REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 135 OF 2017

HAMISI LEWA RUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**An appeal against the original conviction and sentence of Hon. N.S Lutta SPM in Criminal Case No. 717 of 2012 arising from a judgment delivered on 21st July 2017 in the Senior Principal Magistrate's Court at Mariakani)**

JUDGMENT

1. The Appellant was charged in the trial court with the a first count of robbery with violence contrary to section 296(2) of the Penal Code; and was in addition charged with an additional second count of rape contrary to section 3(1)(a)(c)(3) of the Sexual Offences Act, with an alternative offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act.

2. The Appellant was convicted of the second count of rape by the trial Court, and was imprisoned to ten years for the conviction. The particulars of the offence of rape were that on the 17th November 2016 at 13.45 hrs at [Particulars Withheld] village, Kasemeni Location within Kwale county of Coast region, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of Z M by use of force.

3. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal by way of his Petition of Appeal filed in court on 3rd August 2017, and Amended Grounds of Appeal dated 27th August 2018. During the hearing of the appeal on 3rd September 2018, the Appellant availed to the Court written submissions dated 27th August 2018, which he submitted he would rely on.

4. The grounds of appeal by the Appellant are that the trial Magistrate erred in law and in fact by convicting him without considering that the circumstances that prevailed at the scene of the crime were not conducive for proper identification to be established, given that the attack was sudden and terrifying. Further, that the trial Magistrate erred in law and in fact by convicting him without considering that and the victim was a stranger to the suspect; by not considering that the members of the public who arrested him were never summoned to clear the doubt of his arrest; by not considering section 36(1) of the Sexual Offences Act; and by failing to consider his reasonable defence.

5. These grounds were reiterated by the Appellant in his written and oral submissions, wherein he urged that the testimony of the complainant (PW1) showed that the attack was sudden, and the assailant was a stranger to her, and he cited various judicial decisions on identification in difficult circumstances by a single identifying witness, and dock identification by a witness.

6. Further, that the provisions of section 36(1) of the Sexual Offences Act were not used to identify who raped the complainant, and that in particular no samples were taken from the Appellant for forensic or DNA testing to find out if they matched the spermatozoa found in the complainant's genitalia. The Appellant also contended that the complainant was examined by the doctor on 28th November 2018, 10 days after the offence took place.

7. Ina addition, that key witnesses particularly the people who arrested the Appellant, and those who called PW2 and assisted the complainant from the scene of crime were not called to testify. Further, that the investigating officer did not arrest him nor visit the scene of the crime, neither did PW2 witness the offence, therefore their evidence was not sufficient. Lastly on his defence, the Appellant submitted that he was arrested 11 days after the offence at a hotel where he was taking tea, and he did not know what happened on the day of the offence.

8. Ms Mutua, the learned Prosecution counsel opposed the Appellants appeal in oral submissions made during the hearing of the appeal, and submitted that PW1 testified that the attack happened during the day at 1.40 pm and there was thus enough light for her to identify the assailant even though he was a stranger, and that she also spent sufficient time with the assailant. Further, that all the ingredients of the offence were proved by the witnesses who were called to testify, and section 143 of the Evidence Act provides that no specific number of witnesses are required to prove a particular fact.

9. Furthermore, that section 36(1) of the Sexual Offences Act is not mandatory,and there was no issue of pregnancy or disease that would have required compliance with the section. Lastly, on the Appellant's defence not being considered , that the Appellant did not give an account on what happened on the material day being 17th November 2016 , and only denied the offence.

10. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

11. The Prosecution in this regard called five witnesses to testify in the trial court. PW1 was Z M C, the complainant, and she testified as to the events of 17th November 2016 when she was sexually assaulted , and her testimony will be analysed later on in this judgment. PW2 was L S, the complainant's mother, and she testified as to receiving a call on the sexual attack on PW1, whereupon she took PW1 to Mariakani sub-County Hospital and reported the matter to Samburu police station.

12. Sergeant Robi Kibengere (PW3) testified as to receiving the report from the complainant at Samburu Police Station, and that she conducted investigations, and the Appellant was arrested after the complainant saw him. She produced the knife the accused had during the incident, the panty the complainant wore and the clothes the accused was wearing during the incident as the Prosecution's Exhibits 1, 2(a) and 2(b). The last witness (PW4) was Barrington Charo, a clinical officer based at Mariakani sub-County hospital. PW4 testified that he examined the complainant on 17TH November 2016 and produced the filled P3 form and treatment notes as the Prosecutions Exhibit 3(a) and 3(B) respectively.

13. The Appellant when put on his defence gave a sworn statement. He explained the events of 28th November 2016 when he was arrested, and denied commission of the offence or knowing the complainant.

The Determination

14. After considering the grounds of appeal, submissions thereon and evidence adduced in the trial Court, I find that the main issues raised by the Appellant in his appeal are firstly, whether his identification was proper; and secondly, whether he was convicted on the basis of consistent, reliable and sufficient evidence.

15. The identification by the Appellant was made by PW1, and I would like to reproduce her evidence in this regard:

> " **I hail from** [Particulars Withheld]**. I do recall on 17/11/16 at around 1.30pm, I was going back to work from lunch.**
>
> **I had taken a short cut. Suddenly I heard someone's phone ringing. I looked behind and someone held me by the neck and pushed me to the ground.**
>
> **He then went ahead and raped me. The route is not used by many people. I could not scream because I had been held by the neck. He was armed with a knife at the time.**
>
> **He pulled my panty and then raped me. I managed to gather some strength, freed myself and ran away.**
>
> **I ran to the road and sought assistance from a bodaboda rider who took me for treatment at Mariakani, sub-county hospital.**
>
> **I later reported the matter at Samburu police station.**
>
> **The suspect was putting on a blue shirt and blue short on that day.**
>
> **On another day, I was walking home from work when I saw the suspect at Mkilo. I went and called some people but the suspect ran away when he saw us.**
>
> **He was arrested later by the members of the public who had seen him on that day he ran way.**
>
> **The knife he used to threaten me is before court. Marked MFI -1.**
>
> **The clothes he was putting on that day are before court. Marked MF1 – 2 (a) and 2(b).**
>
> **I was issued with a P3 form. This is the one marked MFI – 3(a).**
>
> **I also have the treatment notes. Marked MFI – 3(b).**
>
> **The person who raped me is before court. Accused identified by the witness."**

16. Upon cross examination PW1 stated that she had not met the Appellant before the incident.

17. In analysing the evidence by PW1, I am guided by the legal principles on what constitutes favourable conditions for a correct identification by a sole testifying witness as set out in ***Maitanyi vs Republic* , *(1986) KLR 196*** **where the Court held** as follows:

"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

18. I have also reminded myself of the guidelines 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".

19. I find that the circumstances of the identification of the 1st Appellant by PW1 and PW2 were not favorable for a positive identification, for even though the attack took place during daylight, the sudden and traumatic nature of the attack was such that it was possible for a mistake to be made as to the identity of the attacker, particularly as the complainant testified that she did not know the attacker from before.

20. In addition, it is also notable that the identification by the complainant was a dock identification, and even though she described the clothes the attacker wore, she was never called to identify the Appellant in an identification parade, and relied on the clothes the Appellant wore on his day of arrest to identify him. The identification by the Appellant therefore needed to be corroborated by some other independent evidence.

21. PW3 in this respect produced as the Prosecution's Exhibit 1 the knife purported to have been used by the Appellant during the commission of the offence, and as the Prosecution's Exhibit 2 the clothes he wore on the day of the offence. The most disturbing aspect of the production of these exhibits is that no evidence was given by any of the prosecution witnesses as to when the said knife and clothes were recovered, and if indeed they were recovered from the scene of the crime and/or from the Appellant. There was thus no evidence adduced linking the said knife and clothes to the offence and the Appellant, and particularly given that the Appellant was arrested ten (10) days after the commission of the offence on 28th November 2016.

22. These gaps in the evidence rendered the exhibits worthless as corroborating evidence. This Court finds that the totality of the gaps in the evidence adduced was makes the same not reliable and sufficient to sustain the convictions of rape, which is defined in section 3(1) of the Sexual Offences Act 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 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."

23. 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.**

24. While the testimony of PW1 and the medical evidence by PW4 in this regard left no doubt to the fact that PW1 was brutally and traumatically raped and injured during the attack, it however did not conclusively point to the Appellant as the assailant and the person who committed the unfortunate offence against the complainant.

25. I accordingly order allow the Appellant's appeal and quash the conviction entered against the said Appellant for the offence of rape contrary to section 3(1) (a) (c)(3) of the Sexual Offences Act, Act No. 3 of 2006, and set aside of the death sentence of ten (10) years imprisonment imposed on the Appellant for this conviction. I further order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

26. Orders accordingly

DATED AND SIGNED THIS 2ND DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS THIS 16TH DAY OF OCTOBER 2018

D. O. CHEPKWONY

JUDGE