked and because she was in pain as he was pulling her hair she obliged. When they got there he forced her to remove her bra and blouse. She could not do it as her right hand was paining a lot so he did it himself and raped her again. It was her evidence that he raped her a third time when on their way home he forced her to go into some woods. He then took her phone and some money in her jumper and said he would keep them for her. After raping her the third time he allowed her to put on her clothes and told her to accompany him to his house. She got an opportunity to call out for help when they reached the house of Daniel Otundo Nyangweso (Pw3). When Pw3 heard her cry for help he put on the security light and opened the door then seeing her state called her mother and his own mother who went and took her to hospital. The appellant ran away when she shouted for help and Pw3 whose father he worked for as a herdsman opened the door.

Section 124 of the Evidence Act provides that the evidence of a victim of a sexual offence alone is sufficient to found a conviction provided the court believes her and records the reasons for doing so. I believed the complainant. Not only does she strike me as a truthful and reliable witness by the consistency of her testimonies but her evidence is corroborated by other material evidence. Pw3's evidence corroborated her evidence that it was to his house that she sought refuge. He testified that he heard her call for help and that he put on the security light and when he opened the door she literally fell into his house. He stated that she was crying uncontrollably and that she confided in him that the appellant had raped her. She also told him how the appellant had stayed with her from around 7 or 7.30pm when she first encountered him up to midnight when she managed to escape from him. Her evidence was also corroborated by the clinical officer Joel Ongaro (Pw1). He produced an X-ray taken of the complainant's right shoulder a day after her ordeal and stated that the same showed she had sustained a dislocation on that shoulder. This corroborates her evidence that the appellant twisted her right hand. He also confirmed that an examination of her genitalia confirmed there was penetration – there were healed bruises in her labia and evidence of presence of spermatozoa.

The complainant knew the appellant well a fact that was corroborated by Pw3 for whose family he worked as a herdsman. Pw3 told the court that the complainant was their neighbour and that he occasionally used to see the complainant greeting the appellant. I am therefore satisfied that even though it was dark when she first encountered him she knew him well enough to recognize him. He stayed with her for several hours which gave her opportunity to recognize him. She saw him even more clearly when Pw3 put on the security light. I am satisfied that she had a good opportunity to see him under the (electricity) light as he struggled to hold on to her hand but she slipped out of her sweater and he let go. It is my finding that his sworn statement did not shake her testimony in any manner. I am not convinced that the complainant's evidence was an afterthought. The area Assistant Chief testified as Pw4 and confirmed that he got a report of the rape the day after it happened. He stated that he was even told who the perpetrator was as the complainant had mentioned his name. Corporal Regina Kyule (Pw5) also testified that the complainant had named the perpetrator when she made her report at Keroka Police Station. The medical evidence went on to confirm she was speaking the truth. The court would have convicted the appellant even in the absence of that medical evidence. The circumstances were favourable for a positive identification more so when they got to Pw3's house and he put on the security lights.

It is my finding that the evidence against the appellant was overwhelming. The charge against him was proved beyond reasonable doubt. The appellant intentionally and unlawfully caused penetration of his genital organ upon the complainant initially without her consent and thereafter by obtaining her consent by force and by means of threats that he would kill her. The appeal against conviction has no merit.

As for the sentence I am aware of decisions of the Court of Appeal in regard to minimum sentences in sexual offences. However, I find that the sentence meted by the trial court although it was more than the minimum provided by the law was just in the circumstances of this case. The sentence is upheld and the appellant shall continue serving the same. It is so ordered.

Signed, dated and delivered at Nyamira this 18th day of July 2019.

E. N. MAINA

JUDGE