REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 59 OF 2015

JOHN MAGANGA SHIMBO…… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 257 of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G.M. Gitonga (RM) on 21st August 2015)

JUDGMENT

INTRODUCTION

[1] The Appellant herein, John Maganga Shimbo, was tried and convicted on two (2) counts. Count I was for rape contrary to Section 3(1)(a)(b)(3**)(sic)**of the Sexual Offences Act No 3 of 2006. Count II was for the offence of committing an indecent act with an adult contrary Section 11(A) **(sic)**of the Sexual Offences Act while Count III was for assault **(sic)** causing actual bodily harm contrary to Section 251 of the Penal Code Cap 63 (Laws of Kenya).

[2] The Appellant herein was sentenced to ten (10) years imprisonment and two (2) years imprisonment for Count I and II respectively. Both sentences were to run concurrently. The Learned trial Magistrate did not make a finding on the alternative charge as he took judicial notice that alternative charges are safety valves in case the prosecution failed to prove the main count in a particular case.

[3] The particulars of Count 1 were as follows :-

> **"On the 1st**(sic) **of May 2011 at around 10.00 pm within Taita Taveta County intentionally and unlawfully caused his penis to penetrate vagina** (sic) **of L K Z without her consent."**
>
> **COUNT II**
>
> **"On the 1st day of May 2011 at around 10.00 pm within Taita Taveta County intentionally touched the vagina of L K Z with his penis against her wish."**
>
> **COUNT III**
>
> **"On the 1st day of May 2011 at around 10.00 pm within Taita Taveta County assaulted L K Z thereby occasioning her actual bodily harm."**

[4] Being dissatisfied with the Judgment of the Trial Court, the Appellant lodged an appeal on 2nd September 2015. His Grounds of Appeal were as follows:-

> **(1) THAT the Learned Trial Magistrate erred in law and fact by finding his conviction and sentence without considering that the charge of rape was not proved beyond any reasonable doubts** (sic)**.**
>
> **(2) THAT the Learned Trial Magistrate erred in the rule of law by convicting him without seeing that there was a grudge existing between the complainant and the appellant was unsafe** (sic)**.**
>
> **(4) THAT the Learned Trial Magistrate erred in the rule of law by failing to notice that the source of his arrest was not established**(sic)**.**
>
> **(5) THAT the Learned Trial Magistrate erred in failing to consider his reasonable defence statement.**

[5] On 8th June 2016, the court directed the Appellant to file his Written Submissions. However, on 22nd June 2016, he filed the said Written Submissions together with Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

> **(1) THAT the Learned Trial Magistrate erred in law and fact by appreciating the evidence adduced by prosecution witness (PW1) which was uncorroborated and unbelievable.**
>
> **(2) THAT the Trial Magistrate erred in law and fact by believing on** (sic) **the evidence of PW 3 & PW 4 without seeing that these** (sic)**evidence contradict** (sic) **and cannot support the allegation of the charges.**
>
> **(3) THAT the Trial Magistrate erred in law and fact by relying on the evidence of the complainant (PW II)** (sic)**without seeing that her evidence was unbelievable, uncorroborated, exaggerated and it had bad blood** (sic)**.**
>
> **(4) THAT the Trial Magistrate erred in law and fact by misleading herself on her** (sic)**judgment that the prosecution witnesses' evidence was overwhelming and that there were negotions** (sic)**.**

[6] His Further Written Submissions were filed on 11th July 2016. The State's Written Submissions were dated and filed on 28th June 2016.

[7] When the matter came up in court on 11th July 2016, both the Appellant and the State indicated that they would rely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

[8] This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

[9] The only issue this court identified for determination was whether or not the Prosecution proved its

case against the Appellant herein beyond reasonable doubt. All the Amended Grounds of Appeal were therefore dealt with under one head as they were all related.

I. PROOF OF THE PROSECUTION CASE

[10] The Appellant submitted that there was no proof that he assaulted, **L K Z** (hereinafter referred to as "PW 2"). He contended that her sister who was said to have taken her to hospital was not called as witness in his case. He also argued that B N B (hereinafter referred to as "PW 1") did not explain why he did not accompany PW 2 to hospital on the material night and he could not have had a clear picture relating to the reporting of the incident to the Chief, Village Elder or the Police.

[11] It was his contention that PW 2 who was his niece had only wanted to implicate him for the alleged offence and that her evidence was not corroborated by any other witness. He averred that there was no explanation why she was examined on 5th May 2014 yet she testified that she went to the hospital on 2nd May 2014. Even so, he argued that there was no documentary evidence to show that she went to the doctor on 2nd May 2014 and that it was difficult to believe that an old woman who had been raped and assaulted took herself to the doctor.

[12] He also pointed out that her evidence that she sat on a stool, talked to him and grabbed the "panga" was exaggerated because being an old woman, she could not have over-powered him. He added that it was not possible for a victim to have negotiated with an attacker who was armed with a "panga" and that in any event, he was a relative and his whereabouts could easily have been traced if he had really committed the alleged offence.

[13] He further argued that the Investigating Officer, No 46348 Sergeant Joseph Ringera (hereinafter referred to as 'PW 3) did not tell the Trial Court how PW 2's house looked like, how far it was from other neighbours' houses or how PW 1 looked like when she went to report the incident at the Police Station. He also stated that PW 3 did not even issue her with a P3 Formor explain why the said P3 Form was completed six (6) days after it was issued.

[14] He also submitted that the issuance and completion of the P3 Form, which he said was fabricated, could only have been explained by Dr Walid Matee Ahmed (hereinafter referred to as "PW 4").

[15] On its part, the State set out in detail the evidence by all the Prosecution witnesses and argued that the same was cogent, reasonable, consistent and logical. It pointed out that the cut wound on PW 2's forehead was corroborated by the P3 Form. It asked the court to take judicial notice that a P3 Form is normally first issued at the hospital and can be completed by the police at any time.

[16] It submitted that the dates could easily be explained and that the fact that PW 2 was raped on 1st May 2014, reported the incident on 2nd May 2014, P3 Form issued on 5th May 2014 and signed on 6th May 2014 did not take away the fact that the Appellant committed the heinous offence on PW 2.

[17] It also pointed out that even if the P3 Form was excluded, the Trial Court would have relied on oral and circumstantial evidence. In this regard, it referred this court to the case of **Fappyton Mutuku Ngugi vs Republic [2014] eKLR** in which the court therein held as follows:-

> **"… 28. In *Aml v Republic [2012] eKLR (Mombasa),* this Court upheld the view that:**
>
> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***
>
> **This was further affirmed in the case of *Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa)* where the court stated:**
>
> ***"… [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.""***

[18] Notably, the Appellant relied on technicalities in the P3 Form and Charge Sheet to argue that the Prosecution had not proved its case beyond reasonable doubt. He contended that the said P3 Form did not indicate the shape, depth of the sustained injury, the assessed degree, whether it was harm, maim or grievous, the treatment received prior to the examination or the doctor's reference number.

[19] However, failure to indicate the doctor's reference number was not fatal to the Prosecution's case as PW 4 identified the signature of Dr Lucas, the medical officer who filled out the P3 Form. In addition, the omission of assessment of degree of injuries did not invalidate the said P3 Form. The purpose of the assessment is merely to assist a court in determining what sentence will be proportionate to the injuries sustained by a victim. The more grievous the injury, the higher the sentence.

[20] There is also no law that mandates a complainant to have his or her P3 Form filled within a particular time. What is relevant is the indication of the age of the injuries. Unless an attacker can provide any proof to the contrary, a court will assume that the evidence by a doctor is unrebutted and accept the particulars of the same as given by the doctor.

[21] In the same vein, indication of whether or not a victim has sought and obtained medical treatment prior to having the P3 Form completed is not mandatory. Indeed, Section "B" (4) alludes to medical treatment, if any has been given.

[22] This court noted the Appellant's submissions that the Charge Sheet was unsigned and unstamped by both the Wundanyi Prison and the Learned Trial Magistrate.It could be reasonably expected that he did not raise the issue during his trial as he was a lay man. However, it did appear that the said Charge Sheet was stamped and bore a signature but this court could not for a fact say to whom it belonged.

[23] Be that as it may, the law is clear that a decision of a court with competent jurisdiction will not be reversed or alteredon appeal or revision merely because there was some irregularity, omission or error. Such interference will only obtain if an accused person will suffer prejudice or there will be a failure of justice as a result of such omission, error or irregularity.

[24] Section 382 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

[25] As the Appellant did not demonstrate to this court how the signatures occasioned a failure of justice to him or caused him prejudice, this court found his argument not to have been persuasive.

[26] There was also no indication whatsoever that the exhibits were in possession of PW 2 as opposed to being with PW 3 as the Appellant had contended. Notably, he did not protest at the production of the said exhibits at the time of trial. He could not therefore raise the issue at the appellate stage as the same amounted to an afterthought.

[27] Further, his contention that the arrangement of the witness was poor was neither here nor there as there is no legal requirement that witnesses must be called in any particular order. It does of course assist the prosecution in presenting its case in a logical and sequential manner for ease of the court.

[28] This court therefore found that there was no merit in the technical issues that had been raised by the

Appellant court that would have satisfied it to find that his conviction and sentence ought to be quashed or set aside respectively.

[29] Having said so, the court perused the evidence of PW 2that showed that she knew the Appellant as he was her neighbour, a fact he confirmed during his evidence. Her evidence was that the Appellant went to her house on 1st May 2014 at about 9.30 am carrying a "panga" and told her as follows:-

> **" Leo ninajuja (sic) kukukata na panga. Kwa nini uliua mama na baba yangu, na mimi umenitumia nyoka" loosely translating to "I have come to cut you into pieces. You killed my father and mother and you have sent snake to me."**

[30] She then held the panga in the middle and asked the Appellant what he was doing but he insisted that he would cut her into pieces. He sat on a stool while she sat on a chair and asked him why he had not reported her to the police if she was a witch. It was at this point that he rose and struck her with the "panga" as a result of which she fell. He dragged her out of her house where he raped her and when she cried out, he covered her mouth.

[31] She begged him to take her to the bed but he insisted on finishing "one (1) kick" whereafter they would retreat to the bed for the whole night. When he finished, she managed to escape to PW 1's house and informed him what had happened to her. She was taken to Wesu Hospital and reported the matter at the Police Station on 2nd May 2014. She tendered in evidence her blood stained blouse, petticoat and under pant that she was wearing on the material date.

[32] Her assertions that she had a cut on her head were corroborated by PW 1 and the PW 4. PW 1 confirmed that she went to his house screaming and when he went out, she told him that the Appellant herein had raped her. She cleaned the cut on her forehead with Dettol and advised her to go to hospital. PW 4 tendered in evidence the P3 Form that showed she had stitches, bruises on the vaginal wall, minimum swelling and tenderness of the vulva and watery non-foul smelling discharge on the vagina. In the absence of any evidence to the contrary, this court found and held that she did in fact suffer the injuries that were indicated therein.

[33] The next pertinent question therefore was, who caused PW 2 the said the injuries? It was evident that PW 2 saw the Appellant clearly as there lighting from a tin lamp and they actually had a conversation for a few moments. He was her neighbour and they appeared to have had an altercation previously.

[34] She was not only able to identify him but she actually recognised him. The Learned Trial Magistrate was therefore correct in holding that PW 2 knew the Appellant as he was her nearest neighbour and that she was not mistaken who her attacker was. As he rightly pointed out, the failure to produce the "panga" was not fatal to the Prosecution's case.

[35] The sentence the Appellant was handed down could have been enhanced to life as seen in Section 3 of the Sexual Offences Act Cap 62A (Laws of Kenya) that provides as follows:-

[36] 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.**

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(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 years but which may be enhanced to imprisonment for life.

[37] Section 251 of the Penal Code Cap 63 (Laws of Kenya) stipulates as follows:-

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

[38] This court was of the opinion that the Learned Trial Magistrate was extremely lenient to the Appellant herein and that the sentence ought to have been higher due to the aggravated assault and the fact that PW 2 was a very senior citizen. However, the court took cognisance of the fact that the Learned Trial Magistrate exercised his discretion and also sentenced the Appellant to two (2) years imprisonment for the offence of assault.

DISPOSITION

[39] For the foregoing reasons, this court found the Appellant's Amended Grounds of Appeal not to have been merited and the same are hereby dismissed. In this respect, this court declined to quash the conviction or set aside the sentence that was imposed upon the Appellant herein but instead affirmed the same as it was lawful and fitting.

[40] The upshot of this court's decision therefore was that the Appellant's Appeal that was lodged on 2nd September 2015 was not merited and the same is hereby dismissed.

[41] It is so ordered.

DATED and **DELIVERED** at **VOI** this **6th** day of **September** 2016

J. KAMAU

JUDGE

In the presence of:-

John Maghanga Shimbo..…….. Appellant

Miss Anyumba...…… State

Ruth Kituva…….……..Court Clerk