REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 16 OF 2017

(From original conviction and sentence in Criminal Case No. 222 of 2016 of the Principal Magistrate Court at Baricho).

JOSEPH KOINE MUTHONI.....APPELLANT

V E R S U S

REPUBLIC .....RESPONDENT

JUDGMENT

The appellant Joseph Koine Muthoni was convicted of rape contrary to **Section 3(1) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006** and sentenced to 20 years imprisonment. He has lodged an appeal claiming that the trial magistrate erred in law and fact by;

a) Failing to note that he was not of sound mind and failed to order for psychiatric examination.

b) Failing to consider that from the testimony advised in court he was not armed and it was not possible for one person to overpower her.

c) Not considering that their existed a grudge between the complainant and him.

d) Not considering that the case was full of contradictions and inconveniences.

e) Giving him a sentence of 20 years which was harsh and excessive.

f) Not considering his defence.

The appeal proceeded by way of oral submissions. The appellant submitted that he was arrested along the road at 10.00 a.m and was asked about a woman he was alleged to have raped. He denied but he was arrested and beaten. He was unable to conduct trial because he was hit on the eye. That he is now fit.

For the State, Mr. Obiri the prosecution counsel submitted that the appeal is opposed. That the prosecution proved the case to the required standards. That the prosecution was supposed to prove the identity of the perpetrator, and that the victim had not consented to the act of the appellant penetrating her vagina with his penis. That the complainant had recognized the appellant who is his neighbour. There was no consent as the appellant forcefully had sexual intercourse with the complainant who was aged sixty five years. The complainant was armed with a knife and threatened her of dire consequences.

That the fact of rape was corroborated by medical evidence. He relied on **R –v- Oyier (1985) KLR** where the principles were laid down. That the appellant was properly convicted.

I have considered the grounds and the submissions. I have considered the evidence which was tendered before the trial court and evaluated it as required of the first appellate court. This is in line with the holding in **Okeno –v- R (1972) E. A 32** that for matters of fact the High Court has a duty as the first appellate court to re-evaluate the evidence adduced at the trial and make its own independent finding but bearing in mind that it did not see or hear the witnesses and leave room for fact that.

I will consider the evidence and the grounds.

Evidence

PW 1 narrated the incident that on 18/02/2016 at about 7 pm, she was going home from the shop when the appellant emerged from maize farm and blocked her way.She could see him clearly from the moonlight, he grabbed her chest and pushed her down. She screamed and appellant showed her a knife and threatened her before proceeding to rape her. She recognized the voice of the appellant since they hailed from the same village. She went home but did not take a bath and reported the following day.

PW 2 and PW 4 both confirmed that PW 1 had chest and neck pains. On vaginal examinations, she had vaginal discharge which had foul smell, bruises on her vagina on the labia majora and labia minora. It was diagnosed that she had been raped. She produced treatment notes as exhibit -1-, post rape care form exhibit -2- and P.3 form exhibit -3-.

PW 3 stated how PW 1 came to his home early on the following day to report the incident while she was crying. They visited the scene and found rice and maize stalks lying on the ground. PW 1's dress was dirty and had soil at the back. He told her to report and he went to search for the appellant and took him to the Baricho Police Station.

PW 5 a sergeant at Baricho Police Station stated that on 19/02/2016, the OCS brought PW 1 to her who had been crying the whole morning. She counseled her and PW 1 reported that she had been raped by the appellant who hailed from her village. After the arrest of the appellant, PW 1 was recalled and she identified him. The appellant opted to remain silent.

The issues which arose from the grounds of appeal.

Issues arising:

1. Failure to order for psychiatric examination

On 27/04/2016, the prosecutor requested the court to order the appellant to be taken for mental assessment. A report dated 25/05/2016 from Embu Level 5 Hospital declared him mentally fit to stand trial. The examination was therefore done and the ground is without merits. In any case the appellant never raised a defence of insanity.

2. Contradictions

The contradiction noted is whereby PW 1 states that the following day she went to the home of PW 3 and reported that she had been raped. PW 3 told her to wait for him to make the report but since she was in pain she did not wait.

PW 3 on the other had states that after PW 1 reported the rape incident, she took him to the scene and told her to go to hospital and report at the police station.

The above contradiction is minor and does not affect the main substance of the prosecutions' case that PW 1 was raped and the culprit was identified as the appellant.

In the case of **Erick Onyango Ondeng' v Republic [2014] eKLR**

The Court of appeal held;

> **Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at** *"about 7 pm"* **in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in *TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA*, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:**
>
> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

The contradictions are minor and do not go to the substance of the charge. This ground is without merits.

3. Harsh sentence

An Appellate Court will not ordinarily interfere with the discretion exercised by a trial Judge unless, the Judge has acted upon some wrong principle or overlooked some material factor or the sentence is manifestly excessive in view of the circumstances.

Section 3(3) of the Sexual Offences Act No. 3 of 2006 provides:

A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

The penalty for rape above is a minimum of 10 years and maximum of life imprisonment therefore the sentence imposed upon the appellant of 20 years was lawful. There is no reason to interfere with exercise of dicretion by the trial Magistrate.

4. Appellant's defence not considered

As per the proceedings, the appellant opted to remain silent therefore there was no defence to be considered.

5. Burden of proof

It is trite that the burden of proof always lies with the prosecution to prove their case, beyond any reasonable doubts. This is the standard of proof in Criminal Cases and the burden never shifts.

Section 3 (1) of the Sexual Offences Act No. 3 of 2006

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.

The evidence adduced by the proves these ingredients beyond any reasonable doubts. Medical evidence proved there was penetration and PW-1- testified force was used and there was no consent.

Looking at the whole evidence adduced, the prosecution has proven his case beyond all reasonable

doubts. The entire evidence on record left no doubt, as the trial court found, that the appellant raped the complainant in the manner described.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The guilt of the appellant was proved beyond reasonable doubt by overwhelming evidence on record. The appeal is without merits and is dismissed.

Dated at Kerugoya this 5th day of December 2018.

L. W. GITARI

JUDGE

Read out in Open Court,

Appellant – Present.

Mr. Sitati P. C for State

C/A - Naomi