IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), KARANJA & SICHALE, JJ.A]

CRIMINAL APPEAL NO. 11 OF 2017

BETWEEN

KENNETH MAWIRA BUSAKA.....1ST APPELLANT

FREDRICK OTIENO ODHIAMBO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya (Achode, J) dated 4th October, 2012

in

HCCRA NO. 427 OF 2010)

****

JUDGMENT OF THE COURT

Kenneth Mawira Busaka and **Fredrick Otieno Odhiambo** (the 1st and 2nd appellants herein) have preferred this second appeal against the judgment of **Achode, J** dated **4th October, 2012**, in which they were jointly charged and convicted for gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. They were also charged with an alternative charge of Indecent Act with a female contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. In the main, it was alleged that on **25th February, 2006**, at Mathare valley in Nairobi within Nairobi area, **Kenneth Maina Busaka**, while in association with **Fredrick Otieno Odhiambo**, intentionally and unlawfully caused penetration with their male organs namely, penis into the female organ namely vagina of **GWN** without her consent. The particulars to the alternative charge were that on the same date and place, the appellants intentionally and unlawfully committed an indecent act with **GWN** by touching her vagina.

The appellants denied both the main and the alternative charge after which a trial ensued. In a judgment dated **11th June, 2010**, **Honourable Ngugi**, the then Principal Magistrate, Makadara Law Courts, found the appellants guilty of the main charge and sentenced them to serve life imprisonment. Being dissatisfied with both the conviction and sentence, they moved to the High Court on appeal. After analyzing and evaluating the evidence on record, **Achode, J,** found the appeals to be lacking in merit and dismissed them, upheld the conviction and affirmed the sentences imposed vide a judgment dated **4th October, 2012**, the subject of this appeal.

Briefly, the background to this appeal is that on **25th February, 2006** at around 5.30 a.m., **GWN** (P.W.1) was accompanied by her brother **DM** (now deceased) going to Hospital in Mathare Area, Nairobi when she was attacked by two men known to her. They asked her for money and she gave them the money that she had. The two men held her and led her to a sewage area where there was grass. They ordered her to lie down, removed her pant and ordered her not to scream. They then raped her in turns for about 30 minutes.

She could not scream because she feared they would kill her; that the 2nd appellant raped her first whilst the 1st appellant stood by after which the 1st appellant also raped her whilst the 2nd appellant stood by; that the 2nd appellant again raped her for the second time whilst the 1st appellant stood by and the 1st appellant also repeated the rape ordeal whilst the 2nd appellant stood by; that after the rape ordeal, the assailants dressed up and left. They told P.W.1 to go away.

The assailants did not use condoms while they raped P.W.1. In cross- examination, she maintained that she knew the appellants who often took tea at her hotel and that thereafter, the duo beseeched her to forgive them. She reported the incident to Pangani police station and later on went to Nairobi Women Hospital where she was treated. **Albert Kathuli Mwaniki** (P.W.2), a Government Analyst attached to the Government Chemist in Nairobi received blood samples of P.W.1 and that of the two appellants, samples of their saliva and P.W.1's blood stained pant and biker on **26th January, 2006** and on **18th May, 2006** respectively. He was asked to examine the clothing items in order to establish the presence of semen or spermatozoa and also to classify the blood and saliva samples. He carried out his analysis and found that P.W.1's under pants and biker were stained with semen of group 'A' secreta and degenerated spermatozoa.

He also found that the under pants had light human blood stain of group 'O'. He found the blood sample of the 1st appellant (**Kenneth**) to be of group 'A', whilst that of the 2nd appellant (**Fredrick**) was of group 'B'. The Saliva sample of the 1st appellant was also found to belong to group 'A' secreta whilst that of the 2nd appellant belonged to group 'B' secreta. He formed the opinion that the complainant had taken part in sexual activity with a group 'A' secreta who could have been the 1st appellant. He prepared and signed his report which was produced in evidence.

On the other hand, **JM** (P.W.3), husband to P.W.1 was informed by a brother to his wife, **DM** (now deceased) that his wife had been raped. Later on, his wife informed him that she had been raped by people known to her. He took P.W.1 to Nairobi Women Hospital and reported the matter to Pangani police station. He later assisted the police in the arrest of the 1st and 2nd appellant. He contended that the 1st appellant's mother had sought reconciliation on behalf of his son but he declined. He however tricked the 1st appellant's mother and told her to ask him to come personally so that he could reconcile with him; that when the 1st appellant came, P.W.3 lured him to the police station so that they could reconcile before the police but in the process, he was arrested and placed in custody. In **May, 2006**, P.W.3 with the help of his brother also arrested the 2nd appellant. He had found him in a changaa drinking den. He arrested him and took him to Pangani Police Station. Sometime in January, 2006, **PC (W), Susan Kinaga** (P.W.4), the investigating officer received P.W.1 in her office at Pangani police station when P.W.1 reported that she had been raped by two young men. She booked P.W.1's report and asked her to preserve the clothes she was wearing on that day. She sent her to Nairobi Women Hospital for treatment. She issued her with a P.3 form. She also took samples of her blood and her clothes to the Government Chemist for analysis. Later on, the suspects were arrested in turns and after investigations, she charged the 1st and 2nd appellants for the offence of gang rape. **Dr. Ketra Muhombe**, P.W.5 examined P.W.1 on **27th January, 2006** and observed that she had laceration on the left shin which had formed a scar. On examination of her genitalia, she was found to have had blood stained discharge coming from the cervix. She also had superficial laceration on the posterior vagina wall. He took a swab and did not see any spermatozoa. He gave her standard treatment to prevent HIV and STI.

He prepared and signed his report on **27th January, 2006** which was produced in evidence. Also, on 26th **January, 2006**, **Dr. Zephaniah Kamau** (P.W.6), a police surgeon examined P.W.1 According to him, P.W.1 had no physical injuries and her genitalia was normal. She had a bruise on the left side of the vaginal opening but had no vaginal bleeding or discharge. He took her blood specimen and a blood stained pant and biker which were collected and taken to the Government Chemist for analysis. He filled in the P.3 form which was produced in evidence. On **24th February, 2006**, P.W.6 also examined the 1st appellant. He took a blood specimen and saliva which were collected and taken to the Government Chemist for analysis. He filled and signed a P.3 form in respect of the 1st appellant which was also produced in evidence. Likewise, on **18th May, 2006**, he examined the 2nd appellant. He took his saliva and blood samples which were taken to the Government Chemist for analysis. P.W.6 filled and signed the P3 form which was produced in evidence.

On **18th February, 2006**, **PC Lawrence Wairagu** (P.W.7) while in company of **P.C. Samuel Apima** (P.W.8) received a suspect allegedly brought by members of public on allegations of rape. He re- arrested the 1st appellant and placed him in custody for further investigations.

Upon conclusion of the trial, **Honourable Ngugi** found that the 1st and 2nd appellants had a case to answer and placed them on their defence. The 1st appellant, (D.W.1) gave unsworn statement and did not call any witness. In his defence, he stated that on **18th February, 2006**, he closed his business at 5 p.m. and proceeded to his parents' house where they took tea together after which he left at 6 p.m. to go to his house which was a kilometer away; that on his way to his house, he met with a group of people and one of them said "***it is him***" and he was arrested; that he was beaten by those people who arrested him and that one of them was his neighbor at his place of business who used to threaten him; that on that day, as he was being taken to the police station, the person told him that he would know that he was the *"champion"*. He stated further that the person who identified him for the group to arrest him, one **Joseph Mburu** did not testify in court. He argued that P.W.1 said she did not see her assailants and that P.W.2 did not witness the incident but was only told about it by P.W.1. He urged the court to acquit him as there was no sufficient evidence to convict him. The 2nd appellant testified as D.W.2. In his unsworn statement, he told the court that on **11th May, 2006**, at around 12.45 p.m., he was driving a matatu; that when he reached Agip near Air Force base, he was stopped by "*mungiki*" on allegation that he was not paying toll fee on the road; that the "*mungikis*" confirmed that he was a Luo and they broke his left hand and that he was taken to the police station.

He alleged that Kshs 40,000 was taken from him plus a phone, Nokia 3310. He stated further that he was later arraigned in court and charges read to him which he did not understand and that those people who arrested him did not come to testify in court.

In this appeal, the 1st appellant separately filed what he termed as "*Amended Supplementary Ground of Appeal*" and "*Brief Submissions*" while the 2nd appellant filed what he termed as the "*Appellant's Submissions*" In his grounds of appeal, the 1st appellant faulted the learned judge for failing to find that the burden of proof had not been discharged as the evidence on record was inconsistent and contradictory; for failing to apply the provisions of Section 179 of the CPC as the offence of gang rape was committed alongside robbery with violence in which the complainant was robbed of Kshs 200; for failing to find that the medical evidence was obtained in violation of

Article 50(4) of the Constitution and that his conviction for the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 was unsatisfactory. He urged this Court to allow his appeal.

On the other hand, the 2nd appellant faulted the learned judge for failing to find that the medical evidence (the DNA test) did not conclusively prove that he (2nd appellant) had committed the alleged offence; for failing to find that the prosecution's case was marred with material contradictions especially on the circumstances under which he was arrested and for failing to find that the burden and standard of proof was not discharged for lack of sufficient evidence, hence the conviction was unsafe. He urged this Court to allow his appeal, quash the sentence and set him free.

On **30th November, 2020**, this appeal came up for virtual hearing before us. The 1st appellant while appearing in person elected to rely on his written submissions and urged this Court to consider the time served and the period of 4½ years he spent in remand. The 2nd appellant too chose to rely on his written submissions and urged this Court to take into consideration the time he has spent in custody. On the other hand, **Mr. Njeru**, learned counsel for the respondent orally submitted that the offence of gang rape was proved; that the complainant was raped by two men in turns; that the identity of the two assailants was not in doubt, that is the two appellants; that the complainant testified three times before different magistrates as the appellants asked for the case to start de novo twice upon the transfer of the magistrates and yet, she was very firm and consistent in her testimony; that although the identity of the assailants was by a single identifying witness, that is P.W.1, the two courts below believed the evidence of P.W.1 and that both the appellants tried reconciliation outside court with P.W.1's family. In response to the 2nd respondent's argument regarding the medical evidence, counsel stated that the High Court correctly found that in a charge of rape, it is not a must that ejaculation be proved as long as there is penetration; that there was brightness from electric lights at the scene of crime, hence identification of the assailants was proper and finally, that P.W.1 knew the assailants prior to the incident as they used to take tea in her restaurant. Counsel drew our attention to the minimum sentence for the offence of rape, being fifteen (15) years imprisonment whilst the maximum sentence is life imprisonment. He urged us that in considering the circumstances of the case and the fact that the appellants had beaten P.W.1's brother, the appellants' conviction was safe and they should get the maximum sentence.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

The appeal before us is a second appeal. Our position as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court delivered itself thus on this issue:

> ***"…This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law …"***

In **David Njoroge Macharia vs. Republic [2011] eKLR** it was stated that under Section 361 of the Criminal Procedure Code:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (****See also* ***Chemagong vs. Republic [1984] KLR 213)."***

The two appellants faulted the trial court and the 1st appellate court for finding against them without sufficient evidence. However, our review of the evidence shows that the two appellants raped P.W.1 in turns. Both the appellants were known to P.W.1 as the duo often took tea at her hotel. She was able to recognize them as persons she knew with the aid of flood lights in the area where the offence took place. P.W.1 and the appellants all lived in Mathare Area. The appellants also spent considerable period of time with the complainant. As **Achode, J** surmised, the trial Court believed P.W.1, and stated:

> ***"From the evidence before me, I find the evidence of the complainant credible and reliable, and had no reason to frame up the accused persons. Her evidence was well supported and corroborated by the report of the Government analyst and the report from Nairobi Women's hospital and the evidence of P.W.3 her husband".***

The 1st appellate court proceeded to state:

> ***"I warned myself of the dangers posed in relying on the evidence of one witness to convict the appellant, in line with the Court of Appeal decision in Ogeto vs. Republic [2004] 2KLR, in which the Hon. Judges of Appeal, Omolo, Githinji and Onyango Otieno, JJ.A held, inter alia, that:***
>
> **" it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".**
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> *Sexual offences are by nature secretive and will rarely be committed in the presence of witnesses. There is however no legal requirement for independent evidence to corroborate the evidence of a victim.*

Section 124 of the Evidence Act requires that where in a criminal case involving sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. The law only requires that the reason for believing that the complainant is telling the truth be recorded in the proceedings."

Then there was the 1st appellant's complaint that the medical evidence obtained from him was in violation of the constitution. We do not see any such violation by the removal of a blood sample from the 1st appellant.

On the other hand, the 2nd appellant faulted the findings of the trial and the 1st appellate court on the basis that the medical evidence of the samples taken from him did not conclusively prove that he committed the offence. This complaint was well articulated by the 1st appellate court. The judge rendered herself as follows:

"I however, noted that P.W.2 did not form a medical opinion on the nexus between the 2nd appellant and the complainant. His only conclusion was that the 2nd appellant's blood group was found to belong to group B as did (sic) this secretion. However, it must be remembered that under3 (1) Sexual Offences Act No. 3 of 2006;

"A person commits the offence termed raped 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 threat or intimidation of any kind."

The offence of rape is therefore, not predicated on there being found semen or spermatozoa on the victim. Indeed, it is not dependent on the emission of seed by the assailant".

We find that the conviction was safe and dismiss the appellants' appeal against conviction.

As for the sentence, we take note that the Supreme Court of Kenya has declared the mandatory nature of a sentence to be unconstitutional. See ***Francis Karioko Muruatetu & another vs. Republic [2017] eKLR.***

We take note that the appellants herein were armed with a knife and a metal bar. They beat up P.W.1's brother. We also note that in their mitigation, it was stated:

"Court Prosecutor: Accused persons may be treated as 1st offenders. 1st accused in mitigation: I ask the court to treat me as a first offender. 2nd accused: I ask the court to consider that I was injured seriously during the arrest".

Given that the appellants were first offenders and given that the trial court imposed the maximum sentence of life imprisonment, we deem it fit to interfere with the sentence which we hereby reduce to a term of thirty (30) years imprisonment from the date of conviction, **11th June, 2016.**

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR