REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 135 OF 2015

[An appeal from the conviction and sentence in Sirisia PM Criminal case no. 664 of 2014 by K. Mukabi (RM)]

B W ….....APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

1. **B W** (the appellant) was convicted on a charge of rape contrary to Section 3 (1)(a) of the Sexual Offences Act as read with Section 3 and sentenced to life imprisonment.

The prosecutions case was that on 5th July, 2014 within **BUNGOMA** county, he intentionally and unlawfully caused penetration by inserting his male genital organ namely penis into the female genital organ namely vagina of **L N (Initials used to protect identity of the minor)** a girl aged 18 years. The appellant denied the charge.

2. The evidence of **L N** was that on 15.07.14 at 5.00 p.m while walking in the company of her brother **B** from church in **[Particulars Withheld],** the watchman (who worked with her mother) at **[Particulars Withheld],** hospital summoned her saying her mother had left some flour for her to take home. He said the flour was in the sentry room, so **LN** agreed with her brother that she would go and fetch the flour while her brother would go ahead to buy cooking oil. However as soon as **L N** and the watchman got into the sitting room, the watchman locked up the room. He then laid her onto the ground, strangled her, removed her pants (which got torn) and his pants then raped her using his penis which he inserted into her vagina. The episode lasted a while, and **L N** raised an alarm drawing people to the scene. **B** rushed to call their mother and upon her arrival, the watchman ran away.

3. **B N W (PW2)** confirmed he was in the company of his sister when the appellant called them to collect flour which had been left for them by their mother, and he left **L N** going to pick flour while he went to buy paraffin. Upon his return, he did not find **L N** but he could hear a faint screaming coming from the sentry room.

4. **PW2** proceeded at the sentry door and pushed it open only to find the watchman raping his sister. It was his evidence that the watchman had removed his pants and was on top of his sister, and he also noticed his sisters torn white pants on the floor. When the watchman realized **PW2's** presence he stood up, while **PW2** made a call their mother.

PW2 stated:-

"The watchman is the accused on (sic) the dock. I knew him prior and I used to see him at the gate since my mother works at the hospital."

5. **B N N (PW3)** confirmed receiving information about the incident from her son **B** , so she rushed to the scene at the hospital and found a huge crowd. She saw the appellant standing nearby, surrounded by people. She observed that his trousers were half open and her daughter was on the floor. **LN** narrated to her how the appellant had lured her into the sentry room.

PW3 explained

"I had the habit of leaving food with the watchman so that they are picked by my children".

6. The appellant then fled from the scene but was followed by people including motor cycle riders. **L N** was examined by **JANET WANDILE (PW4)**, a clinical officer who found the vagina did not have tears, but the hymen was broken with semen on the vulva which was an indication of sexual intercourse. **A HIV** test and pregnancy test were positive. The appellant was also examined and found to be **HIV** positive.

This witness stated

"L also alleged that it was the 3rd time she had intercourse with the accused ….. accused alleged it was 4th time. PW3 claimed that she never had a grudge with the appellant"

7. In his unsworn defence, the appellant insisted that **L N** was his 2nd wife and he could not remember what transpired on 5.07.14. He narrated events of 30.06.2014 when he received three unnamed guests whom he claimed called on him to discuss dowry issues relating to **L N**. He promised to respond to the issue within 5 days and gave the guests kshs. 5000/-. However the next day when he arrived home, he did not find **L N**, and went in search for her at her parents home. **L N's**mother welcomed him but after 15 minutes several people came screaming,interrogated, assaulted him then took him to the police station. He maintained that he was a stranger to the charge although he confirmed that he worked at **[Particulars Withheld], HEALTH CENTRE** as a watchman.

8. In his judgment the trial Magistrate had no doubt that the appellant was positively identified as (a) he was well known to the victim and **PW2** even before the events of 5th July, 2017. (b) The encounter was in broad daylight at 5.00 p.m, and there could be no mistake on his identity.

9. The trial Magistrate also noted there was no consent and the appellant tricked **L N** into a situation where he took advantage of her. Further, that the appellant was actually caught in the act by **PW2**, and when **L N** underwent medical examination soon there after there were deposits of semen in the vulva. He also noted that when **PW3** arrived at the scene she observed that the appellant's trousers were half open.

10. The appellant's alibi defence was considered and rejected as having been dislodged by evidence of prosecution witnesses.

11. The appellant now contests the findings on grounds that the prosecution case was full of contractions and the medical report did not prove that he was the one who raped **L N.**

12. The appellant filed written submissions where he argued that the trial court shifted the burden of proof onto the defence.It was his contention that the prosecution witnesses contradicted each other with reference to the time of the incident because witness **PW1** and **PW2** said it occurred at 5 p.m, **PW3** said it was at 7.00 p.m. Although in opposing the appeal, Mr. Akello on behalf of the State did not address this part, I have perused the record and found that the appellant is misrepresenting the record.

PW1 and **PW2** referred to 5.00 p.m as the time they initially encountered the appellant. **PW3** referred to

7.00 p.m, as the time she received a report from **PW2** that her daughter had been raped. The lapse of time between 5.00 p.m and 7.00 p.m was well captured in the earlier part of this judgment. That was eaten up by the indulgence of the appellant in the act and **PW2** had gone to buy oil.

There was no contradiction in that regard.

Whereas the Clinical Officer seemed to refer to 9.00 p.m as the time the incident occurred, she was not an eye witness to the incident, the material substance of her testimony was the medical finding and not time of the incident.

Indeed the appellant elected to display selective amnesia, saying he could not recall the events of 5th July, 2017, only that he was at home. That anomaly by the clinical officer is so minor it does not go to the root of the matter and is not fatal.

13. As to whether B went to buy cooking oil or paraffin the bottom line is that **B** parted company with **L N** and the appellant thus giving an opportunity for the appellant to be alone with **L N.**

Contrary to the appellants submissions that **PW3** confirmed her daughter had been having sex with him on three previous occasions, the record simply indicates that during cross examination **PW3** stated

"My daughter told me you raped her. This is the 3rd time you have been found having sexually assaulted other girls."

14. There is also the reference of past trysts by **PW4** who stated that **L N** told her she had sex with the appellant on three previous occasions whereas the appellant said the incident marked the 4th such intimacy.

Whereas that may be the position, and even if the appellants insistence that **L N** was his wife was to be believed forcing a woman to have sex against her will, whether she is a wife, girlfriend or a commercial sex worker is an offence. As the trial Magistrate aptly pointed out in his judgment, the most crucial factor was whether the complainant had consented to the act because consent is a key element in rape; indeed I can do no better than refer to Section 42 of the Sexual Offences Act No. 3 of 2006 which provides that

> ***"A person consents if he or she agrees by choice, and by the freedom and capacity to make that chance.***

15. Certainly **L N** had the capacity to make a choice as she was 18 years but she had not consented and the appellant lured her using a technicoloured story. I am in agreement with **MR. AKELLO** that the evidence was watertight and there is no reason whatsoever to warrant interference with the trial courts judgment. I find that the conviction was safe and I uphold it. The sentence was legal and it is confirmed. The appeal is dismissed.

DELIVERED and DATED this 15th day of June, 2017 at BUNGOMA.

H.A OMONDI

JUDGE.