REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.41 OF 2009

MICAH NYARANGI OMBORI……..……...APPELLANT

VERSUS

REPUBLIC……...…RESPONDENT

(From Original Conviction and Sentence in Kericho Criminal Case No.2399 of 2005 by Hon. W. Nyarima)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 140 of the Penal Code (now repealed). The particulars of the offence were that on the 12th day of December 2005, at [particulars withheld] Sub-location of Nyamira District within Nyanza Province he unlawfully had carnal knowledge of CK without her consent.

2. The accused also faced an alternative charge of indecent assault on a female contrary to section 144 (1) of the Penal Code. The particulars of the offence were that on the 12th day of December 2005 at [particulars withheld] Sub-location in Nyamira District of the Nyanza Province, he unlawfully and indecently assaulted CK by touching her private parts. The accused also faced a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code, the particulars of which were that on the 12th day of December 2005, at [particulars withheld] sub-location in Nyamira District within Nyanza Province, jointly with others not before court, unlawfully assaulted CK. Count III and V charged the accused with assault causing actual bodily harm to William Ochieng and Thomas Murundu respectively.

3. The appellant was charged jointly with two others, Fred Mokoya Nyambachi and Peter Ongaga Bota, in Kericho Criminal Case No.2399 of 2005 before the Senior Principal Magistrate. They pleaded not guilty to all the charges. After a trial in which the state called 4 witnesses, the trial court found that the accused had a case to answer and they were put on their defence. In his judgment dated 22nd July 2009 the trial court found the 1st and 3rd accused guilty as charged but acquitted the 2nd accused. The appellant who was the 1st accused, was convicted of rape and assault causing grevious harm and sentenced to 3 and 2 years respectively, the sentences to run concurrently.

4. Dissatisfied with both the conviction and sentence, the appellant has filed the present appeal in which he raises the following grounds set out in the Petition of Appeal dated 24th July 2009:

> ***1. That the learned trial magistrate erred in law and fact by convicting the appellant herein on a charge whose particulars were fatally defective.***

2. That the learned trial magistrate misdirected himself in law and fact by convicting the appellant in analyzing the evidence on record hence arriving at a wrong decision in law.

3. That the learned trial magistrate erred in law and fact by failing to reconcile material discrepancies/contradictions in the prosecution case hence causing injustice to the appellant.

4. That the learned trial magistrate by convicting the appellant erred in law and fact by relying on the statements of witnesses whose testimonies had no probative value.

5. That the learned trial magistrate by convicting the appellant herein erred in law and fact by failing to take into consideration the defence testimony which raised doubt in favour of the appellant.

6. That the learned trial magistrate by convicting the appellant herein erred in law and fact by failing to take into consideration the weight of evidence tendered against the appellant.

7. That the learned trial magistrate erred in law and fact by exercising his discretion on sentence and failing to give an option of fine.

8. That the learned trial magistrate erred in law and fact by failing to make a finding that there was no common intention between the three accused persons to infer guilt.

5. In considering and determining this appeal, I am required, as the first appellate court, to subject the evidence adduced before the trial court to a fresh evaluation and draw my own conclusions, bearing in mind that am not bound by the findings of fact of the trial court. In doing this, I must bear in mind that I have neither seen nor heard any of the witnesses. In this regard, I am guided by the words of the Court of Appeal in the case of **Kiilu & Another V. R (2005) 1 KLR 174** in which it stated:

"…an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions."

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

6. The State called 4 witnesses. PW1 was CK. Her evidence was that on the material day, she was with one Faith, William Ochieng and two others at Cherera attending a child's celebration. On the way back, they used a rough road. As they were crossing a river, the accused emerged from bushes with torches. They were armed with pangas and sticks. PW1 stated that she was carrying a torch which she flashed at the third accused and identified him, and he hit her with a stick.

7. The appellant, who was the 1st accused, then pulled her into a maize farm and beat her up. The 3rd accused and appellant then raped her and they took away her biker and pants. She was taken for treatment and issued with a P3 form. She stated that she did not know the accused before, but she identified the 1st and 3rd accused using torch light. The record indicates that she stated that the time was 5.30 p.m., though it appears from the evidence that the time was 5.30 a.m.

8. PW2, William Ochieng, testified that he worked at a hotel called Luango. On the material day, at about 6.00 a.m. he was walking with PW1 and others towards Sondu from a circumcision fete. They met four people standing on the road, two of whom had pangas. Two of the men got hold of PW1 and pulled her into the maize plantation, while the two others ordered him to kneel and beat him with sticks.

9. He testified further that he then fled and joined the rest of their companions, and they reported the

matter at Chabera AP Camp. They returned to the scene and found PW1 with a woman. She had a swollen face and blood was oozing from her private parts, and she was naked save for a lesso. PW2 further testified that the suspects were arrested later that day. According to PW2, the 3rd accused is the one who got hold of PW1 while the 1st accused, the appellant in this case, beat him. He knew the accused well as they all came from the same village.

10. Julius Magot, PW3, was a Clinical Officer at Sondu Health Centre. His evidence was that he examined PW1 on 13th December 2005. She had been physically and sexually assaulted. He found lacerations on her cheeks, left arm and both thighs. He also found pus cells which he stated, indicated sexual infection but there were no bruises and lacerations on the vagina. PW3 also testified that he examined William Ocheing whom he found had a swollen left cheek and broken molar.

11. The last prosecution witness, PW4, was the investigating officer, No.73691 P.C. Silas Cherono attached to Sondu Police Station. He produced the complainant's t-shirt, shorts and handkerchief in evidence.

12. At the close of the prosecution case, the trial court found that the accused had a case to answer and placed them on their defence.

13. The appellant opted to give an unsworn statement. He stated that he was at home doing his work when police officers and eight other people came and arrested him. He was taken to a place where there was a ceremony, and later to Sondu Police Station. He denied committing the offence.

14. After setting out the respective evidence of the prosecution and defence, the court dated 22nd July 2009, considered the issues that arose for determination. The first related to the allegations of rape and assault. The finding of the trial court was that the evidence before him supported the allegation of assault on PW1 and PW2, and of rape against PW1. The second issue related to identification. The court noted that the incident happened at 5.30 a.m when identification could have been difficult. PW1's evidence was that she shone her torch and saw the 1st and 3rd accused. She also stated on cross-examination that she knew the 3rd accused as he worked at a local hotel. She accompanied the police to the 1st accused's house where he was arrested.

15. Of note in the judgment of the trial court is that he observed that the 1st and 3rd accused persons changed their sitting positions while PW2 testified, but that PW2 was clear in his evidence that he identified the 1st and 3rd accused. The trial court stated that it disbelieved the alibis of the accused and found the evidence of PW1 and PW2 credible. The court found that the 1st accused had committed the offence of rape as charged. He also found the 1st accused guilty of assault against PW1 and convicted him in respect of count 1 and 2. He found the alternative charges spent as a result of the convictions on the main counts. He sentenced the appellant to 3 years imprisonment on the 1st count and two on the second, count, with the sentences to run concurrently.

16. The appellant appeals against these findings of the trial court. His Learned Counsel, Mr. Maengwe filed submissions which he requested the court to rely on in rendering its judgment. Learned State Counsel, Ms. Keli, appeared for the state and made oral submissions in response.

17. In her response, Ms. Keli opposed the appeal on behalf of the state. It was her submission that the evidence produced by the State at the trial was overwhelming, that all the witnesses who testified were consistent, credible and reliable witnesses, and the evidence adduced was sufficient to convict the appellant. In her view, the prosecution had proved the case against the appellant beyond reasonable doubt, and the conviction was safe and the sentence legal.

18. While the appellant had raised 8 grounds of appeal in his petition of appeal, in the submissions filed on his behalf dated 15th November 2015, his Counsel addressed the court on four main grounds. I shall consider these grounds and the responses from the state in respect thereof against the evidence adduced

before the trial court.

Identification

19. In his written submissions, Mr. Maengwe argued, as a first ground that there was no identification parade conducted. That the alleged offence had occurred at 5.30 a.m, the area was bushy, and there was insufficient lighting. His submission was that there was no single evidence, whether physical or circumstantial, to link PW1 and the appellant to the offence. As no identification parade was conducted, the appellant was not properly identified. The response from the state is that there was no need for an identification parade as the evidence on identification was sufficient. Ms. Keli submitted that PW1 and 2 were able to identify their attackers and specifically identified the appellant. They were attacked between 5.30 and 6.00 a.m and they were carrying torches which they shone on the appellant and his co- accused.

20. I note from the evidence that PW1 testified that she shone her torch on the appellant when he attacked her and pulled her into the maize farm. She was raped by the 3rd accused and another person, and that the appellant also raped her as his co-accused held her. She also testified that it was the appellant who led PW1 and the police to the 3rd accused's house. I further note from the evidence before the trial court that both PW1 and 2 stated that they had seen the appellant at the time of the incident, while the evidence of PW2 was that he knew the accused persons, including the appellant, as they all came from the same area. In the circumstances, I agree with the finding of the trial court that the appellant was one of the perpetrators of the rape against PW1, and the assault against PW2. There was no need for an identification parade to be conducted.

Alibi Defence

21. The second ground on which Counsel for the appellant made submissions was that the trial court failed to consider the appellant's alibi defence. In response, the state argues that the appellant's alibi defence was properly considered by the trial court, but it was disproved by the strong prosecution evidence that placed the appellant at the scene of the crime. According to the state, the evidence of PW1, that she was attacked by the appellant, was confirmed by PW2 who stated that he saw three men attacking them. Both prosecution witnesses maintained that they saw the men who attacked them, including the appellant, by way of torches.

22. I have considered the evidence adduced by the prosecution and the unsworn statement of the appellant. In the case of ***KARANJA VS. REPUBLIC***, **[1983] KLR 501** it was held that:

> ***"The word 'alibi' is a Latin verb meaning 'elsewhere' or 'at another place'. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e when he was initially charged".***

23. In this case, I note that the appellant's evidence in his defence was that he was at home doing his work when police officers and eight other people came and arrested him. His evidence did not, in my view, amount to an alibi defence. He did not state that he was elsewhere at the time of commission of the offence, but that he was at home at the time police came to arrest him. In my view therefore, there was no failure by the trial court to consider the appellant's defence, and it properly convicted him on the basis of the evidence adduced by the prosecution.

Evidence of Rape

24. The appellant further submits, as a third ground of appeal, that the medical evidence adduced by PW3, the clinical officer, did not support the case of rape against him. The submissions by the appellant are that the evidence of the clinical officer PW3 was that his examination of PW1 showed that there was a sexual infection, but no bruises or lacerations on the vagina.

25. The response from the state is that the evidence of PW1 was that she had been raped in turn by the accused persons. She had been examined by the clinical officer, PW3, who had established that she had a sexual infection. According to the state, in accordance with section 124 of the Evidence Act, her evidence did not need corroboration as the court was satisfied that she was credible and truthful. The state's submission was that her evidence was sufficient even without the medical evidence as she was alone when she was attacked by the appellants.

26. Under section 124 of the Evidence Act titled ***"Corroboration required in criminal cases"*** it is provided that:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

27. I have considered the appellant's ground of appeal against the evidence adduced before the trial court. The evidence of the complainant was that she was raped by the appellant and the 3rd accused. She described how she was intercepted while walking home with the 2nd complainant and pulled into the bushes and raped. She was found without her clothes, and had lacerations on her thigh and face, as well as a sexual infection. The trial court considered the evidence adduced, and found that it established a case of rape against the appellant. Having considered the evidence before the trial court and its findings, I am satisfied that the court rightly convicted the appellant, and I find no basis to disturb its findings and conclusions.

Assault

28. The appellant has also challenged his conviction on the ground that he was charged jointly with others in count III with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. Counsel submitted that though the accused were charged jointly, no evidence in support of the offence was produced. The state argues that on the contrary, there was sufficient evidence produced by the prosecution in support of this count. In this regard, the state relied on the evidence of the clinical officer who produced two P3 forms which confirmed that PW1 and PW2 were assaulted by the appellant and the 3rd accused.

29. I have considered the prosecution evidence with respect to the assault on the two complainants. I note that the clinical officer observed that PW1 had been physically and sexually assaulted. He found lacerations on her cheeks, left arm and both thighs. It was also his evidence that the second complainant, William Ochieng, had a swollen left cheek and broken molar.

30. I am satisfied that the prosecution evidence was consistent with respect to the assault on the complainants, and that the evidence of PW1 and PW2 with respect to the assault against them was corroborated by the evidence of the clinical officer who examined them and found that they had indeed been subjected to an assault. I am therefore satisfied that the trial court correctly found that the charge of assault had been proven against the accused.

31. Counsel also impugned the judgment of the trial court, his argument being that it differed from the testimonies recorded. He did not elaborate on this ground in his submissions, and in the circumstances, I am unable to make any findings in respect thereof.

32. The appellant was sentenced to a term of three years for the offence of rape and two years for the

offence of assault causing grievous harm, both sentences to run concurrently. As observed by the state, this was a lenient sentence given that the sentence for rape under section 140 of the Penal Code was life imprisonment, while the offence of grievous harm carries a penalty of 5 years as provided by section 251 of the Penal Code.

33. In the circumstances, I am satisfied that the conviction and sentence in this case were proper. I therefore find no merit in the appeal, and it is hereby dismissed.

Dated, Delivered and Signed at Kericho this 15th day of February 2017.

MUMBI NGUGI

JUDGE