REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL CASE NO. 83 OF 2014

TN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable S. Mokua

in Eldoret Chief Magistrate's court Criminal Case No. 1954 of 2013

dated 14th May, 2014)

JUDGMENT

TN was charged in the lower court with the offence of rape, contrary to *Section 31(a) (b)* as read with *Section 3(3)* of the *Sexual Offences Act No. 3 of 2006.*

The particulars of this offence are that on the 13th day of May 2013 at [particulars withheld] in Uasin Gishu County, the appellant herein intentionally and unlawfully caused his penis to penetrate the vagina of MK without her consent.

In the alternative the appellant faced a charge of indecent act with an adult, contrary to *Section 11(A)* of the *Sexual Offences Act*; of which particulars are that on the 13th day of May 2013 at [particulars withheld] in Uasin Gishu County, the appellant intentionally touched the vagina of MK with his penis against her will.

The prosecution case is that the complainant herein, one MK, was in the year 2014 aged 25 years. On 13th May 2013 she was working at [particulars withheld]. At about 3.00 a.m she was [particulars withheld] and was heading to her house at [particulars withheld]. She was dropped a short distance from her house and walked towards the house. After walking for a short distance she saw the appellant whom she referred to as T. He was known to her and she had seen him earlier in Town wearing a white jacket. He was in the very same jacket. It was dark but she was able to see the white jacket. Titus stopped her and told her that he had admired her for a long period and was desirous of having sex with her. The complainant urged him to let her go but he insisted on taking her to his place. She requested that they go to a lodging, promising to pay for it. They walked upto a place where there was garbage and he stated that he had to have sex there and then. He tore her clothes and removed his trouser as she pretended to remove her pant. She tried to escape but he caught up with her and slapped her. He forced her to remove her pant. He pushed her against the wall and forcefully slightly penetrated her vagina with his penis. She ran to a lighted place naked. She screamed for help and people turned up to help her. The appellant warned her against screaming. A neighbour called J and some touts approached the scene and the appellant disappeared. She went to report at Eldoret Police station and took with her the torn skirt and soiled sweater. J, the PW-2 in this case was attracted to the scene by the complainant's scream. She was saying that she was being raped. When he got out of the house, 10 metres away at a place where there was light, saw the appellant struggling with the complainant. He had known the appellant for a period of 6 years as a tout in town. He knew him as F. The appellant ran away and he assisted the complainant to the police station.

The case was investigated by PW-4 who issued the complainant with a P-3 form. The P-3 form was filled on 14th May, 2013 by Dr. Yatich. The doctor noted that she had abrasions on the right and left knees. Her private parts had remnants of hymen. There were however no serious injuries. She was a mother of one child. Spermatozoa cells were traced. She was however not pregnant. The doctor was of the opinion that there was vaginal penetration. The said P-3 form was produced by PW-3.

The appellant upon his arrest was also examined by the very same doctor on 24th June, 2013. His lower hip had redness and swelling. He had normal external genitalia. Syphilis, hepatitis and HIV tests were negative. His P3 form was thus filled. PW-3 produced it as an exhibit.

The appellant upon being placed on his defence gave unsworn testimony and called no witness. He stated that prior to his arrest he used to work at construction sites. On 13th while heading for work he heard that some lady had alleged that he had raped her. He was in shock and went to report at the police station. On 31st he was arrested. He did not commit the offence. The complainant used to be his girlfriend before she left for Mombasa. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was imprisoned to 10 years. Dissatisfied with the said conviction and sentence he appealed to this court on the grounds that:-

(1) He prays for a lesser sentence.

(2) He is poor and his family depends on him for a living.

(3) His parents died 5 years ago in the post-election violence.

(4) He is HIV positive and 10 years sentence is harsh.

(5) The court considers his appeal and allow it.

Though the appellant from the above stated grounds appears to be appealing only against the sentence, this court has a duty to evaluate correct. As the trial magistrate rightly observed, in a case of rape the issues for determination is whether there was penetration of a genital organ by a genital organ; whether such penetration was with or without consent; and whether the alleged perpetrator was positively identified.

On the same issue of identification by the complainant of the appellant, I find it shaky. The complainant said she had seen the appellant in town earlier wearing a white jacket. When she saw him later at night, it was at a dark place and saw the white jacket. Apart from the colour of the jacket, no other description of it is given of which would distinguish it from any other white jacket. White jackets are many in the market and it is possible to have several persons on any given day wearing white

jackets. Identification of the appellant by the white jacket is by itself inadequate. The said white jacket was even not recovered to at least establish that the appellant owned one. The complainant also alleged that the appellant was known to her. She however did not expound on how she knew him and for how long. She did not describe him physically, by name or otherwise. Saying she knew him alone was not adequate evidence that she was able to recognize him as the culprit. However, the shortcomings on her evidence on recognition of the appellant are made good by the evidence of PW-2, her neighbour. He heard screams and put lights on. When he got outside, 10 metres away at a place where there was light, he saw the complainant on the ground and the accused pulling her towards a dark area. He recognized both. He knew the appellant for a period of 6 years as a tout in town. He knew him as F. The complainant had herself stated in her evidence that upon slight penetration by the appellant, she managed to run to a place where there was light. He caught up with her there as she screamed for help. PW-2 buttresses the evidence that there was light at the place. Though its source was not disclosed and its intensity, the evidence of PW-2 shows it was enough light to enable him recognize someone at a distance of about 10 metres. Irrespective of the shortfalls in the evidence, I am convinced just as the trial court was, beyond reasonable doubt, that it is the appellant who committed the offence.

The complainant was an adult and a mother of one. On the material night she was not new to sex. When she says that she was slightly penetrated by the appellant before she managed to escape, she meant exactly what she said. "penetration" in Sexual Offences Act, is defined as partial or complete insertion of the genital organs of one person into the genital organs of another person. It follows that even the slightest penetration would suffice for the offence. I am therefore also satisfied beyond reasonable doubt that there was penetration.

The last issue is of consent. The evidence of the complainant and that of PW-2 shows the complainant did not consent to the act. She was forced into it. Her skirt was torn and pullover soiled. She tried to escape and even screamed for help.

The foregoing evidence discloses an offence of rape against the complainant by the appellant.

As stated earlier on the appellant does not appear to challenge the conviction on his grounds of appeal, but the sentence of 10 years in prison. *Section 3(3)* of the *Sexual Offences Act* states that 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. The wording of the section shows the minimum sentence for the offence is 10 years and the maximum life imprisonment. However, following the supreme court decision in the case of ***Francis Karioko Muruatetu and Another, Petition No. 15 of 2015***, mandatory minimum sentences are unconstitutional and the court have therefore discretion to give a fitting sentence for any offence committed, guided by the legal provisions on sentencing. The appellant was sentenced to seemingly available "mandatory minimum sentence" in the Act. If the trial court was aware that it had discretion to go below that sentence in the year 2014, probably a more lenient sentence would have been given, taking into consideration that the court gave seemingly the minimum sentence available then. For the reason, and considering the circumstances under which the offence was committed, and the appellant's plea on appeal, I do reduce the sentence from 10 years imprisonment to 6 years imprisonment from the date of 16th May, 2014 when he was sentenced by the lower court. The appeal therefore succeeds to the said extent.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **17th day** of **July** 2019.

In the presence of:-

The appellant

Ms Mokua for state

Ms Sarah - Court assistant