REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 90 OF 2015

JAMES WAMBUA MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence arising out of the judgment

of H.M. Nganga RM delivered on 12th March 2015 in Criminal Case No. 221 of 2014

at the Resident Magistrate's Court at Tawa)

JUDGMENT

The Appellant was charged with two offences in the trial Court. In Count I he was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars were that on 2nd June 2014 at [particulars withheld] village , Kako location in Mbooni East District within Makueni County, he unlawfully assaulted F M W, thereby causing him actual bodily harm.

Count II was of the offence of rape contrary to section 3(1) as read with sub section 3 of the Sexual Offences Act. The particulars of the offence were that on the 2nd June 2014 at [particulars withheld] village , Kako location in Mbooni East District within Makueni County, he intentionally and unlawfully caused his penis to penetrate the anus of F M W without his consent. The Appellant was also charged with an alternative offence to Count II of committing an indecent act with an adult, contrary to section 11(A) of the Sexual Offences Act.

A plea of not guilty was recorded as against both counts in the trial court on 17th July 2014. The Appellant was tried and convicted of the charges of assault causing actual bodily harm and of rape, and sentenced to thirty (30) years in prison for the offence of rape.

The Appellant being aggrieved by the judgment of the trial magistrate preferred this appeal against the conviction and sentence, in a Petition of Appeal he filed in Court dated 11th June 2015. The grounds of appeal are in Amended Grounds of Appeal and Submissions the Appellant availed to the Court, and in summary are that his identification was based on the evidence of a single witness; no recovery memo of the clothes recovered from the scene of crime and produced as exhibits was produced; there was contradictory evidence adduced; vital and crucial witnesses were not called to testify; the P3 form was filled by a person who was not a qualified doctor; and that his defence was not considered.

The Appellant in this regard submitted that the identification and recognition evidence against him by PW1 was mistaken as the incident occurred at night when visibility is poor. Further, that no voice identification was carried out to establish if it was his voice that PW1 heard that night. Furthermore, that no exhibit memo was produced to show which clothes were recovered at the scene and if they were the ones produced in Court as exhibits. In addition, that the clothes were circumstantial evidence relied on by the prosecution thus weakening their case.

It was also alleged that PW1 gave contradictory evidence as to whether he left the club with the Appellant or met him on the way, and that contradictory evidence was given as to his arrest. In addition, that a villager elder by the name of David Muala Kasingu who was mentioned during the trial was not called as a witness, nor was the person who treated PW1 and filled the P3 form. Lastly, that in his defence he explained how he came to find himself in this situation after a fight in the pub.

Tabitha Saoli, the learned Prosecution counsel, filed submissions dated 9th March 2016 wherein it was urged that the Appellant's case was one of recognition and not identification; PW1 gave detailed and consistent evidence as to the rape which was collaborated by PW3 who produced a P3 form showing the injuries he suffered; the Appellant did not object to the production of the clothes as exhibits during trial; and that the clinical officer who was a medical practitioner was qualified to produce the P3 form.

The grounds raised in this appeal can be collapsed into two issues. These are firstly, whether there was proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of rape was based on reliable, consistent and sufficient evidence. 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**).

The prosecution in this regard called six witnesses, whereupon the trial Court found that a *prima facie* case was established and put the Appellant on his defence. PW1 was F M W, the complainant; PW2 and PW4 were David Mwanthi, a village elder, and R N, PW1's employer, who found PW1 and the clothes of PW1 and the Appellant the next day after the commission of the crime; PW3 was Sarah Njau Njoroge, a Clinical Officer at Kisau sub-district hospital who produced the P3 form and testified as to the injuries suffered by PW1; PW5, Alphonce Wambua Nuti, the Assistant Chief of Kyaluma sub location, and PW6 Inspector Dina Muita who was the investigating officer of the case, testified as to report of the offences and events that followed. The Appellant gave an unsworn statement and did not call any witnesses in his defence.

On the issue raised of identification, **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness in ***Maitanyi vs Republic , (1986) KLR 196*** 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".**

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".**

In the present appeal, the offence that the Appellant is convicted of took place during the night. PW1

testified as follows in this regard:

> **My names are F M W.I come from Kako location, Kyaluma sub-location, [particulars withheld] village. I am a farmer.I am employed by N M. I graze cattle and other domestic work. I have worked there for about 5 months. I know accused Joshua Mutua Mutiso. He is there. (Points at accused). He was working at the home of one Mutisya in the same village as a domestic work. I remember 02/ 06/2014 at midnight, we were in a bar at Kyaluma. We were drinking. I left with Mutiso from the club. We were going home. He ran before me and waited for me and hit me with a panga on the head both sides and right arm above elbow and left leg at the waist. I fell down. He removed my clothes. All clothes he removed. He removed my trouser first. The trouser was black in colour. He removed my white shirt. He then removed the short I was wearing and black underwear.**
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> **He started k****** kwa m****** (anus). I was lying with the stomach. He continued for 30 minutes. He had also removed his clothes. I had seen as we were in club, he was wearing a striped shirt checked and was wearing a black cape and red catapult. We struggled and I left him at the scene. I ran naked and left the clothes. He also ran and left his clothes. He did the act on me near the road on the side, 2 meters from the road. When I ran, I went and slept near the kitchen until morning. In the morning R, my boss found me in the kitchen. I was completely naked. She called Kasirnu, the village elder. They came, woke me up and gave me a lesso to cover myself. I went to the house I was staying but before then I told them I was beaten by Mutua Joshua and Mutua a********. I told them where the incident occurred they went to the scene and collected the clothes I changed clothes and went to the chief and informed me the person who assaulted me. The chief sent members of public who arrested accused."**

Upon cross-examination by the Appellant, PW1 further testified as follows:

> **"I am well. I know you.We lived in the same village. Your name is Joshua Mutiso. From the day you started to work for Mutisya you stayed there for 2 months before I knew you. On 01/ 06/ 2014, we drank together until midnight. We did not leave the club together. You waited me on the way. You had a panga. That day you hit me. You had removed your cap, shirt and other clothes. The clothes we found are the clothes in court. I have not seen your trouser.**
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> **Since I knew you, we have been drinking together for about 2 months. I don't remember coming to your house. On 01/ 05/ 2014, I went to look for you on 01/06/2014. it was on 01/06/2014 that I called you from your work of herding. On 01/06/ 2014, I had bought you beer, left, came back and we continued drinking until midnight."**

The trial magistrate also examined PW1 who responded as follows:

> **"The club is known as ya Kimeu that we were drinking. We drank until around 12 midnight. We left together from the club and each went his way. I did not where Mutua went but he waited me ahead. I did not accompany anyone It is about 30 meters that Mutua appeared. I was walking with a torch. I was not so drunk. I did not record in my statement that I had a torch. The man appeared from the bush and hit me and I fell. I did not know who it was at that time. When I was hit I lost conscious. I lost consciousness for about 17 minutes. When I regained consciousness, I found myself naked without any clothes .- After regaining conscious I did not know who the man I was with way. I knew it was Joshua Mutua when I saw his clothes the following day. The man was raping me. I was lying on my stomach and he was raping me. We struggled but he continued. was then able to flee myself and I ran to R N my employer and I slept there. In the morning R found me naked and called Kasimu. I told them that Mutua had beaten me and raped me. At that time, I was recollecting the events and I knew it was Mutua who did that to me because I was hearing his voice."**

Lastly on re-examination the PW1 testified as follows:

> **On 01/05/2014, I did not go to accused house. On 01/06/2014, I did not go to accused house where he works. I met him at the Kyaluma market before we went to the bar. We met first at 1.00 p.m., drank a little parted and then met again at- 5.00 p.m. at the bar. The bar is known locally as 'kwa Kimeu'. We drank until midnight. We left together and walked a few meters and parted. I was not carrying anything.I walked for about (show court a distance of 100 meters), before the man attacked me. I did not who the man was when I was hit and lost consciousness. I did not know the man but I was hearing his voice saying n******, nitakuua '. In the morning, I told R and the village elder who raped me. They went to the scene and found his clothes."**

I find that even though the Appellant was previously known to PW1 and had been with PW1 shortly before the commission of the offences, however, because of the circumstances in which the offence took place, namely that it was night and PW1 had been drinking in a bar, as well as the inconsistencies in PW1's testimony as to whether he was conscious or unconscious during the commission of the offence, his evidence of the identification of the Appellant by his voice requires corroboration . In this respect, there was evidence adduced by PW1, PW2, PW4 and PW6 that PW1's and the Appellant's clothes were found at the scene of the crimes, which clothes were produced as exhibits during the trial by PW6, and which point to the Appellant having been at the scene of the offence and the perpetrator of the offence.

I will address the ground raised by the Appellant in this regard with respect to the production of the said clothes without an exhibit memo. In the first instance there is no legal requirement about production of exhibit memos when producing exhibits during trial as evidence. Secondly, the nature and role of Exhibit memo's is that they are a pre-trial document and procedure that identify by number and description, the exhibits a party intends to offer into evidence during the trial, and parties are required to exchange their exhibit memos before trial in preparation for the trial. The Court notes in this regard that the said clothes were properly produced as exhibits by PW6 who was the investigating officer, after they were found and collected at the scene of crime by PW2 who testified to this effect, and handed over to PW5 who in turn handed them over to PW6.

As to the arguments that the trial court erred in relying on the evidence of the clothes found at the scene of the crime and therefore on circumstantial evidence to convict the Appellant, I am guided by the principles that apply before a court can rely on circumstantial evidence as was stated by the Court of Appeal in **Erick Odhiambo Okumu vs Republic (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012)** as follows:

> **"It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in *MUSILI TULO V. REPUBLIC* (*supra),*:**
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> ***"[C]ircumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics."***
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> **But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990* this Court tabulated the conditions as follows:**
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> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken***

cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

(See also *SAWE V. REPUBLIC [2003] KLR 364* and *GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).*

Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. *(See TEPER V. R. [1952] All ER 480* and *MUSOKE V. R [1958] EA 715)*. In *DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997* this Court reiterated this principle as follows:

"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."

Arising from the foregoing citation, this Court finds that firstly, there was no error made in relying on the circumstantial evidence as a means of finding guilt on the part of the Appellant. Secondly, there were co-existing circumstances that strengthened the inference of guilt on the part of the Appellant. These were that the clothes were found at the scene where the crime was committed the next morning. In addition, PW1, PW2 and PW4 who knew the Appellant prior to the crime all testified that the clothes were the ones they had seen and used to see the Appellant wearing.

The Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** 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. The Appellant was not a stranger to PW1, PW2 and PW4 and their identification of his clothes was therefore reliable for the foregoing reasons. I therefore find that there was sufficient corroboration of the identification of the Appellant, and that he was properly identified as the person who assaulted and raped PW1.

On the issue whether there was sufficient evidence to convict the Appellant for the offence of assault causing bodily harm and rape, the ingredients of the offence of assault are the application of force on the person of another, which occasions bodily harm. Section 3(1) of the Sexual Offences Act provides the elements of the offence 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 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 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.**

In the present appeal, as regards proof of assault causing actual bodily harm and penetration, PW1 testified that he was attacked by the Appellant who this Court has found was positively identified, who hit PW1 with a panga on the head, both sides and right arm above elbow and left leg at the waist. Further that the Appellant then started to "*k******* *kwa m*******'' which when translated from Kikamba language means that the Appellant started having sex with him in the anus.

Additional corroboration of this attack was provided by the PW3 who produced a P3 form she filled, and who testified as to the injuries suffered by PW1 which were bruises on the forehead, and head and upper limbs and laceration in the anus.. The Appellant has argued in this respect that PW3 was not qualified to produce the said P3 form as she is not a geologist or pathologist as required by section 77 (1)(3) of the Evidence Act. . Section 77 of the Evidence Act provides as follows:

"(1) In criminal proceedings any document purporting to be a 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."

The section therefore authorises the production and use of a medical report in a criminal trial, and there is a presumption as to the validity and authenticity of such reports. My understanding of the above the provisions is that in the absence of any challenge to the contents of a medical report, the presumption of authenticity stands. The trial court is however, *suo motto* or by request of the accused person, given discretion to call for the maker of such document to appear in court and be cross examined on the form and content of the report or document. The treatment notes could therefore be used by PW3 to fill the P3 form. In addition PW3 was a clinical officer and therefore qualified as a medical practitioner for purposes of section 77(1) of the Evidence Act in terms of filling and producing the P3 form.

As regards the requirement of lack of consent, from the evidence of PW1, his assailant assaulted him first by hitting him on the head with a panga and he lost consciousness. When he came to the rape was going on. There was thus not only force used during the sexual attack, but the PW1 was at the time incapacitated and incapable of giving any consent. I therefore find that the offence of rape was proved to the required standard. The Appellant's conviction for the offence of rape was therefore safe.

The Appellant in his defence admitted to having had differences with PW1 on the night of the commission of the offence, which was evidence of motive, and his only defence was that he was left at the bar when PW1 left with another man holding his hand. However this defence in my view does not explain how his clothes were found at the scene of the offence the next morning, and therefore did not affect the prosecution's case in any material way

Lastly, the Appellant in his Petition of appeal also appealed against the sentence. I note in this respect that no sentence was imposed for the conviction of the Appellant for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The applicable law on sentencing where there is conviction of several offences at one trial is found in section 14 of the Criminal Procedure Code which provides as follows:

(**1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.**

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

There was therefore an error made by the trial magistrate in sentencing the Appellant person only for the conviction for the offence of rape and not sentencing him for the conviction for the offence of assault causing bodily harm. Section 251 of the Penal Code in this regard provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

As regards the sentence imposed for conviction of rape, the penalty for rape under section 3(3) of the Sexual Offences Act is imprisonment for a term which shall not be less than ten 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 10 years and a maximum sentence of life imprisonment. **I note that the Appellant was found to be a repeat sexual offender offender by the trial Court having been previously convicted of committing an unnatural act, and that it was held by the trial Court and expressed in strong and emphatic terms that he needed a deterrent sentence, and society needed to be saved from "his beastly and heinous tendencies".**

It is my view in this respect that the minimum sentence provided for by law is enough deterrence in the circumstances of the offence that the Appellant committed against PW1, and that the sentence of imprisonment of 30 years imposed by the trial magistrate, although lawful, **was excessive.**

I accordingly uphold and affirm the conviction of the Appellant for the charge of assault causing actual bodily harm contrary to section 251 of the Penal Code, and his conviction for the charge of rape contrary to section 3(1) as read with sub section 3 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 3 (three) years imprisonment for the conviction for the charge of assault causing actual bodily harm, and 10 (ten) years imprisonment for the conviction for the charge of rape, which terms of imprisonment shall run concurrently from the date of the Appellant's conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 8TH FEBRURY 2017.

P. NYAMWEYA

JUDGE