REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 99 OF 2016

MWANDIA A. MWANZIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon E.M Kagoni SRM**

delivered on 16th August 2016 in Criminal Case No. 1815 of 2015

in the Chief Magistrate's Court at Mombasa)

JUDGMENT

The Appeal

1. The Appellant was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence were that on the 10th day of June 2015 at [particulars withheld] in Changamwe Sub-county within Mombasa County, in association with another, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of N S aged 23 years old without her consent.

2. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. The Appellant pleaded not guilty to the charge in the trial court on 11th September 2015. He was tried, convicted of the offence of gang rape, and sentenced to serve 20 years in custody for the offence.

4. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in his Amended Petition of Appeal filed in Court on 16th May 2017 are as follows:

> **a) THAT, the learned trial magistrate erred in law and order when he relied on the prosecution evidence which was not water tight to warrant a conviction and sentence.**
>
> **b) THAT, the learned trial magistrate did not take into account that PW1 never told the court the time of the alleged rape and how long the struggle ensued.**
>
> **c) THAT, the learned trial magistrate erred in law and fact when he relied on PW1 testimony which was not consistent and no eye witness was present to collaborate her testimony.**
>
> **d) THAT, the learned trial magistrate erred in law and fact when he relied on PW1 testimony who never shed light on the intensity of light if it was at night.**
>
> **e) THAT, the learned trial magistrate failed in law and fact when he admitted MF1 (consent form) yet PW1 testified that she was denied the form by the doctor.**
>
> **f) THAT, the learned trial magistrate erred in law and fact when he relied on contradictory evidence by PW1 who testified that she was taken to hospital at midnight and the PRC form filled after midnight whereas as per the PRC form it is dated 12/6/2015 i.e. after two days when the alleged offence was committed.**

g) THAT, none of the arresting members of the public recorded a statement to corroborate the evidence.

h) THAT, the learned trial magistrate erred in law and fact in basing judgment on the sole evidence of the complainant.

i) THAT, the learned trial magistrate erred in law and in fact by relying on the evidence of Dr. Sceria Obuya who produced the P3 form and PRC form which were prepared by two other doctors.

j) THAT, the learned trial magistrate erred in law and fact by relying on inconsistent testimony of the complainant without any evidence of DNA or blood test.

k) THAT, the learned trial magistrate erred in law and fact in convicting the Appellant without any corroboration by relying in the provision of Section 124 of the Evidence Act without any justification.

l) THAT, the learned trial magistrate erred in law and fact by believing the testimony of the complainant without giving concrete reasons or justification.

m) THAT, the learned trial magistrate did not consider the time of the alleged offence and identification of the accused person.

n) THAT, the learned trial magistrate erred in law and fact in relying on the evidence of the investigating officer whose evidence was disjointed and incomplete without linking the Appellant to the offence.

o) THAT, the learned trial magistrate erred in law and fact in convicting the Appellant without any medical evidence, exhibits or witnesses linking the Appellant to the charges.

p) THAT, the learned trial magistrate failed to consider that the accused had no legal representation and the totally broke down and allegedly cried a lot making any cross-examination impossible.

q) THAT, the learned trial magistrate failed to consider that the accused had no legal representation and the totally broke down and allegedly cried a lot making any cross-examination impossible.

r) THAT, the learned trial magistrate's sentence was excessive without considering the mitigation and sentence for the offence that the accused was charged with.

s) THAT, the learned trial magistrate erred in law and fact by relying on wrong evidence explanation, findings and authorities in convicting the Appellant.

5. The appeal proceeded for hearing on 20th July, 2017, and both the Appellant' counsel and the Prosecution counsel made oral submissions. Mr Oduori, the learned counsel for the Appellant, submitted that the trial magistrate had relied on evidence that was not watertight to warrant a conviction, because the evidence was only from the complainant and was not corroborated.

6. Further, that the medical expert who had produced the PRC form was not the one who prepared it, and it was not clear why the maker had not produced it. Mr. Oduori also pointed out that the evidence given by the Investigating Officer was not supported by either pictures of the scene, DNA or blood samples, to confirm that the Appellant was indeed the one who committed the offence.

7. According to Mr Oduori, the identification of the Appellant was not properly done by the complainant, since she only testified that she knew the Appellant and that the offence took place during the day. He also contended that the complainant had made it difficult for the Appellant to cross-examine her, when she broke down and wept uncontrollably. Lastly, the counsel for the Appellant submitted that his client was a first time offender and prayed for leniency, and that the sentence be reduced from 20 years imprisonment which was in excess, to 15 years imprisonment.

8. Mr. Fundi, the learned prosecution counsel, submitted that the evidence of the complainant was not shaken, and that the Appellant refused to cross examine the complainant and other witnesses. Further, that the Appellant did not create doubt in the evidence of the complainant, since he failed to explain to the court events of the material day, neither did he raise any defense.

9. On the issue of the ingredients of the specific offence, Mr. Fundi submitted that penetration had been proved by PW1 and corroborated by the doctor. Further, that on the ingredient of consent, PW1 testified that she did not consent to the act and that consent was obtained by threat and fear. Reliance was placed on section 124 of the Evidence act which provides that:

"A court can convict on the evidence of the victim alone if it is convinced that the evidence is true.''

10. Lastly, on the issue of identification, Mr. Fundi submitted that the Appellant was well known to the complainant, since he had been her customer at the hotel where the complainant worked. He was of the opinion that 20 years imprisonment was lenient enough, and urged the Court to dismiss the appeal and uphold the conviction and sentence.

11. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

The Evidence

12. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called eight witnesses. N I S was PW1 and the complainant, and she testified that she had known the Appellant for about a month while she was working in a café known as [particulars withheld], and that he promised to get her a job at the port. That on 10th June 2015 at about 5:00pm the Appellant called the complainant and informed her that the job he had promised her had been found, and he asked her to meet him at a place called [particulars withheld].

13. Upon meeting the Appellant, they then proceeded on foot to the port using a short cut he proposed. As they walked, a stranger approached them and pointed a knife at the complainant, at which point the Appellant started beating the complainant. The complainant testified that the Appellant hit her on the head and ordered her to remove her panty. The Appellant then raped her and left her bleeding. After the ordeal, PW1 went to the main road and a good samaritan escorted her to Changamwe Police Station. PW1 was later referred to Coast General Hospital for treatment.

14. PW1 further testified that on 5th September 2015 while at home she saw the Appellant and followed him, and found him at the restaurant she used to work. She raised an alarm and the Appellant was arrested, escorted to Changamwe Police Station, arraigned in court and charged with the offence of gang rape.

15. PW2 was Dr. Samira Osman, who produced as Exhibit 1 a P3 form filled on 10th September, 2015 by Doctor Khadija, who she testified was a colleague at Coast General Hospital with whom she had worked with for two years, and was familiar with her handwriting and signature. She testified that the P3 form stated that the complainant was examined on 10th September, 2015, and from the injuries noted, the complainant had suffered harm.

16. PW2 also produced as exhibit 2 a PRC (Post Rape Care) form signed on 12th June 2015 by Saida Mwinyi, who she had worked with at the hospital for 4 years and was familiar with her handwriting and signature. The PRC form indicated that the clothes the complainant wore during the ordeal were bloodstained and that she had bruises on her face, scratch marks on her legs and knees and her hymen was freshly broken.

17. The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in this respect. The Appellant gave an unsworn testimony without calling any witnesses. He told the trial court that he had been arrested while having a meal in a hotel and he denied committing the offence.

The Determination

18. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are two issues for determination raised in this appeal. The first is whether there was a positive identification of the Appellant; and secondly, whether there was sufficient, consistent and credible evidence to convict the Appellant for the offence of gang rape.

19. On the issue raised of the identification of the Appellant, the Court notes that the evidence of identification by PW1 is the only evidence that put the Appellant at the scene of the crime. PW1 in this respect testified that she was able to identify the Appellant as she had known him before for a month as he used to visit her place of work, and that she met him and walked with him on the day the crime was committed. She later saw and identified him after the rape, as a result of which the Appellant was arrested.

20. I am reminded in this respect of the guidelines that apply to visual identification as set out in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

21. In addition it has been stated by the Court of Appeal in **Wamunga vs. Republic, (1989) KLR 424** as follows at page 426:

> **"..where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

22. Lastly, in **Anjononi and Others vs Republic, (1976-1980) KLR 1566, it was held** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

23. From the evidence adduced by PW1, the gang rape took place during daylight, and on the material day she spent considerable time with the Appellant walking with him on the way to the port. PW1 had also seen and knew the Appellant for a month before the rape, and was able to recognize him when she later saw him, leading to his arrest. The circumstances were therefore not difficult such as to raise any doubt or mistake as to the identification by PW1, and I therefore find for these reasons that that there was positive identification of the Appellant.

24. On the second issue as to whether the prosecution proved that the Appellant committed the offence of gang rape beyond reasonable doubt, section 10 of the Sexual Offences Act provides for the said offence as follows:

"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

25. Gang rape therefore occurs where a person commits a rape or defilement in association with another or other persons, It also occurs where a person is in the company of another or others who commit the offence although he does not himself rape or defile the victim. The key ingredients of the offence of gang rape include the following:

a) Proof of rape or defilement;

b) Proof that the assailant was in association with or in the company of another or other persons with the common intent of committing the offence.

26. Section 3(1) of the Sexual Offences Act on the other hand provides the elements of rape as follows:

"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."

27. The Court of Appeal in its decision in **Republic vs Oyier (1985) KLR 353** elaborated on these elements as follows:-

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 has 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.**

28. In the present appeal, PW1 testified that after they were approached by a stranger, the Appellant grabbed her while the stranger removed a knife and they then pushed her to the ground and removed her panty. Further, that the Appellant was in the meantime beating her, while his accomplice held her by the throat and put the knife on her chest. The Appellant then raped her and that she was left at the scene bleeding.

29. The Post Rape Care form produced by PW2 as Exhibit 2 dated 12th June 2016 showed that the complainant was wearing a bloodstained skirt, had scratch marks on her face and on both legs and knees,, her outer genitalia was bloodstained, she had abrasions on the vagina and her hymen was freshly broken. The P3 form produced by PW2 as exhibit 1 also referred to this PRC.

30. I will first address the ground raised by the Appellant of lack of corroboration of the evidence of PW1 that she was raped by the Appellant. The medical evidence adduced by PW2 did not only corroborate the complainant's claim of rape, but also confirmed the violence she said was meted on her by the Appellant and his accomplice. It is notable in this respect that there was no break in the sequence of events as alleged by the Appellant, as PW1 testified that the offence occurred on 10th June 2015, the report was made to Changamwe police station that night after midnight which was 11th June 2015, and her medical examination was conducted on 12th June 2015.

31. Besides, the proviso to section 124 of the Evidence Act provides that no corroboration is required in cases involving sexual offences, where the Court believes that the complainant it telling the truth. The testimony by PW1 was consistent as to what transpired during her ordeal, and it was also evident from the proceedings that she was traumatized as she broke down and cried during the hearing, prompting the trial court to recommend counseling. There is thus no reason for this Court to doubt her credibility.

32. The Appellant further claimed that the crying by the complainant prevented his cross-examination. However, the record of the trial Court is clear that on 23rd December 2015, when the Appellant was given an opportunity to cross-examine the complainant, he indicated he had no questions to ask.

33. On the production of, and reliance by PW2 on a P3 form and PRC form that were filled by other doctors, PW 2 stated he had worked with the said doctors before and was familiar with their handwriting. In my view, the procedure adopted by the trial Court accords with section 77 of the Evidence Act which provides as follows;

"(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him

for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

34. PW2 in this regard confirmed to the trial court that the signatures on the P3 form and PRC form were genuine, and the person who signed them held the qualification which they professed to hold. In the circumstances, it was not necessary to call the makers and the trial court was entitled to presume the same genuine.

35. It is therefore clear that the Appellant used force during an sexual attack on PW1 while in the company of an accomplice, and there was no consent on the part of PW1 to the sexual intercoeurse. I therefore find that the offence of gang rape was proved to the required standard. The Appellant's conviction for the offence of gang rape was therefore safe.

36. Lastly, the Appellant in his Petition of appeal also appealed against the sentence. The penalty for gang rape under section 10 of the Sexual Offences Act is imprisonment for a term which shall not be less than fifteen years, but which may be enhanced to imprisonment for life. It is to be noted from the said provision that the offence the Appellant was convicted of attracts a minimum sentence of fifteen years. While sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008.**

37. I nevertheless note that the Appellant was found to be a first offender by the trial Court, and that it was held by the trial Court that he needed a deterrent sentence as he had committed a brutal offence and beastly act on a person known to him. It is my view in this respect that the minimum sentence provided for by law was enough deterrent in the circumstances of the offence that the Appellant committed against PW1, and that the sentence of imprisonment of 20 years imposed by the trial magistrate, although lawful, **was excessive.**

38. I accordingly uphold and affirm the conviction of the Appellant for the charge of gang rape contrary to section 10 of the Sexual Offences Act, Act No. 3 of 2006. I will however set aside the sentence imposed by the trial magistrate, and substitute it with an appropriate sentence of this Court. I accordingly sentence the Appellant to 15 (fifteen) years imprisonment, which term of imprisonment shall run from the date of the Appellant's conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE