REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 9 OF 2014

LAWRENCE MUNENE JUMA …….....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

1. Appellant was charged with the offence of Rape contrary to Section 3(1)(a) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006 (the Act). The particulars of the offence were-

> **"LAWRENCE MUNENE JUMA: On the 17th day of April 2012 at around 5.00pm VOI within Taita-Taveta County intentionally and unlawfully caused his penis to penetrate the vagina of (withheld) without her consent."**

He was also charged with the alternative charge of committing an indecent act contrary to Section 11(A) of the Act. After trial Appellant was convicted on the main charge and was sentenced to ten (10) years imprisonment. He has filed this appeal against that conviction and sentence. This being the first appellant Court, I am guided by the principles set out in the case **OKENO –Vs- REPUBLIC 1972 EA 32** where it was stated-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs R. (1957) E.A. 336 and the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala Vs. R. (1957)E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings 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, see Peters Vs Sunday Post (1958)E.A. 424."**

The prosecutions case was that Appellant held (name withheld) (hereinafter called '**the girl**') by her mouth, pushed her whereby she fell and then raped her. PW2 and PW3, mother and sister of the girl found the girl at the scene with her clothes soiled which clothes were exhibited in the case. PW3 stated in evidence that the girl told them that Appellant had taken her to that place and that he had raped her. PW3 further stated-

> **"I saw the accused (Appellant) had his penis protruding. PW1 (the girl) had a lot of**

dirt."

2. Learned Counsel Mr. Mwinzi for Appellant submitted in support of the Grounds of Appeal.

3. On the first ground he stated that the complaint was a fabrication of family members. He supported this ground by stating that when the Appellant was first presented before the trial Court the Court was informed by prosecution that Appellant was facing a charge of defilement of a minor child yet later the charge was substituted to one of rape.

4. I can find no foundation for that submission. What the trial Court's proceedings clearly show is that Appellant was presented before Court on 18th April 2012 a day after the offence was reported to Police. Prosecution informed the Court that Appellant had been arrested the night before and the Police investigations were incomplete. The Court on prosecution's application ordered Appellant to be remanded at Voi Police Station. The matter on 20th April 2012 was mentioned before Court and it is true prosecution informed the Court that Appellant ahd been suspected to have defiled the girl but that after investigation prosecution wished to substitute the charge to one of rape. That in my view and as rightly submitted by Learned Counsel for the state Mr. Gioche does not show fabrication of any kind. That ground is rejected.

5. On second ground Learned Counsel submitted that the main charge was defective because the year 2012 seemed to be inserted and yet that such insertion was not counter signed.

6. The simple response to that submission was as made by Learned Counsel Mr. Gioche. Section 382 of the Criminal Procedure Code clearly provides that an error in a charge can only lead to reversal of trial Court's judgment if such error caused prejudice. Appellant did not show any prejudice. Further I am unable to state if indeed the year 2012 in the charge sheet was inserted after the charge was read out to accused because if it was inserted before the charge was read and signed by the Trial Magistrate there cannot be said to have been prejudice. That ground of appeal is also rejected and so is the submission stated in the charge.

7. On the third ground Appellant pin pointed the evidence about the age of the girl with view to show that the prosecution's evidence was inconsistent. Appellant also on this ground submitted that there was no evidence of the offence of rape.

8. There is evidence in the lower Court's proceedings which indicate that the girl suffered from some disability. The mother, PW2 stated that the girl was 24 years old. That she had dropped from school due to illness. PW4 the Medical Officer who examined the girl also noted that the girl was physically handicapped and that she could not walk without support. But I think the most telling was what the Court noted. The Court record when the girl was testifying shows as follows-

> **"The witness is unable to explain what is "tabia mbaya" after spending like 15 minutes trying to ask questions. She appears sick and mentally unstable."**

With that in mind it is not surprising that the girl stated she was 20 years contrary to what the mother said that she was 24 years old. The difference in the statement of her age in my view did not go to the root of the charge.

9. Contrary to the submissions by the Appellant there was sufficient evidence to support the charge of rape. PW3 stated that she found the girl on stones and she saw Appellant's penis protruding. She noted the girl had a lot of dirt and the girl told her and PW2 that Appellant had done her "tabia mbaya." The soiled clothes of the girl were exhibited before Court. The Medical Officer stated-

> **"There was a whitish discharge in the vagina [of the girl] …. A vagina swab was not done because there were no kits … The conclusion was that there was sexual act as a result of the wet vaginal discharge which looked like semen."**

The girl in support of that evidence of the Medical Officer

stated in her evidence-

> **"My mother took me to hospital at Voi District Hospital and the doctor examined me. He removed the waste and dirt from me which the accused (Appellant) had put in me using his penis …. I told Police that the accused had done me tabia mbaya."**

Indeed as submitted by Learned Counsel Mr. Gioche the prosecution's evidence did show that there was penetration which was without the consent of the girl. That sufficiently satisfied the ingredients of Section 3(3) of the Act.

10. Appellant further submitted that prosecutions case failed to

call the girl's father and uncle who assisted in the apprehension of the Appellant. In this regard Appellant relied upon the case **JUMA NGODIA –Vs- REPUBLIC (1982-88)1 KAR 454**. The Court of Appeal inn that case held viz-

> **"The prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not calla vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."**

11. Prosecution's evidence was that Appellant was first apprehended by PW3, the girl's sister. The girl's father and uncle came later to assist to continue restraining Appellant. The father and the uncle were vital and necessary witnesses to prove the offence of rape. Prosecutions failure to call them was not detrimental to his case.

12. Appellant was under the misconception that sexual offences must always have corroborative evidence. That misconception is not supported by the Law. That is what the amended Section 124 of Evidence Act provides. The Section provides-

> **"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."**

13. Before concluding on this judgment I wish to state that as correctly submitted by the Appellant the burden is upon the prosecution to prove a case beyond reasonable doubt but it is important to note that that standard is not one that is insurmountable. This is what I understand Denning J stated in the case **MILLER –Vs- MINISTER OF PENSIONS [1947]** where he stated in explaining what reasonable doubt is-

> **"It need not reach certainty, but it must carry a high decree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

It follows that the fact the clinic where the girl was taken did not have a kit to confirm presence of spermatozoa in the girl's vagina cannot be a basis to find that the prosecution failed to prove its case beyond reasonable doubt. I wholly agree to so hold would be amount to injustice since there is sufficient evidence to prove Appellant raped the girl. I also echo the finding of the trial Court that the prosecution presented consistent evidence.

14. In conclusion therefore Appellant's appeal is hereby dismissed.

Judgment by:-

MARY KASANGO

JUDGE

In the presence of:-

……. for Appellant

……. for Respondent

DATED and DELIVERED at VOI this 5TH day of NOVEMBER, 2014.

……..……

JUDGE