REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CRIMINAL APPEAL NO. 84 OF 2018

EDWARD MUTSAMI MIRIMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by J. N. Maragia, RM,

in Kakamega CM Sexual Offence Case No. 16 of 2017 dated 8/3/2018)

JUDGMENT

1. The appellant was convicted of offence of rape contrary to S. 3 (1) of the Sexual offences Act No. 3 of 2006, and an alternative count of Indecent Act. The particulars were that on 25th February, 2017 in Kakamega East District the Appellant unlawfully caused his penis to penetrate the vagina of CM without her consent. For the alternative count, the particulars were that at the same time and place the accused touched the vagina of CM with his penis against her consent.

2. There was a second count of malicious damage to property. However the trial court found that this count was not proved. The appellant was convicted for the offence of rape and sentenced to ten (10) years imprisonment on 4.6.18.

3. Being dissatisfied with the conviction the appellant has appealed herein, raising the following grounds of appeal.

1. THAT I did not plead guilty to the charges.

2. THAT the learned trial Magistrate grossly erred in law and fact in pressing over a trial without considering my application to be served with the witness's statement.

3. THAT the trial Magistrate grossly erred in law and fact in presiding over a trial that seriously offended sections 198 (4) of the C.P.C.

4. THAT the learned trial Magistrate grossly erred in law and fact in not observing that I was not subjected to medical corresponding investigations as it is under Section 36 (2) of the S.O.A.

5. THAT the learned trial Magistrate grossly erred in law and fact in finding penetration proved even in the wake of flissy and inadequate evidence.

6. THAT the learned trial Magistrate grossly erred in law and fact in rejecting my plausible defence without proper valuation.

4. To prove its case the prosecution called a total of four witnesses. PW1 was the complainant. At the time of giving evidence she was 68 years old. She testified that on the night of 25.2.17 someone shouted at her door, "open, open". Upon inquiry the person said he was police and then added that he was a Jambazi number one. The person gained entry into her bedroom through a window. However, PW1 had moved to the sitting room and closed the middle door between the sitting room and the bedroom. This caused the attacker to go back to the main door and gain entry into the sitting room, where he found PW1, held her neck, straggled her, caused her to lie down and raped her. She had on her petticoat which was an exhibit in court. PW1 screamed and attracted neighbours who came to her rescue. The attacker left the house with his trousers half on, and ran away but was apprehended by PW1 neighbours a few metres from the house. When they arrested

him, PW1 was able to recognize the attacker by the perfume the attacker had worn. PW1 was treated (see treatment booklet P.MFI.2, P3 form PMFI.3). PW1 identified the attacker as his neighbour for six years and is the appellant herein.

5. PW2 testified that he was woken up by his mother to go to the rescue of PW1. He together with his 2 brothers Gilbert and Gerald woke up other neighbours. Together they gave chase to the appellant who could not run far because his long trouser was half on. They apprehended the attacker and handed him over to the village elder.

6. PW3 was Corporal Mwasho Danson No. 63708. He testified that on 26.2.17 at night he was at his work station when PC Esther woke him up to go to the report desk. He did that and found the complainant in company of 2 men. The complainant reported that she was in her house sleeping when she was raped. PW3 woke up a PC Mutai and both went to the scene. On arrival they found the appellant lying beside the complainant's house. They saw damaged window which they produced in court as exhibit No. 4. He took the suspect to the police station and recorded statements of witnesses.

7. PW4 was Samuel Muyabi, who was a village elder for Milimani area. On the material night he had slept but was woken up by a call from one Mama, the mother of PW2. The mama informed him of what had happened and she left for the scene. She found the appellant at the scene. He was in a T-shirt and jeans trousers which was half way down. He also saw the broken window. The complainant was later taken to hospital for treatment while the police arrested the appellant. PW4 testified that the appellant was a serial rapist and has many cases pending in court.

8. PW5 was John Alfayo, a clinical officer at Ileho Health Centre. He had examined the complainant. He found the 66 years old complainant tired with no jaundice. There were bruises on left eye, tenderness on her chest. Approximate age of injury was 11 hours. There were bruises on the labia minora. She was also bleeding from her vagina. Her urine was blood stained, with humerial, epithelial and sperm cells. PW5 produced treatment booklet as P.Exh.2, P3 form as P.Exh.3.

9. In challenging the charges the appellant was his own witness. He gave a sworn statement, stating that on the material night a neighbour of his called Kennedy had asked him to go and help him remove Kennedy's cow from a ditch. While performing that act, unknown people descended on him with blows and pangas and rungus. They beat him up and he lost consciousness. When he woke up he found police with him and people alleging that he had raped the complainant. He denied the charges and stated that they were disguised to cover for the long running dispute over land. The appellant never called the said Kennedy to give evidence.

10. As the first appellate court this court has the duty to review and re-evaluate the evidence produced in the trial court and to arrive at its own findings. I have done that in this matter. I have also considered the grounds of appeal in totality.

11. The first ground is that the appellant did not plead guilty to the charges. I do not see how this becomes a ground of appeal. The appellant pleaded not guilty and that is the reasons why the trial was necessary. This ground therefore lacks merit and is dismissed.

12. Grounds two (2) to six (6) form the basis of this appeal and are argued in the appellant's submissions. These grounds taken cumulatively address the adequacy of evidence, the corroborative value of witnesses and reliability and weight placed on such evidence by the court. In ground two of his appeal the appellant states that he was not given statements of witnesses. However on 16.4.17 the accused informed the court that he had been given witness statements and he prayed for time to prepare for his case (See pg. 7 line 2 of proceedings). So the Appellant is not telling the truth when he alleges that he was not supplied with witness statement. The remaining grounds relate to quantity of evidence, which I will now address.

13. The Appellant was physically arrested by people at night within the compound of the complainant. The complainant identified him as the person who had raped her a few minutes earlier. The identification was by his perfume. The Appellant alleges that perfume cannot be used to identify a person. However, in my view perfume can be a powerful identity of a person, especially where a heinous bodily offence had been committed. The smell of somebody, under those circumstances, endures forever. Perhaps what is to be asked is this, what was the appellant doing at the place where he was arrested? The allegation that he was helping rescue a cow is not convincing. Where was the cow, and where was the said Kennedy? The accused person has not explained what he was doing in the vicinity of the complainant's house. It is the finding of this court that the appellant was properly identified, was arrested, and taken to police station and was later charged as required by the law.

14. The testimony of PW2, PW3, PW4 and PW5 are all consistent with that of PW1 and corroborate the evidence of PW1 beyond any reasonable doubt. The PW5 evidence, including the examinations of the vagina of the complainant lead to an inescapable conclusion that the appellant committed the offence as charged. The Appellant submitted that he too ought to have been examined to establish if he had committed the offence. However, the examination of his penis was not absolutely necessary. The vagina was being examined because it has the capacity to be bruised, and to retain spermatozoa. The complainant had bruises on the labia minora, bleeding in the vagina and sperms in the vagina. The examination was done within 11 hours of the offence. During that time it was only the appellant who had contact with the complainant. So there was no need to conduct parallel inquiry on the genitals of the appellant.

15. As for his evidence during the trial, the appellant merely denied the commission of offence, stating that he had been on a mission to save a cow which had fallen into a ditch. He stated that at the ditch he was attacked. However, there was no evidence of any ditch or of any cow which was to be rescued. Interestingly, even Kennedy, the alleged owner of the cow, was not called to give evidence. It is the finding hereof that the appellant's defence amounted to a mere defence and the trial court was duly entitled to disregard it.

16. In the same way the allegation by the appellant of existent of bad blood brought about by dispute over land was not proved and amounted to mere allegation. In the end it is the finding of this court that the trial court's finding on conviction was arrived at through the due process of the law and cannot be impeached. The same is therefore upheld.

17. On sentencing the court notes that the appellant has not appealed against the prison term of 10 years imposed by the trial court. However, even if he had appealed against the same, this court would still not interfere with the discretion of the trial court on sentencing,

which in any event, appears to have been lenient for a serious case such as is before this court.

18. The totality of this judgment is therefore that the appeal herein lacks merit and is dismissed in its entirety. The trial court's finding on conviction and sentencing are accordingly upheld.

Right of appeal within 14 days.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ongige – State Counsel

Appellant -

Court Assistant – Mr. Erick