REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 78 OF 2015

JAMES MURIITHI WERU……...…….APPELLANT

VERSUS

REPUBLIC……...…RESPONDENT

[Appeal from the Judgment and Conviction by Hon.W. Kagendo Chief Magistrate in Mukuruweini CR.C.NO.5 of 2015 dated 16th February, 2015]

JUDGMENT

1. The appellant, **James Muriithi Weru**, was charged with the offence of Rape contrary to **Section 3(1) (a) (b) and (3)** of the **Sexual Offences Act.** The particulars of the charge were that on the 2nd January, 2015 at [particulars withheld] Village within Nyeri County he intentionally and unlawfully caused his member to penetrate the rear end of **J W N** aged 35 years without his consent.

2. In the alternative, the appellant was charged with committing an Indecent Act contrary to **Section 3 (1) (a) and (b)** of the **Sexual Offences Act, 2006;** that on the same date and at the same village the appellant intentionally touched the complainants' buttocks with his hands.

FACTS

3. The facts of the case as recorded by the trial magistrate was that the prosecution called a total of seven witnesses; that the complainant was aged 35 years and that his speech was slow and delayed; the trial court cross examined him to test his ability to give evidence and found that this challenge was not so severe so as to impair his ability to testify; he gave sworn testimony and stated that he met the appellant as he was headed home; the appellant requested him to accompany him to look for an axe at the homestead of one Gaitho; whilst there they went into the store where fodder was stored; that instead of getting the axe the appellant demanded to have sex with him; he removed **PW1s'** trouser and applied oil between **PW1's** buttocks and forcefully had sex with him; he was then given Kshs.100/- and warned not to tell anyone; the next day he told some young men who then sought the appellant out and gave him a thorough beating and frog marched to the police station; **PW1** was then taken to hospital and was examined and treated; the appellant was arrested and subsequently charged in court was tried and convicted on the main charge and was sentenced to twenty (20) years imprisonment.

4. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on 5th October, 2015 raising four grounds of appeal, inter alia;

(i) The conviction was based on the evidence of a single identifying witness;

(ii) There were material inconsistencies and contradictions in the evidence of the prosecution witnesses; the trial magistrate erred in convicting the appellant on evidence that was rebutted;

(iii) The prosecution did not prove its case beyond reasonable doubt;

(iv) That the trial magistrate failed to consider the defence raised by the appellant.

5. When the appeal came up for hearing on the appellant chose to rely on his written submissions whereas Prosecuting Counsel for the State Ms Gicheha made oral presentations; hereunder is a summary of the parties rival submissions;

APPELLANTS SUBMISSIONS

(i) The appellant contends that the medical report was inconclusive in that the medical officer who examined the complainant did not indicate that there was rape; there were also no visible injuries found on the anal part of the complainant; that there was a delay in taking the complainant to hospital for examination for rape this raised doubts;

(ii) The evidence of **PW1** was uncorroborated yet the trial court convicted him on the evidence of a single identifying witness;

(iii) That the prosecution failed to call crucial witnesses to testify; the case referred to by the appellant was **Bukenya & Others vs Uganda (1972) EA 549;**

(iv) The prosecution failed to prove the age of the complainant which was a critical component when it; that the prosecution failed to provide credible evidence to prove age; the case referred to was **Kaingu Elias Kasomo vs R Cr.Case No.504 of 2010;** and contends that the prosecution failed to prove its case to the desired threshold;

(v) The trial magistrate erred in not taking into consideration the ***alibi*** statement of defence; that his testimony was corroborated by his defence witnesses; and that his defence was not displaced by the prosecutions' case; yet the trial court concluded that none of the witnesses was with him between 2.00pm to 5.00pm; the crucial time being 4.00pm when the offence is alleged to have taken place;

(vi) The appellant prayed that this court analyze the evidence and arrive at a different conclusion than that of the trial court; and that his appeal be allowed in its entirety.

RESPONDENTS SUBMISSIONS

(i) Counsel in response submitted that the **PW1** was found to be truthful in stating that he had reported the matter to the appellants parents and also he had told his brother **PW2** but nothing was done; that the delay in taking the complainant to hospital for a medical examination was caused by the inaction of the guardian **(PW2)** and the appellants parents; he then reported to some young men who then sprang into action and **PW3** and **PW4** had the appellant arrested; that the prosecution had called all relevant witnesses and had proved its case to the desired threshold;

(ii) Counsel submitted that the delay in taking the complainant to hospital was not inordinate; the delay is explainable; one reason being that the complainant was physically challenged and that it took some-time for him to share and talk to someone about the incident; secondly there was the failure to take the complainant seriously leading to in-action by the brother and the appellants parents; but never the less the delay of four days did not erode the evidence and did not mean that the offence was not committed;

(iii) The appellant had a defence of ***alibi***; he called **DW3** and **DW4** as his defence witnesses; they all testified that they had seen him that day but none could account for his whereabouts from 4pm to 5pm; and that was the time when the offence is said to have occurred; their evidence did not shake the prosecutions' case;

(iv) The court was urged to dismiss the appeal and to uphold the lower courts' conviction and sentence;

ISSUES FOR DETERMINATION

(6) Upon reading the appellants written submissions and taking into consideration the oral presentations made by Counsel for the State this court has framed the following issues for determination;

(a) whether the appellant was positively identified;

(b) whether the medical report was inconclusive; whether the prosecution proved its case to the desired threshold;

(c) whether the trial court considered the appellants defence and had good reasons for rejecting it;

(d) Whether the sentence is harsh and excessive.

ANALYSIS

7. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the appellant was positively identified; whether the medical report was inconclusive; whether the prosecution proved its case to the desired threshold;

8. The essential ingredients of the offence that the prosecution was tasked with proving are identification of the assailant, lack of consent and the forceful act of penetration;

9. **On identification**; the incident is said to have occurred at about 4pm; at that time there is sufficient daylight and therefore the circumstances and conditions are found to have been favorable for proper identification; **PW1** though mentally challenged gave sworn testimony after the trial court had examined him and found that his challenge was not severe as to impair his ability to give evidence; and that he understood the importance and the need to tell the truth; he vividly narrated how he met the appellant as he was headed home; the appellant requested him to accompany him to look for an axe at the house of one Gaitho; whilst there the appellant told him that he wanted to have sex with him and removed **PW1s'** trouser and applied oil between his buttocks and forcefully had sex with him; in his evidence he referred to the appellant by name **" Murithi";** he stated that he knew the appellant very well and had known him before that day; and indicated that the appellant's home was far from where he lived with his brother; the evidence of **PW2** the brother of the complainant corroborated that of the complainant that the appellant was a person known to both of them; and that he too knew the appellant before that day;

10. The trial court in its judgment made the following observations of **PW1** that;

> **"James has some incapacity but is alert as to the time and place and is well oriented. The court does not even for a moment doubt his truthfulness. Why? He clearly had no motive to falsely implicate the accused person. In-fact owing to his slow gait, the court does not believe he could have come up with a false scheme."**

11. The trial court was convinced that he was telling the truth and had no reason to doubt his evidence; on corroboration the trial court observed;

> **"…he was the only witness. Like the late Justice Tuiyot used to say, these things happen behind closed doors and windows and one cannot expect an eye witness"**

12. The trial court then made a finding that the appellant was a person well known to the complainant;

“The accused person is well known to him and must have known his (complainant) incapacity and he used it to have sex”

13. From the evidence adduced this court finds no reason to interfere with the trial courts finding that the complainant was a truthful witness and that he knew the appellant prior to the incident and that he was the person who raped him; this court is satisfied that the conditions and circumstances were favourable and that the appellant was positively identified by **PW1** by way of recognition;

14. **On penetration** the court notes that the incident occurred on the 2/01/2015 and the complainant was examined on the 6/01/2015; the trial court found the delay in taking the complainant to hospital not to be inordinate and that the delay is explainable; one reason being that the complainant was physically challenged and that he did not take action immediately and that it took some-time for him to share and talk to someone about the incident; secondly there was the failure to take the complainant seriously leading to in-action by the brother;

15. This court concurs with the findings of the trial court that the delay of four days was explainable; further the period is found not to be inordinate and does not erode the evidence that an offence was not committed;

16. **PW1** in his stated that the appellant demanded to have sex with him; that the appellant lubricated the complainants’ behind by applying oil; and then proceeded to forcefully have sex with him; the trial court recorded that the complainant indicated where the appellant did this; and recorded that:

“…… (witness touches between his buttocks).”

17. The complainant was examined at Mukuruweini Hospital and upon examining **PW1** the doctor **(PW7)** noted that there were no lacerations or tears or discharge in the anal region; he tendered into court the P3 Form and the treatment notes as exhibits;

18. Penetration is defined in the Act as;

“ the partial or complete insertion of the genital organs of a person into the genital organs of another.”

19. The appellants contention was that there was no conclusive medical evidence tendered by **PW7** that the complainant had been raped; the same notwithstanding it is trite law that penetration in rape cases can be effected even if the genitial organ is in the slightest degree placed within the orifice of the other genital organ which is inclusive of the anal region; and that for there to be penetration it is not necessary that there be visible tears and lacerations;

20. In this case although the victim was mentally challenged the trial court found that there was credible testimony by him and that the lack of tears and lacerations and medical evidence notwithstanding that he was telling the truth;

21. This court is disinclined to interfere with the trial courts finding and finds that the absence of visible tears and lacerations is no reason for this court to doubt the victims testimony; this court is satisfied with the evidence of **PW1** on penetration;

22. **On Consent**; the complainant told the trial court that the appellant had sex with him forcefully; the trial court noted the complainants mental incapacity and made the following observation;

“He is mentally challenged and does not have a proper guardian. His particular circumstances should not be used against him. The accused person is well known to him and must have known his (complainant) incapacity and he used it to have sex.”

23. Section 42 of the Sexual Offences Act defines consent and reads as follows;

"Section 42: For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and the capacity to make that choice."

24. At the commencement of the trial the prosecution had pointed out to the trial court the complainants mental challenges and had requested indulgence; and on the court record and in its judgment the trial the court made note of the complainants' mental challenge; this court finds that the trial court had the opportunity to observe at length and noted the complainants' mental incapacity and finds no reason to interfere with the trial courts finding on the complainants incapacity to give consent;

25. The prosecution is found to have proved identification, lack of consent and penetration to the desired threshold; this ground of appeal is found lacking in merit and is disallowed.

Whether the trial court considered the appellants defence and had good reasons for rejecting it;

26. The appellant contends that the trial court did not consider his defence; it is noted from the record that the appellant gave an unsworn statement of defence; and that he called three (3) alibi witnesses one being his father, the appellants' brother and the appellants' wife; the trial court considered all their testimonies and found them to be untruthful and also found that none of his alibi witnesses could vouch for the appellants whereabouts on that material date between 2.00pm and 5.00pm the incident having taken place at 4.00pm; that the complainant is found to have had no motive of falsely implicating the appellant;

27. The trial court after considering the appellants defence found that its credibility wanting and that the defence did not cast any doubt in the courts mind; it made a finding that the prosecution had proved its case and proceeded to convict him.

28. After re-valuating the evidence on record this court is satisfied that the trial court weighed the appellants defence against the prosecutions' case and found that it did not displace the prosecutions' case; the conviction is found to be safe;

29. The ground of appeal is found lacking in merit and is hereby disallowed.

Whether the sentence was harsh and excessive

30. The appellant has appealed against sentence; he had requested for an option of a fine which the trial court declined to grant; and he was sentenced to serve a term of twenty (20) years;

31. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

32. In this instance the trial court convicted the appellant after finding him guilty of the offence; before sentencing the appellant was called upon to mitigate and he prayed for leniency and also prayed for an option of a fine to which the trial court declined as it not provided for in the Sexual Offences Act and was also found to be inappropriate in this instance;

33. It is this courts considered view that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case; that the appellant had taken advantage of a vulnerable person who had no one to look out for him; and there was need to issue a deterrent sentence; the trial court also noted that the appellant showed no remorse and was therefore not lenient when meting out the twenty year sentence; this court also notes that that the trial court did take into consideration the fact that the appellant was a first time offender;

34. The provisions of Section 3(3) of the Sexual Offences Act provides for the punishment for the offence and reads as follows;

"3(3). 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 (10) years but which may be enhanced to imprisonment for life"

35. The sentence is as provided by the law and is found to be legal and that there is no reason found that warrants interference with it as it is as prescribed by law and it is found not to be harsh and excessive in the circumstances.

36. The ground of appeal that the sentence was harsh and excessive is found to be without merit and is disallowed.

FINDINGS

37. For the reasons stated above this court makes the following findings;

(i) The appellant was positively identified by way of recognition;

(ii) The prosecution proved all the key ingredients of the offence to the desired threshold; the conviction is found to be safe;

(iii) The trial court is found to have considered the defence and gave good reasons for rejecting the appellants defence;

(iv) The sentence is not found to be harsh and excessive in the circumstances and there are no good reasons found for interference.

DETERMINATION

38. The appeal on conviction and sentence is hereby found to be lacking in merit and is disallowed; the conviction and sentence are affirmed.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 16th day of February, 2017.

HON.A. MSHILA

JUDGE