



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 54 OF 2017

BETWEEN

JOHN KANDIE BARTILE..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Conviction/Judgment/Decree/Order of the High Court of Kenya at Eldoret (C. W. Githua, J.) dated 22nd July 2015

in

H.C. Cr. A. NO. 161 OF 2014)

JUDGMENT OF THE COURT

[1] The appellant was convicted by the Resident Magistrate, Iten for the offence of rape contrary to **section 3(1) (a) as read with section 3(3) of the Sexual Offences Act** and sentenced to ten (10) years imprisonment. His appeal to the High Court at Eldoret against conviction and sentence was dismissed. He now appeals against the judgment of the High Court.

[2] The prosecution called four witnesses at the trial. Their evidence in summary is as follows:

On 5th June 2012 at about 7.00p.m. the complainant who is a woman aged about sixty (60) years went to the home of **Winnie Kiprop (Winnie)**, who used to sell Sapphire, an illicit brew. She found **Winnie's** husband and the appellant in the house. The appellant is a village elder and the father of **Winnie**. After buying and taking the brew she left for her nearby home. After walking for about 20 metres, the appellant followed her. He held her tightly and knocked her down. The complainant called his name and asked him what he was doing. However, the appellant pushed her against the ground, tore her underwear, unzipped his trouser, and removed his genital organ and raped her for about an hour.

[3] **Alice Rotich, (Alice)** who is a neighbour to **Winnie** heard the screams between 7 p.m. and 8 p.m. She went to the scene and with the help of moonlight saw the appellant on top of the complainant and raping her. She recognised the appellant with the help of moonlight. **Alice** held the appellant's shirt and pulled him from the complainant. The appellant stood up, adjusted his trousers and walked away. **Alice** took the complainant to her house where she slept. On the following day she accompanied the complainant to the scene where the latter collected her torn underwear.

[4] Thereafter, the complainant reported the offence at Tambach Police station at about 4 p.m. and gave the name of the appellant to **PC Kenneth Mwanyalo, (PC Kenneth)**. The complainant was issued with a P3 form and advised to go to hospital.

[5] On 6th June 2012, at about 3 p.m. the complainant went to Tambach District Hospital. She was examined by **Lokalis Kiptarus** – a clinical officer. The clinical officer did not find any evidence suggesting that the complainant was raped.

[6] Later, **PC Kenneth** summoned the appellant to the police station. The appellant went to the police station on 16th July 2012 and was arrested.

[7] The appellant testified at the trial that on 5th June 2013 at about 7 p.m. he went to guard his *shamba* to save his crops from destruction by

elephants. At about 11 p.m. and while guarding his *shamba*, he heard screams from **Winnie's** homestead. He went there and **Winnie** told him that the screams were from a drunkard. He left for his house. On 8th June, 2013, he was informed that he was required at Tambach Police station and he went there.

[8] The appellant called **Winnie** as a witness. **Winnie** testified among other things, that after the complainant took liquor in her house, she left for her house. At about 11 p.m. she heard screams from the complainant's premises. She went there and saw a man with a white shirt fleeing. The complainant was lying at a path next to her house. She told **Winnie** that she was raped by a person she did not know. The appellant went and inquired the reason for the screams. **Winnie** told him that it was the complainant who had screamed and he went away.

[9] The trial magistrate made a finding that the appellant was positively identified by the complainant and **Alice** who knew him well; that the complainant was raped; that her evidence that she was raped was consistent and was not rebutted by the appellant or shaken during cross-examination and that the evidence of the appellant and **Winnie** was inconsistent as regards whether or not the appellant met the complainant after hearing screams and that the defence raised by the appellant was not credible.

[10] On its part, the High Court considered the appellant's main grievance that he was convicted on the basis of evidence which did not prove the charge, and made findings that the evidence of the complainant was materially corroborated by the evidence of **Alice**; that the appellant admitted that he was a neighbour to the complainant and **Alice** and that he had no dispute with either of them; that the complainant and **Alice** were truthful witnesses since they had no reason to give false evidence against the appellant; that **Alice** was an independent eye witness who recognised the appellant through moonlight at close quarters; that the evidence of the complainant that she was in the company of the appellant a few minutes before he accosted her and raped her was not challenged by the appellant; that the alibi defence of the appellant and the evidence of **Winnie** were not credible and lastly, that the fact that the complainant had no injuries did not mean that the offence of rape was not committed.

[11] The appellant's main ground of appeal is that the High Court erred in upholding the conviction when the offence was not proved beyond reasonable doubt and that penetration as an ingredient of the offence was not proved.

[12] We have considered the grounds of appeal and the appellant's submissions. The appeal is opposed by the State. **Kwame Chacha**, the learned prosecution counsel relied on the case of **Martin Nyongesa Wanyonyi v Republic [2015] eKLR** for the proposition that the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.

In this case, the appellant testified that she was knocked down, her underwear torn and raped. She testified that she screamed during the ordeal and **Alice** found the appellant raping her. **Alice** testified that she heard the screams, went to the scene and found the appellant on top of her and having sex with her. The evidence that there were screams was admitted by the appellant and **Winnie**. She complained to **Winnie** that she had been raped. The complainant also complained to **PC Kenneth Mwanyalo** on the following day that she was raped and produced her torn underwear. She also complained of rape to **Lokalis Kiptarus**, the clinical officer at the time of medical examination. Although the clinical officer did not find evidence of rape, there was overwhelming and credible evidence that the complainant was indeed raped.

[13] The conviction of the appellant depended on visual identification which in turn depended on the credibility of witnesses. The trial magistrate warned herself on the dangers of relying on the evidence of visual identification at night. The two courts below made a concurrent finding that the complainant, **Alice**, the appellant and **Winnie** were neighbours and that the complainant knew the appellant before. The complainant's evidence that she was in the company of the appellant in the house of **Winnie** and that he followed her as she left, was believed by the two courts below. The complainant gave the name of the appellant as the person who raped her to the police on the following day. The appellant's defence of alibi was considered and rejected. **Winnie** was also found to be untruthful witness. An appellate court cannot interfere with the findings on credibility of witnesses by a trial court unless it is shown that no reasonable court could have reached such a finding or if it is shown that there existed errors of law (**Republic v Oyier [1985] KLR 353**). The appellant admitted that he had no dispute with the complainant and **Alice**. The two courts below considered the entire evidence and found that the prosecution case on the identification of the appellant as the person who raped the complainant was credible. There was no reason for the complainant and **Winnie** to give false testimony since the appellant admitted that he had no dispute with them.

[14] We are satisfied that the concurrent findings of the two courts below that it is the appellant who raped the complainant were based on cogent and credible evidence and that the appellant's alibi was correctly rejected.

[15] For the foregoing reasons, the appeal has no merit. Accordingly, it is dismissed in its entirety

We so order.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR