REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 69 OF 2017

FORMERLY ELDORET HCCRA NO. 95 OF 2015

LOCHOLIA KWAROK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of Cr. No 473 of 2014 in the Principal Magistrate's Court at Kabarnet delivered on the 16th day of July, 2015 by Hon. E. Kigen RM]

JUDGMENT

1. In accordance with the duty of a first appellate court (see ***Okeno v. R*** (1972) EA 32), I have examined the evidence presented before the trial court giving allowance to the fact that I did not see or hear the witnesses testifying before the court and will, consequently, defer to the trial court on any observations made as regards the demeanour of the witnesses.

2. The appellant was, on the 28/5/14, initially charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. He denied the charge. After the first witness (PW1) testified on this charge and alleged to have been raped by the accused and another person, the charge was substituted with one of rape contrary to section 3(1) (a) of the Sexual Offences Act No. 3 of 2006, on 23/9/14. There was no apparent explanation as to why the appellant was charged with assault, if the offence allegedly committed was truly one of rape as charged in the substituted charge.

3. The complainant PW1 testified that she was assaulted by one Domoita and the accused before they took turns to rape her as follows:

> "The accused slapped me. Domoita proceeded to beat me up. They pulled me outside [a house] and **the accused tied my legs and proceeded to rape me.** They tore my clothes and removed my pants and raped me. The accused was the first one then followed by Domoita. I screamed and pleaded with him to leave me but they refused. He threatened to kill me. I managed to untie myself and ran naked to Eunice's house who told me that I should not enter her house naked. The accused came to the house of Eunice and banged the door as they were looking for me. I hide under bed. Eunice screamed and the accused and the other suspect ran away. I went to Chepseunio's house to hide where I was given clothes. My torn clothes were brought to Eunice's house. The following day I went to Chemolingot Hospital where I was given medication and later came to Nginyang' police to report where I was issued with a P3 form which was duly filled. P3 form MFI 1. The accused was arrested at Nginyang' by Police Officers and my children."
>
> **[Emphasis added]**

4. The complainant's allegations of rape is sought to be corroborated by the evidence of her minor child aged 10 years who gave unsworn statement, the trial court having found upon a *voire dire* examination that *"the minor is aged above 10 years [and] she does not understand the meaning of giving evidence under oath [and] will therefore give unsworn evidence owing to her tender age."* The child (PW2) described the incident as follows:

> "**The accused tied my mother's legs and hands and removed her clothes and covered her with thorns and told her that he would kill her. The accused [lay] on top of my mother and raped her. Domoita also slept on my mother and raped her. My mother managed to run to Eunice's house and hid under the bed.** The accused and Domoita followed us upto Eunice's house. They were drunk. Members of the public came and the accused ran away."

5. As regard's the allegation of rape, Eunice (PW3) to whose house the complainant (PW1) ran out to hide, only testified that:

> "The said **C informed me that she had been raped by the accused.** She later ran and hid in another neighbours' house."

6. PW4 Jackson Yauralima, Nursing Officer at Chemalingot Dispensary ,testified on behalf of his colleague Kaptum Isaac who had filled the P3 form and who was said to be on leave, that the complainant had **"Tears on the Labias, were in the process of healing. Had a scar – FGM scar which gave a map of tear on the private parts. Whitish fouly swelling vaginal discharge suggestive of infections,"** and concluded on re-examination that:

> **"The evidence showed sexual intercourse.**
>
> **The injury shows that the act was vigorous.**
>
> **The injury had taken about 1 week from the healing process.**
>
> **The complainant is elderly and the injuries showed that she had been sexually abused."**

7. PW5 APC Emmanuel Mulinge Kioko then of Mondi Sub-County Administration Police (AP) testified that the complainant had reported at the AP Camp on 26/5/14 at 12.00 alleging that she had been assaulted by a person known to her and who she had been spotted at the market, leading to the arrest of the appellant while alleging trying to escape.

8. PW6, Police Constable Duncan Ochieng said that he had on 24/5/14 received the complainant, accompanied by an Administration Police Officer from Mondi alleging to have been raped by the accused and Domoita. On Cross-Examination, the Police Officer said:

> "The complaint was for rape. At the AP (Administration Police) she had complained of assault."

9. When put on his defence, the appellant gave an unsworn statement that the offence is not true and that there was no evidence of rape, and wondered why the charges were changed from assault to rape in the course of the trial. He observed that the complainant reported the matter one week after the alleged offence.

10. In the Judgment of the trial court, the learned magistrate made short work of the issue of proof of rape and held:

> "As per the second issue it was the complainant testimony that she was raped severally by two people known to her. I find that it would have been of little importance for the tests to be conducted. The act of having been committed by two separate people.
>
> The commission of a sexual offence can be properly corroborated by circumstantial evidence or proved by oral evidence of the victim.
>
> This was held in **Ongweya vs Republic** [1964] E A 129.
>
> All this notwithstanding it is the prosecution evidence which impressed me as being truthful and well collaborated to prove this case beyond reasonable doubt.
>
> Having said all the above I find that indeed the prosecution has established its case beyond reasonable doubt and I do hereby proceed to find the accused guilty of the offence of rape in violation of section 3 (1) (a) of the Sexual Offences Act No. 3 of 2006.
>
> **E KIGEN, RM**
>
> **10/7/1**5"

The trial court sentenced the accused to imprisonment for 10 years provoking this appeal.

Issue for Determination

11. Having considered the submissions by the appellant and counsel for the Respondent, the issue of determination in the appeal is whether there was evidence to the required degree of cogency to prove the allegation of rape against the appellant.

12. The point taken by the appellant as to the proper offence being gang rape contrary to section 10 of the Sexual Offence Act rather that rape contrary to section 3 (1) of the Act is well founded in view of the alleged double rape by the appellant and one Domoita. However, section 382 of the Criminal Procedure Code would cure such defect, if the charge of rape was proved against the appellant, because no prejudice can be shown to have been suffered by the accused where all the elements of the offence of rape would have to be proved for a conviction under the charge as now presented. It would be a different case if the reverse obtained, that the accused was charged with the offence of gang rape under section 10 of the Sexual Offence Act which carries a stiffer sentence of imprisonment for a term of not less than fifteen years which may be enhanced to imprisonment for life as opposed to the sentence for rape which shall not be less than 10 years imprisonment to life.

13. I would agree that the charge is improperly drawn as stating that the appellant *"jointly with another not before the court intentionally and unlawfully caused his penis to penetrate the vagina"* of the complainant and should rather have been charged as gang rape that the appellant with another not before the court raped the complainant in turns. However, as I have stated above, I consider that section 382 of the Criminal Procedure Code would cure the defect, if evidence showed that the accused himself did penetrate the complainant, notwithstanding the allegation of rape against another person with whom the accused, separately, had sexual intercourse with the complainant.

Determination

14. The evidence relating to the alleged rape by the accused and his co-suspect Domoita had gaps, inconsistencies and contradictions as follows:

a. The complainant (PW1) who said she had her legs tied did not give a detailed description as to how the accused were able to penetrate her legs tied up as alleged;

b. The complainant's 10 year old child (PW2) testified that her mother had been tied up on the legs and hands, and there was similarly no details as to how she managed to untie herself and escape to PW3's house;

c. (PW4) the Nursing Officer who presented the medical examination report on behalf of his colleague who did the examination and filled the P3 form, obviously embellished the evidence as captured by the examination so as to give an impression of rape. While the P3 report simply recorded *"Tears on the Labias (healed) scars"* without giving any conclusion as required by Section **"C"** paragraph 1 (b) of the Report, the witness gave his own version of the findings as follows. Pray, how would he have know that the scar was FGM scar, and if it was and the examiner had recorded the scars were 'healed', how could these injuries be evidence of rape the previous week? It is significant that the medical official who examine the complainant and filled the P3 Report on 27th May 2014 did not make any conclusion of rape;

d. There was no explanation as to why the complainant did not report the alleged rape on 20th May 2014 until the 26th May 2014, according to the evidence of PW5 the arresting Administration Officer and the P3 Report of 27th May 2014. Yet in the complainant's own testimony, she claimed to reported the assault the very following day which would have been on 21st May 2014 as follows:

> i. "The following day I went to Chemolingot Hospital where I was given medication and later came to Nginyang Police to report where I was issue with a P3 form which was duly filled."

e. It was not clear whether the report at Nginyang Police was made ***later*** that day on 21st may or on the 26th may 2014 after the report to the AP camp. The evidence of PW6 was that the AP officer accompanied the complainant on **24th May 2014** when she made the rape report, but this cannot be accurate if the report to the AP was not made until the **26th May 2014. The P3 form issued by PW6 dated 26th May 2014 does not indicate that the complainant had been previously seen as alleged by her the day following the alleged rape;** and

f. The complainant had, as testified by AP officer PW5, and conceded by the Police Officer (PW6) only reported a case of assault to the Administration Police as testified by PW5. Indeed, the P3 form issued by the police officer at Nginyang Police Station to the complainant for presentation to MOH Chemolingot Hospital requesting for examination gave the details of the alleged offence as follows:

"She alleges to have been **assaulted** by person well known to her …."

15. I do not find the prosecution evidence on the alleged rape of the complainant by the accused to be credible.

16. As held in ***Shazad & 2 Ors.*** *v. R* (1988) KLR 282, 286 the High Court (Sachdeva & Patel, JJ.) held that –

> "A report to the police, as soon as possible after the incident, would tend to show the consistency of a witnesses' evidence. It has been held in **Tekerali Korongozi & Ors. v. Re** (1952) 19 EACA 259 that evidence of first complaints to persons in authority are important as they often provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide a safeguard against later embellishment or made-up case."

In that case it was found *'that the evidence showed that the complainant had not reported the alleged assault to the police as soon as possible after it had occurred. In the circumstances of this case, the likelihood of embellishment or making up could not be ruled out'* and the appeals from conviction and sentence for grievous harm c/s 234 of the Penal Code were quashed and set aside.

17. In the present case the complainant first complained of assault to the AP officer and later changed to rape in the same fashion as the levying of charges against the appellant before the trial court.

18. While the demeanour and appearance of the complainant and that part of the evidence of a complainant may corroborate her evidence in a sexual offence, as held by Windham, CJ. in ***Ongweya v. R.***, supra, relied on by the learned trial magistrate, there was, with respect, no credible evidence to corroborate the allegation herein that the complainant had been raped by the accused. Although, the facts of ***Ongweya*** appear similar to the present case, there was in the early complaint to the complainant's neighbour Eunice in this case, evidence of assault rather than rape in the complainant's bleeding head and the accused's pursuit with broken sticks. Again unlike, ***Ongweya***, the complainant in this case had at the Administration Police (AP) camp before reporting to the Nginyang'Police Station complained only of ***assault*** by the accused.

19. I have, however, found on evidence - from the complainant PW1, that she was slapped and beaten by the accused and Domoita; that of her minor daughter PW2 that they had beaten her mother and covered her with thorns; that of her neighbour Eunice (PW3) that the accused and Domoita had chased after her and they had broken sticks and she was bleeding on the head; and that of the medial examination P3 reporting bruises on the face and knee - that the accused did assault the complainant as initially charged, the P3 examination report recoding

"Bruise Left face below the ear" and "*Bruise Right lateral Knee"*, which the examining nursing officer categorised as "harm". Giving allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses (see ***Peters v. Sunday*** Post (1958) EA 424), I take into account that the trial magistrate has recorded that the complainant had *"visible marks on the back and hands."*

20. The irresistible conclusion on the evidence in this matter is that the charge of rape was a frame up to get back at the accused who appears to have beaten the complainant following some disagreement over an unclear matter that had also led to the eviction of the complainant from the said Domoita's house where she had been given refuge by Domoita's wife. The accused was no shown to have sexually assaulted the complaint and the rape charge can therefore not be sustained.

21. The accused has been in custody for over 4 ½ years since arrest on 26th May 2014. This court having found him guilty of the lesser offence of assault pursuant to section 179 (2) of the Criminal Procedure Code the period that the accused has been in custody would have been sufficient punishment for the offence of assault causing actual bodily harm under section 251 of the Penal Code.

Orders

22. I find the appellant not guilty of the charge of rape c/s 3(1) (a) of the Sexual Offences Act and consequently acquit him under section 354 (3) of the Criminal Procedure Code. The accused is pursuant to section 179 (2) of the Criminal Procedure Code is found guilty of the charge of assault c/s to 251 of the Penal Code and sentenced to serve imprisonment for 3 ½ years.

23. As the accused shall have served his entire sentence in full having been in custody for over 4 ½ years, I direct that he be immediately released from custody unless otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.