IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 313 of 2018

BW.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Bungoma (H. A. Omondi J.) delivered on 16th June 2017

in

HC Cr. Appeal No. 135 of 2015)

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JUDGMENT OF THE COURT

1. The appellant was charged with rape contrary to Section 3 (1) (a) (b) as read with Section 3 of the Sexual Offences Act. The particulars were that on 5th July 2014 at [particulars withheld] Township, Bumula Division within Bungoma County he intentionally and unlawfully caused penetration by inserting his male genital organ namely penis into the female genital organ on LN a girl aged 18 years without her consent.

2. The appellant was tried and convicted by the magistrate's court. He was sentenced to life imprisonment. His appeal to the High Court against conviction and sentence was dismissed. He has lodged the instant second appeal to this Court. The grounds of appeal are that the judge erred by conducting proceedings that violated his rights; arrived at a decision without analyzing the evidence on record; acted with bias in rejecting the alibi adduced by the appellant in his defence and; finally, the judge erred and imposed a harsh and excessive sentence in the circumstances of the case.

3. The prosecution case was premised *inter alia* on the testimony of the complainant, LN PW1, who testified as follows:

> *"…. I am 18 years old. I reside at [particulars withheld]. I am unemployed. On 5th July 2014 at 5.00 pm I was coming from church in [particulars witheld]. I passed by [particulars withheld] Hospital and then I was summoned by a watchman of [particulars witheld] Hospital. I never knew him though he works with my mother. I only used to see him. He told me my mother had left him flour for me to take home. He knows my mother. I then went to where he was and he told me the*

flour was at the sentry. I was with B my sibling. So we agreed B to go buy cooking oil while I fetch the flour from the watchman. I entered the sentry and he came in and locked up the door. He then lay on me on the ground and he strangled me and threatened me not to raise any alarm. He removed my pant which got torn and he removed his pants and he raped me. He used his penis and he penetrated my vagina. The episode lasted for a while. I then raised alarm and people came to the scene. B then went to call my mother. When my mother came the watchman ran away. I was escorted to [particulars withheld] Hospital on the same day. I also made a report at the police station. I was issued with a P3 Form. The watchman is the accused on the dock in court today….. There was no flour and he raped me. The accused forced me and I did not consent to have sex with him."

4. In support of the charge, PW 2 BN testified as follows:

"…. I am 15 years old. I am a student at [particulars withheld]Primary in Class 8. I reside at [particulars withheld]. On 5th July 2014 at 5.00 pm I was with my sister … heading home from church. We were to go and buy paraffin. We crossed the road then a watchman summoned us to collect flour which had been left by mother. It was the watchman of [particulars withheld] Hospital. He called my sister to pick the flour. He was standing beside the gate. My sister went and I went to buy paraffin. On returning, I never found my sister but I heard screams from the sentry. The scream was faint.

I knocked the door to the sentry. I knocked the bottom door and pushed it and I saw the watchman was raping my sister. He was on top of my sister. He had removed his pants. I saw my sister's torn pant on the floor. It was white in colour. When he realized I was around the watchman stood up and I went to call my mother. I borrowed a mobile phone and called my mother who came immediately. The watchman fled before my mother came. My sister was escorted to the police station. My sister was then referred for medical examination at [particulars withheld] Hospital. The watchman is the accused on the dock. I knew him prior and I used to see him at the gate since my mother works at the hospital. The accused was arrested the next day and I identified him at the police station."

5. Janet Wandile PW4 testified as the clinical officer based at [particulars withheld] Health Centre. She stated that on 5th July 2014 at 10.00 pm she together with another clinical officer examined the complainant PW1. The complainant gave a history of having been raped by a one BW. PW 4 testified that the complainant was 18 years old; that on examination, no physical injury was noted; her vagina was normal without tear; there was no laceration, the hymen was broken with semen on the vulva; her pants were torn on the left side and there was no blood. PW4 further testified that the presence of semen in the complainant's genitalia indicated she had carnal knowledge. She conducted pregnancy and HIV tests on the complainant and the results were positive; that dental test and analysis revealed PW1 was 18 years old and finally, that the complainant stated that it was the third time she had intercourse with the appellant.

6. PW4 further testified that the appellant was brought to hospital on 7th July 2014 and was tested for HIV and was found to be positive. She filled a P3 Form for the appellant. On his part the appellant stated it was the fourth time they had intercourse.

7. Relying on the evidence adduced by the prosecution, the trial magistrate convicted the appellant and sentenced him to the minimum mandatory life imprisonment. Aggrieved, the appellant lodged a first appeal to the High Court. The appeal was dismissed and his conviction and sentence upheld. Further aggrieved, the appellant has lodged the instant second appeal.

8. At the hearing of this appeal, the appellant appeared in person while the State was represented by Principal Prosecuting Counsel Ms Oduor. Both the appellant and the State filed written submissions.

APPELLANT'S SUBMISSIONS

9. In his submissions, the appellant asserted that the judge did not properly evaluate the evidence on

record; failed to appreciate that no independent witnesses were called to testify despite the record showing that many people had gathered at the scene of crime; that no DNA sample was taken; that the prosecution relied upon the P3 Forms and the findings therein which perse did not prove rape; that the P3 Form showed that there was no tear and no laceration on the victim; that this finding meant there was no struggle and no rape; that the fact that the complainant's hymen was broken meant that it could have been broken on any other day.

10. Submitting on excessive and harsh sentence, the appellant asserted that the trial court and the High Court did not establish the cause or source of the HIV infection of the complainant and the judge erred in holding that there was no doubt that the appellant may have shattered the life of an innocent girl as a result of his action. It was submitted that the judge having failed to establish the source of the HIV infection of the complainant, the court erred in passing a harsh and excessive sentence of life imprisonment on the supposition that it was the appellant who shattered the life of the complainant by infecting her with HIV. It was urged that a life sentence was harsh and excessive in the circumstances of this case.

RESPONDENT'S SUBMISSIONS

11. The State in opposing the appeal submitted that the prosecution had proved its case beyond reasonable doubt; that PW1 in her testimony stated that she screamed thereby attracting the attention of PW2 who found the appellant in the act; that PW2 found the appellant on top of his sister committing the offence of rape; that the age assessment done on PW1 established she was 18 years old.

12. The respondent submitted further that the appellant was positively identified through recognition; was a person known to both the complainant and PW2; the incident took place at 5.00 pm during broad day light and there was close body contact between the appellant and the complainant leaving no room for mistaken identity and or recognition. It was submitted that there was proof of penetration from the evidence of the complaint as well as the medical report tendered by PW4 who examined the complainant; that the presence of semen in the vagina of PW1 proved there was sexual intercourse and penetration. On the issue of consent, the State submitted that the complainant stated she did not consent to the sexual intercourse.

13. On the defence put forth by the appellant, it was submitted that the defence was an alibi which was not proved; that there was no corroboration of the alleged defence and; that it was raised late in the day and was therefore an afterthought.

ANALYSIS and DETERMINATION

14. This is a second appeal. By dint of ***Section 361*** of the ***Criminal Procedure Code***, *a second appeal is confined to* matters of law. This Court restated as much in ***Karingo -vs- R (1982) KLR 213*** at p. 219;

> *"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"*

15. In this appeal, we have considered the grounds, submissions by both parties as well as authorities cited. The trial magistrate and the learned Judge made concurrent findings of fact that the appellant raped the complainant. In **Adan Muraguri Mungara v Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court and the first appellate court, in the following terms:

> *"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in*

law, thus entitling this Court to interfere."

16. On our part, as a second appellate court, we have re-examined the evidence on record to ascertain if an error of law is disclosed in the Judgment of the High Court. On identification of the appellant as the person who committed the alleged offence, we are satisfied the appellant was identified by recognition. Both the complainant and PW2 knew the appellant prior to the alleged offence and there is no doubt in our mind that the appellant was positively recognized and placed at the scene of crime. There is no error of law in the identification of the appellant.

17. A critical issue in this appeal is whether there was consent by the complainant to sexual intercourse with the appellant. In her testimony, the complainant stated she did not consent to the intercourse. The record shows that the complainant's pant was torn. This is corroborated by the testimony of PW2 who also testified that he heard a faint scream. On the other hand, the complainant PW1 informed the clinical officer PW3 that it was the third time she was having sexual intercourse with the appellant. On his part the appellant stated it was the fourth time they had intercourse.

18. The fact that the complainant and the appellant had on previous occasions engaged in sexual intercourse is a matter for noting. We have considered this piece of evidence and weighted it against the evidence relating to the torn underpants, the faint screams by the complainant and PW1's testimony that the appellant strangled her and threatened her not to raise alarm. We are satisfied the evidence of strangulation and a torn panty lead to an inference that there was no consent to sexual intercourse on the part of the complainant. We are alive to the fact that consent to sexual intercourse can be withdrawn and the fact that previously the duo had engaged in sexual encounters does not negate that rape can be committed if no consent has been given on a latter occasion. With this in mind, we defer to the concurrent findings of the two courts below that as a matter of fact, the complainant did not consent to sexual intercourse with the appellant.

19. On the life sentence meted upon him, the appellant submitted that the sentence was excessive and harsh in the circumstance of the case. This Court in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in **Francis Karioko Muruatetu & another –v- Republic SC Petition No. 16 of 2015** held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution**.** This Court in **Christopher Ochieng – v- R** *(supra***)** stated:

> *In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in* ***Francis Karioko Muruatetu & another – v- Republic (supra****), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.*

20. Guided by the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra**) and persuaded by the decisions of this Court in **Christopher Ochieng – v- R** (supra) and **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** in relation to sentencing, we are convinced and satisfied that the life imprisonment meted upon the appellant was excessive and cannot stand given the circumstances of the case. We intervene and hereby set aside the life sentence meted upon the appellant. We have considered the circumstances of this case where both the complainant and the appellant stated that it was not the first time they were engaging in sexual intercourse. In light of this, we find that the life imprisonment meted on the appellant is excessive and harsh. We substitute the term of life imprisonment with an imprisonment for a term of 20 years with effect from the date of sentence by the trial court on 17th July 2015. Otherwise, we uphold the conviction of the appellant for the offence

charged.

21. This judgment is delivered under Rule 32(2) of the Court of Appeal Rules 2010, Kiage, JA. having refused to sign it.

Dated and delivered at Eldoret this 6th day of June, 2019.

ASIKE MAKHANDIA

……..

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.