IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OUKO, NAMBUYE & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 50 OF 2016

BETWEEN

PETER BUKALATI SIMIYU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgmaent of the High Court of Kenya at

*Nairobi (**Mbogholi, J.**) dated 7th December, 2011).*

in

(H.C.Cr.A. No. 358 of 2009)

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JUDGMENT OF THE COURT

[**1**] **Peter Bukalati Simiyu** the appellant herein was tried and convicted by the Senior Resident Magistrate's court at Githunguri for the offence of **rape** contrary to section 3(1) (b) as read with section 3 of the Sexual Offences Act, No. 3 of 2006. He was alleged to have intentionally and unlawfully committed an act which caused penetration of the vagina of ANJ. Following his conviction, he was sentenced to serve life imprisonment. The appellant who was aggrieved by his conviction and sentence appealed to the High Court. Upon hearing his appeal, the High Court (**Mbogholi Msagha, J**) upheld the judgment of the magistrate's court and dismissed the appeal.

[**2**] The appellant is now before us in this second appeal in which he has raised seven grounds. He faults the High Court for: upholding his conviction when the charge against him was bad for duplicity; basing his conviction on evidence of blood grouping which was inconclusive; failing to find that he was not properly identified as a perpetrator of the offence charged; failing to find that the penile penetration of the ANJ's genitalia was not proved by evidence; making inferences based on own theories unsupported by any evidence; failing to find that essential witnesses were not produced; and failing to find that the appellant's defence was not adequately considered.

[**3**] During the hearing of the appeal the appellant relied on written submissions that he had filed wherein he argued his grounds and quoted authorities. We have considered these submissions in light of the record of appeal, the submissions in opposition to the appeal made by the Assistant Director of Public Prosecution who appeared for the state, and the appropriate law.

[4] This being a second appeal the jurisdiction of this Court as stated under section 361(1) of the Criminal Procedure Code is restricted to matters of law only. It has also been stated time and again that in a second appeal the Court must give deference to the concurrent findings of the two lower courts and only interfere if the findings were based on no evidence at all or on a perversion of the evidence or if no court would reasonably have arrived at the conclusion of the lower court using the same evidence (see **M'Riungu vR (1983) KLR** 455).

[5] We find it appropriate to start with the first issue that the appellant took up, which was that the charge against him as drafted was defective. He submitted that it was not clear from the charge which read "**rape contrary to section 3(1)(b) as read with section 3 of the Sexual Offences Act**" whether he was pleading to the offence of rape, or subsection 3 which only articulates the sentence for rape.

[6] **Mr. Obiri**, Assistant Director of Public Prosecution (ADPP) who appeared for the State submitted that duplicity did not arise as the charges against the appellant all related to independent offences, and that duplicity could only have arisen if he was charged with several charges in one count.

[**7**] We note that apart from the offence of rape, the appellant was also charged with two other counts, that is, assault causing actual bodily harm contrary to Section 251 of the Penal Code and being unlawfully present in Kenya contrary to Section 13(2) of the Immigration Act, Cap 172 Laws of Kenya. The trial magistrate rejected the charge of assault, ruling that it was erroneous because the assault was part of the rape offence. The trial magistrate therefore convicted the appellant of the offence of rape only. The appellant has not complained against the finding of the trial magistrate in regard to the charge of assault, nor did he raise the issue before the High Court. In our view, what appeared to be duplicity in the charge sheet, arising from the two counts of rape and assault causing actual bodily harm, was addressed by the trial court and no complaint is before us in regard to the count of assault causing actual bodily harm.

[8] We understand the appellant's complaint regarding duplicity to be the manner in which the charge of rape was framed in the statement of the charge, specifically the provisions under which he was charged. Section 3 of the Sexual Offences Act states as follows:

> **"(1) A person commits the offence of 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 10 years but which may be enhanced to imprisonment for life."**

[**9**] The offence of rape as defined under Section 3 encompasses Section 3(1) (a), (b) and (c), all of which form the ingredients of the offence. That is that the offender must have willfully and intentionally committed the act of penetration, without the consent of the complainant, or by obtaining the consent using force or threats or intimidation. To this extent, the charge against the appellant as framed was defective as it excluded Section 3(1) (a) and (c) all of which constituted vital ingredients of the offence.

[**10**] Duplicity as defined in Black's Law Dictionary, 10th edition, is "**the charging of the same offence in more than one count of an indictment…**". This does not arise in the count charging the appellant with rape, and thus although the charge was defective, it was not duplex. As regards the issue whether the defect in the count as framed rendered the charge fatally defective, we will address this in due course.

[**11**] During the trial, six witnesses testified in support of the prosecution case. The main witness who identified the appellant as the perpetrator of the offence was the complainant, ANJ. She maintained that it was the appellant who assaulted her and raped her. She narrated how the incident occurred at about 8.00 pm when she was on her way from the shop. The appellant accosted her, pulled her to nearby tea bushes where he threatened her and stabbed her with a knife as she resisted. The appellant also hit ANJ with a mallet as ANJ continued to resist. Finally, ANJ stopped resisting because she was bleeding profusely and had no more strength. The appellant then forced ANJ to remove her underpants, and it was at that stage that he spoke in Kigisu language and ANJ identified his voice as that of Bukolati, a person known to her. The appellant forcefully had sexual intercourse with ANJ who was by then tired, worn out, and passed out in the process. When she regained consciousness, the appellant was speaking to her in Kigisu which is also her language, demanding money. At that stage the appellant had also removed what had covered his face and ANJ recognized him as Bukolati whose voice she had earlier identified. As ANJ refused to give the appellant any money, the appellant continued to beat her until she became unconscious. The appellant then went away and came back later with his wife to find that ANJ was now conscious. Assisted by his wife, they carried ANJ to her home and informed **JBM (J)**, the husband to ANJ that they had found her on the road. ANJ explained that she could not immediately inform her husband that it was the appellant who had assaulted her because the appellant was present and she felt threatened.

[**12**] It is apparent that when ANJ was first taken to the police post and seen at a private clinic, she did not reveal that she had been sexually assaulted. Therefore, no swabs were taken. It was only the next day when ANJ was taken to hospital by her husband and the appellant's wife, that she opened up and informed them that it was the appellant who had assaulted her and raped her, and this led to the arrest of the appellant.

[**13**] **Dr. Stephen Ndolo Kioi**, a doctor attached to Kiambu District Hospital produced in evidence a P3 form which was duly filled by **Dr. Karau** who examined ANJ. Dr. Karau had already left the public service by the time Dr. Kioi produced the P3 form. Dr Karau had noted on the P3 Form that ANJ had injuries including: bruises and swelling on the face; swollen left eye; multiple lacerations on the forehead; and lacerations on the neck. Her vagina and cervix appeared normal but she had a whitish thick foul smelling discharge. No laboratory investigation was apparently carried out.

[**12**] Both the trial magistrate and the learned Judge accepted the evidence of ANJ and believed that she spoke the truth that she was raped. Both were also satisfied that ANJ positively identified the appellant as the perpetrator of the offence. As regards identification, ANJ was clear that she identified the appellant by his voice and also by recognition because at some stage, the appellant's face was uncovered. ANJ struggled with the appellant for a while and despite the stressful circumstances, was able to recognize him. There was no reason why ANJ would turn against the appellant, if indeed the appellant had rescued her as he purported to have done.

[**13**] ANJ's evidence was corroborated by the evidence of JBM who recovered a knife where ANJ claimed she had thrown it during the struggle with the appellant. Also consistent with ANJ's evidence was the recovery of half a kilo of sugar in the appellant's jacket, which ANJ identified as the sugar she had just bought from the shop when the appellant accosted her. Further consistency was in the evidence of the Government Analyst who found traces of human blood of B+ (which is the blood group of ANJ), on the appellant's jacket.

[**14**] Although there was no medical evidence to confirm penetration, the evidence of ANJ which as we have stated, both the lower courts

found credible, was sufficient to prove that the appellant forcefully and unlawfully had sexual intercourse with her and thereby caused penetration of his genital organs into ANJ's vagina without her consent. We are satisfied that the evidence implicating the appellant was not purely circumstantial evidence but was anchored on the direct evidence of the victim who heard, saw and identified her assailant.

[**15**] The appellant's defence which was basically a denial, could not stand in light of ANJ's evidence. Moreover, the defence of the appellant revealed that he had a grudge against both ANJ and JBM whom he claimed had appropriated money from their group. The appellant was also not happy with ANJ's marriage to JBM. These provided possible motive for the appellant's action. It is evident that the appellant called his wife and that together they carried ANJ and took her to her house. ANJ also testified that the appellant's wife and JBM took her to hospital the next day, and it was then that she was able to reveal the identity of her assailant as the appellant. No doubt the appellant's wife would have been a useful witness. However, being a spouse to the appellant, she was not a competent and compellable witness, and therefore the prosecution cannot be blamed for failing to call her as a witness. **[16]** Moreover, under the proviso to **section 124** of the Evidence Act Cap 85, in cases involving sexual offences, the court can convict an accused person relying on the evidence of the complainant alone if for reasons that the court has stated it is satisfied that the complainant is telling the truth. For the reasons already stated there was ample reason for the court to believe the evidence of ANJ, and thus there was sufficient evidence in support of the charge of rape against the appellant.

[**16**] Coming back to the question whether the defect in the charge of rape was fatal, **Section 382** of the Criminal Procedure Code, states:

> **"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."**

[**17**] In our view no prejudice was caused to the appellant by the failure to state in the statement of the charge, the proper section under which the appellant was charged. This was because the particulars of the charge were clear and made the appellant aware that the charge against him was one of rape, as defined under **Section 3** of the Sexual Offences Act. The inclusion of the penal section only brought to the appellant's attention the seriousness of the offence. In addition, the alleged defect in the charge is one that could have been raised at an earlier stage in the trial court. Accordingly, we are satisfied that the defect is one that can be cured under **Section 382** of the Criminal Procedure Code.

[**18**] As regards the appeal against sentence, both the trial court and the first appellate court addressed the issue of sentence. The trial court gave clear reasons why it exercised its discretion in giving the appellant such a severe sentence. Under **Section 361(1)(b)** of the Criminal Procedure Code, this Court has no powers to hear an appeal against severity of sentence unless the sentence has been enhanced by the High Court, or the subordinate court had no powers to pass that sentence. The sentence that was imposed on the appellant by the trial magistrate is clearly provided for under Section 3(3) of the Sexual Offences Act. The learned Judge of the High Court found that the trial magistrate properly exercised his discretion in passing the sentence and we have no jurisdiction to interfere.

Accordingly, we find no merit in this appeal. It is dismissed in its entirety.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPTY REGISTRAR