REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL CASE NO. 30 OF 2019

LAWRENCE MWANGI WACHIRA.....APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Gatundu

Chief Magistrate's Court Criminal Case No. 6 of 2017 by L. M. Wachira (CM) on 27/03/19)

J U D G E M E N T

1. **Lawrence Mwangi Wachira,** the Appellant was charged with the offence of **rape** Contrary to **Section 3(1) (a) (b) (3) of the Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on the **27th** day of **January 2017** at **Rapha Medical Clinic, Kiamwangi** in **Gatundu South Subcounty,** intentionally and unlawfully caused his genital organs namely penis to penetrate the genital organs namely vagina of **LWW** without her consent.

2. On Count two, he faced a charge of **Administering a substance with intent,** contrary to **Section 27(1) (b) (3) of the Sexual Offence Act No. 3 of 2006.** Particulars being that on the **27th** day of **January 2017** at **Rapha Medical Clinic Kiamwangi** in **Gatundu South Sub-county**, intentionally administered a sedating drug to **LWW** with the intention of over powering her so as to engage in a sexual activity with **LWW.**

3. After full trial, he was convicted and sentenced to **ten (10) years imprisonment** on both counts, sentences that were ordered to run consecutively.

4. Aggrieved, he appeals on grounds that;-The learned Magistrate erred in convicting him on insufficient circumstantial evidence and the court erred in convicting him notwithstanding undischarged reasonable doubt.

5. Facts of the case were that on the **27th** day of January 2017, PW1 **LWW** went to a medical clinic to seek treatment as she had discomfort in her lower abdomen. She encountered the Appellant who instructed her to lie on the examination couch and remove clothes. Having complied he swabbed her vagina with cotton wool and injected her on her right arm. She felt dizzy and was unable to talk but saw the appellant remove his clothes. He lay on her and had sex with her. On completion of the act, he injected her the second time and she slept. She woke up later and sat on the couch. The appellant advised her to wait until she felt better but she paid Kshs.300/= and left having been given two (2) types of medicine. She went home and informed her sister and employer, subsequently she reported the matter to the police and sought treatment at Medicins Sans Frontieres, Mathare and Eastleigh project and Gatundu level 4 hospital. Investigations carried out culminated into the arrest of the appellant who was later charged.

6. Upon being put on his defence the Appellant stated that the complainant went to his clinic with abdominal pain and infection. That in the course of examination his secretary was present. He examined her and noted intermittent bleeding. After examining her they went to his office and he gave her two (2) injections and antibiotics. She paid Kshs.300 and left. On the 3/2/2017 the police notified him of rape allegations and informed him that the complainant ought to be paid Kshs. 80,000/= but he declined as he had not raped her.

7. The appeal was canvassed by way of written and oral submissions, respectively. It was urged by **Mr. Gitonga,** learned counsel for the appellant that evidence adduced by the complainant was contradictory. That the lower court convicted the appellant on circumstantial evidence that was weak and uncorroborated. That no witnesses who were present at the clinic were called to testify to indicate if there was any commotion; The medical report was negative of any spermatozoa; The appellant was not medically examined to prove the complainant's allegations that she was suffering from a sexually transmitted decease and the post rape case treatment indicated that the complainants hymen had multiple old tears, instead of fresh tears which was evidence of previous sexual experience. These conditions in his opinion did not prove the principles enunciated in the case of **Abang'a alias Onyango –vs- Republic (Cr. APP. No. 32 of 1990 (UR) that:**

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

8. That failure to subject the appellant to a DNA test to ascertain if the appellant was connected to the offence was erroneous. That the prosecution failed to prove the nature of drug administered via a toxicology report.

9. That at trial, the court erred in convicting the appellant on the weakness of the defence put up and that the prosecution failed to lay basis for production of the post rape care form and treatment notes which were relied upon.

10. The Respondent (State) through learned State Counsel, **Mr. Ongira** opposed the appeal. He urged that all ingredients of the offences were proved. Evidence tendered in court was consistent and well corroborated. He invited the court to take note of Section 124 of the Evidence Act where the court can convict if it believes in the testimony of a victim. That the doctor who examined the complainant found her with fresh bruises which was proof of a sexual encounter.

11. With regard to the defence put up of the alleged attempt by the victim to extort money from the appellant and that the incident could not have happened in the presence of two individuals who were present, he argued that the issue of reconciliation was brought up by the appellant and the court disregarded it and that it also considered alleged contradictory evidence.

12. Further, he argued that the doctor confirmed the presence of injection marks on the right side of the victim.

13. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

14. With regard to the 1st count, the offence of rape is provided for in **Section 3(i) of the Sexual Offences Act** that stipulate thus;-

(1) A person commits the offence termed 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.

Therefore the prosecution was duty bound to prove;-

1. Whether the act that caused penetration into the genital organs of the complainant was perpetrated.

2. The identity of the perpetrator.

3. Whether it was unlawful and intentional and/or without consent.

15. As correctly argued by the defence, in the case of **Republic -vs- David Ruo Nyambura & 4 others (2001) eKLR the court stated thus;-**

"…It is the cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution through out to prove the guilt of an accused……".

16. PW1 stated that she was violated sexually on the **27th January 2017** at about 6.00 p.m. The following day the 28th January 2017, she sought treatment at Mathare Eastleigh Project (Medicins San Frontierers) a sexual victims recovery centre. Subsequently she was examined at Gatundu Level 4 Hospital by PW2 Dr. Wycliff Omollo. It was established that she had fresh bruises at the posterior fourchette (thin fold of skin at the back of the vulva) and the external cervical os (opening between the uterus and vagina).

Penetration is defined by **Section 2 of the sexual offences Act as;-**

"……..the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

Although it was noted that the hymen had multiple old tears, evidence of fresh bruises aforestated was proof of recent penetration into the complainant's genetalia.

17. The complainant identified the Appellant as the perpetrator of the act that caused penetration into her genital organs using his male

genital organs. She testified that at the outset the Appellant dipped cotton wool in some substance and used it to wipe her genitalia then administered an injection on her right arm that made her feel dizzy and her body became immobile but she remained conscious. Therefore what she told the court supported her assertions directly.

18. It is argued that the court relied upon circumstantial evidence that relies on an inference to connect it to conclusions of a fact. To reach a conclusion that a person committed an act following allegations, some principles as argued by the defence must be established, but as I have pointed out, evidence adduced by the complainant was what she perceived by her senses of sight, therefore, it was direct evidence as opposed to circumstantial evidence.

19. It is the contention of the Appellant that he could not have committed the act of penetration into the complainant's genetalia in the presence of his receptionist/secretary who was present during the entire process of examination.

20. DW2 **Esther Wambui** who described herself as a mid-wife alluded to having been at the clinic as a patient. She stated that she saw a lady enter the examination room and the secretary took inside a card. On cross examination she stated that she did not know what transpired inside the room and ordinarily the secretary does not remain inside the room during treatment.

21. DW3 Jane **Nyambura Ndungu** who described herself as the receptionist stated that the examination was done in her presence. On cross examination she stated thus;-

> ***"…. She was being examined at the stomach. He used the cotton wool to swab the vagina. I now change and state that the examination was on the vagina. Sorry I was not present…. I am a receptionist and I should not be present during examination I am not a nurse"***

22. The only conclusion that could be made following such allegations was a fact of DW3 having not been present during the examination of the complainant. Therefore evidence of the identification of the perpetrator of the Act remains that of the complainant.

23. In the case of ***Mr. Kassim Ali -vs- Republic Cr. App. No. 84 of 2005 (Mombas*a**)** the court stated thus:

> ***"….. A fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence''***

24. It is argued that none of the witnesses who were at the clinic indicated any corroboration. The complainant was emphatic that she was motionless. She could neither move nor utter a single word, therefore she could not have communicated to other persons outside the examination room.

25. It is also argued that the medical report was negative for any spermatozoa.

In the case of **Mark Oiruri Mose -vs- R (2013) eKRL** the court of appeal stated thus;-

> ***''Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girls organ''.***

Presence of spermatozoa is not a requirement when it comes to proof of penetration.

26. Another argument put up is failure to subject the appellant to a DNA test to ascertain if indeed he was connected to the offence.

The court of appeal in **AML -vs- Republic (2012) eKLR stated that;-**

> ***"The fact of rape or defilement is not proved by a DNA test but by way of evidence."***

27. The complainant's credibility was not called into question by the defence for stating that the Appellant did not reduce the nature of treatment given into writing a fact alleged to have been contradicted by the investigation officer, PW4 **No. 90567 PC (W) Mary Kitole** who told the court that she had a general outpatient record of the clinic that showed that the complainant actually visited the clinic and was treated for lower abdominal pains. The defence admitted the document was authored by the Appellant but objected to it being adduced in evidence, an objection that was overruled by the trial court.

It is notable that the complainant did not identify this particular document therefore the investigating officer should have expounded on how he obtained it although it is admitted it was authored by the appellant and he did not comment on it. What is of importance is the admission that indeed the complainant was treated at the clinic and on the fateful date. The alleged contradiction, therefore, did not discredit the complainant as a person.

28. The fact of the complainant having notified her sister of what befell her at the outset was confirmed by PW3 **HWK.** She encountered the complainant at 7.00 p.m. while crying and she narrated the ordeal to her. Her conduct was of a person who was distressed. It buttresses the fact of having been molested.

29. The defence put up by the Appellant was a denial. He alleged that the Investigations Officer went and informed him of the allegations

on the 3/2/2017 and asked him to pay Kshs.80,000/= for the matter to be compromised but he declined. In her testimony PW4 the Investigating Officer stated that she visited the scene (clinic) on the 4/2/2017. She was silent on the issue of the alleged proposed reconciliation. On cross examination the allegation was not brought up. If indeed she intended to extort money from the appellant, it was a crucial issue that should have been raised to elicit her answer being the alleged person allegedly culpable for the possible misdeed. This therefore, must be viewed as something that was thought of and added later.

30. The detailed re-examination of what transpired leads to the conclusion reached by the trial court that the appellant was the perpetrator of the act of penetration.

31. It is argued by the prosecution that the complainant did not consent to the act. In the case of **Oyier -vs- Republic (1985) KLR 353 the court of Appeal held that:-**

> ***1. "The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.***
>
> ***2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.***
>
> ***3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."***

32. Evidence was adduced that the complainant went to hospital to seek treatment. Treatment notes authored by the Appellant and evidence adduced by him, DW2 and DW3 confirm that fact. At the point of being molested she did not resist physically because she was immobilized. She was inhibited from indicating her resistance to the act or even her unwillingness to participate in the Sexual **Act (See Section 43 (2) of the Sexual offences Act)**. Therefore, the intentional and unlawful act was perpetrated against her person without her consent.

33. With regard to the second count, it is alleged that the appellant intentionally administered a sedating drug to the complainant with the intent to overpower her so as to engage in a sexual act. The prosecution was obligated to prove the nature of the drug that was administered that was stated to have been a sedative. A sedative would be a substance that induces sedation. There are various sedating drugs therefore it was imperative for the prosecution to prove the type of drug they had in mind when they came up with the particulars of the offence. In convicting the Appellant the trial court based its basis on the fact that the complainant had visible injection sites on her right arm inner surface. The learned Magistrate opined that no defence was offered in that regard.

34. Prior to the Appellant giving any explanation in defence the prosecution was required to adduce in evidence a toxicology test that would have determined the type or amount of drug that was administered to prove the charge. It was not sufficient for the prosecution to rely on circumstances that prevailed. Due to failure on the part of the prosecution to act diligently the second count was not proved to the required standard.

35. From the foregoing, I find the appeal having succeeded partially. On the second count, I do quash the conviction and set aside the sentence imposed.

36. On the 1st count, the Appeal fails, therefore I affirm the conviction. On sentence, the period meted out is the minimum prescribed sentence for the offence. Therefore, I dismiss the appeal on the 1st Count in its entirety.

37. It so ordered.

Dated, Signed and Delivered in Kiambu this 12th day of September, 2019

L.N. MUTENDE

JUDGE