IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, MAKHANDIA & ODEK, JJ.A)

CRIMINAL APPEAL No. 33 of 2018

BETWEEN

WILSON TARUS KANDIE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the judgment and sentence of the High Court of Kenya

at Eldoret, (Githua, J.) dated 22nd October 2015

in

H.C Cr. A. No. 192 of 2012)

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JUDGMENT OF THE COURT

1. The appellant, ***Wilson Tarus Kandie***, was charged with rape contrary to **Section 3 (1) (a) as read with Section 3 (3) of the Sexual Offences Act.** The particulars were that on the 2nd day of August 2010 at about 19.00 hours at Kiptum within Keiyo District of Rift Valley Province, he intentionally and unlawfully caused penetration by use of his penis into the vagina of ***T J R*** without her consent. He faced an alternative charge of assault causing actually bodily harm contrary to ***Section 251*** of the **Penal Code.**

2. The prosecution case was founded *inter alia* on the testimony of ***TJR***, (PW2) who testified as follows:

> ***"I am a house wife. I know the accused person. He is before court. He is my neighbour. He stays 3 km away from my home. I recall on 2nd August 2010 at 6.00 pm. I was coming from the posho mill when I met Wilson Tarus Kandie on the way. He greeted me and I responded. He asked whom I had met along the way and I told him no one. I went about 100m as he had left. He followed me. I was not worried because I know him. Instead of passing, he got hold of me. I was carrying a sack tied with a rope on my back. He got hold of my back and pulled me to the ground. I fell on my back. I tried to remove the sack from my back but he sat on my front and I could not remove the sack and its ropes from my arm and back. I was wearing a skirt, biker, short and pant. He started removing my inner pants after lifting my skirt up. He removed my short, then the biker and pant. I screamed. He strangled me with his hand. He then stepped on my left rib. …He then pulled me inside a bush about 100m. He left the clothes where he had placed them after removing them. He spread my legs and inserted his penis inside my vagina. After he was satisfied he started inserting his hands inside my vagina just to spoil it….. There is a boy by the name S K who came and saw me and went to report. He saw the bushes moving. When Silas saw us, the accused was still doing his thing. Silas is my neighbour. He is four years old. He continued doing that to me until 8.00 pm when the father of my children came and found us. He called me after spotting my clothes and the bag of floor. After he called me. The accused person now ran off. My husband came with our son K. He asked me who had spoiled me and I told him it was Wilson Tarus Kipcherowo. He asked me to go home. I told them I could not walk and they carried me.… The following day my husband went back to the scene as my daughter took me to Iten District Hospital. The accused only lowered his clothes to the knees and did his work. At Iten, I was examined and treated. I later went to Iten Police Station to report. I was issued with a P3 Form. We looked for the accused in vain. Later we heard he had a quarrel with his brother who cut him. He was admitted at Moi Teaching and Referral Hospital. We decided not to act because he was unwell. In September 2011, I pointed him out to the police and he was arrested."***

3. ***Jane Cheptoo,* (PW1),** a clinical officer attached to Iten District Hospital testified that she examined the complainant and filled a P3

Form. That the complainant had injuries on the neck, chest, legs and her private parts. She had scratch marks on her face. She complained of pain on both upper limbs. Her left knee had bruises and the right front part of her leg had bruises too. That her private parts had perineal tear; there was a urinary tract infection and there were spermatozoa. She concluded that the complainant had been raped as per the high vagina swap which was positive and the bruises on her private parts as these all showed there was penetration.

4. ***SC R*, (PW4)**, testified that he was the husband to the complainant. That on 2nd August 2010 at around 7.30 pm he was at his home. He passed by his neighbours home and heard children saying there was someone who was screaming. That he was not worried. That upon reaching his home, he asked his son where the mother was. He said she had not come. That he got worried and took a torch and a wooden bar and started walking towards the posho mill as she had gone there. That on the way he saw somebody lying beside the road flat. She was unconscious. He tried calling her and she could not respond. He called for assistance and when he met one Thomas, he informed him what had happened. Thomas told him he met ***Wilson*** running and earlier he had seen the complainant and Wilson who was walking behind her. **PW4** further testified that he saw the inner pants on the ground and he summoned a crowd and showed them. That he then called his daughter from Moi University to come and assist the mother. She came and took her to Iten Hospital. That there were three inner pants. A short, a biker and pant. That he took photographs of the clothes. PW4 produced the three items of clothing as exhibits.

5. The appellant in his defence opted to given an unsworn statement. He denied committing the offence. He stated that he had been at Korkitony since June 2010 up to September 2010 at their other home. That he had a land dispute with his brother and his father showed him land near **PW4** who is the complainant's husband. That he found out the land also had a dispute.

6. The appellant further stated that **PW1's** evidence was contradictory and inconsistent with the testimony of **PW4**. That **PW1** stated that she was assaulted in the forest yet **PW4** says he found the complainant by the roadside. That **PW1** had stated that her clothes were not torn yet **PW4** stated they were not torn. That **PW4** testified that he met ***C*** (who is PW4's brother) yet the said Cdid not record a statement with the Police. That Samuel who had also been mentioned did not testify.

7. Upon evaluating the prosecution and defence evidence, the trial magistrate convicted the appellant for the offence of rape and sentenced him to serve a term of 15 years' imprisonment. In convicting the appellant, the magistrate held that the complainant had recognized the appellant; that there was no way the complainant would confuse a neighbour; that due to recognition, there was no possibility of mistaken identity. That the evidence of the appellant was general and only challenged the arrest and lack of eye witnesses. That the defence on record was a mere denial of facts.

8. Aggrieved by the conviction and sentence, the appellant lodged an appeal to the High Court. The appeal was dismissed. In dismissing the appeal, the learned Judge expressed herself as follows:

> ***"I find that PW2's claim that she had been raped on 2nd August 2010 was materially corroborated by the testimony of PW1 and the medical evidence in the P3 Form. PW1 noted scratch marks and bruises on her face, neck, left knee and right leg. There was also a perineal tear on her private parts. A vaginal swab revealed the presence of spermatozoa in her vagina. The injuries noted were two days old. In my view, the presence of scratch marks, bruises on her face, neck and legs and tear on her private parts together with the presence of spermatozoa on (sic) her vagina is sufficient proof that the complainant had engaged in sexual activity without her consent.***
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> ***The recorded evidence shows that the offence was committed for about two hours 6.00 pm to 8.00pm. PW2 therefore had sufficient time to see and recognize her assailant even before darkness fell. It is not disputed that PW2, PW4 and the appellant were neighbours consequently PW2's identification and recognition of the appellant as her assailant was reliable and satisfactory."***

9. Dissatisfied by the dismissal of his appeal by the High Court, the appellant has lodged the instant appeal citing the following abridged grounds:

> ***(i) That the two courts below erred in failing to find that the charge sheet was defective.***
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> ***(ii) That the appellant's trial was not conducted in accordance with the Constitution.***
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> ***(iii) That the prosecution case was not proved beyond reasonable doubt.***
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> ***(iv) That the evidence by the prosecution witnesses were contradictory and uncorroborated.***
>
> ***(v) That the two courts below did not properly evaluate the evidence.***

10. At the hearing of the instant appeal, the appellant appeared in person. The State was represented by the Prosecution Counsel ***Mr. Mulamula***. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

11. In his submissions, the appellant contends that the charge sheet and subsequent charges were defective. That the provisions of fair trial and fair hearing as provided for in ***Article 50 (2)*** of the Constitution were violated. That the Occurrence Book (OB) number indicated in the charge sheet was OB21/19/09/2011. That this number was required to appear in any document or exhibit produced in court. However, the exhibits produced in court had OB No. 22/3/8/2010. The issue is which is the correct OB number? That the names of the complainant appeared in the OB as ***T J Rh*** while the name in the P3 Form was ***TRh***. That if these documents were meant to serve the same purpose, why do they have irregularities? That the charge sheet indicated there were only two witnesses yet more than two prosecution witnesses gave

evidence. That where did the other prosecution witnesses who testified come from? That during trial, the appellant complained there were more witnesses than indicated in the charge sheet. That the trial court should have amended the charge sheet to include these other witnesses. That the extra witnesses recorded their statements after the trial had commenced. That these extra witnesses only conspired against the appellant.

12. The appellant further submitted that he was not provided with witness statements. That some witnesses recorded their statements after the trial had commenced. That the medical report produced in court is of doubtful admissibility as it failed to meet the provisions of ***Section 170*** of the **Evidence Act.** That the medical report was incomplete; it did not have the section "B" part of it and did not have the rubber stamp of the medical facility from which the complainant alluded to. That such a document contravened the provisions of ***Sections 66*** and ***68*** of the **Evidence Act**.

13. The appellant further submitted that the testimony of **PW2** (the complainant) was not credible. That **PW2** testified that there was a boy ***S K***who saw the appellant and went to report. That if the boy went to report, to whom did he report? Why was action not taken immediately? That there were other users that he is the one who assaulted and raped the complainant.

14. It was further submitted that the fact that the complainant allowed the assailant to spread her legs without struggle means that she consented to the sexual encounter. That if she had screamed for help immediately as alleged, people would have come even from far. That whereas **PW1's** evidence is that the complainant was injured by fists and kicks, the complainant in her testimony never stated she was injured by fists and kicks. That the evidence of **PW1** (clinical officer) was false.

15. The appellant further submitted that **PW2** testified that her assailant was ***Wilson Tarus Kipcherowo***. That his name is not ***Wilson Tarus Kipcherowo*** but he is ***Wilson Tarus Kandie***. That due to the conflicting names, the complainant was mistaken and the correct person who raped her was the said Wilson ***Tarus Kipcherowo*** who is not the appellant.

16. In concluding his submissions, the appellant faulted the learned Judge for not finding that the prosecution case was not corroborated and was not proved beyond reasonable doubt.

RESPONDENT'S SUBMISSIONS

17. The State in opposing the appeal urged that all the ingredients of the offence of rape as charged were proved to the requisite standard. That the charge sheet as drafted was not defective. That the P3 Form that bears the name of the complainant as ***T R*** as opposed to ***T J R*** appearing on the charge sheet do not render the charge sheet defective. That failure to include the names of all prosecution witnesses on the charge sheet did not render the charge sheet defective. That the appellant was supplied with all witness statements before any witness testified and there is no law that requires all the witnesses be listed on the charge sheet. That the appellant was accorded a fair trial and the provisions of ***Article 50 (2)*** of the Constitution were not violated. That the appellant was informed of the charge with sufficient details and particulars and he cannot be heard to say that failure to include the middle name of the complainant in the P3 Form prejudiced his right to a fair trial. That the appellant raised no objection during trial that he had not been supplied with any witness statement. That the two courts below properly evaluated the prosecution and defence evidence as required.

18. The respondent further reiterated that the ingredients of the offence of rape as charged were proved. That the complainant being a neighbour recognized the appellant as the person who raped her. That the evidence of **PW1** and **PW2** was uncontroverted and the said evidence proved beyond reasonable doubt that the complainant was raped. That **PW2** narrated that she was walking home. She recounted how the appellant whom she recognized dragged her on the ground for about 100 metres and strangled her with one of his hands and had sexual intercourse with her without her consent. It was submitted that **PW2** had sufficient time to see and recognize the appellant as the sexual ordeal lasted for about two hours between 6.00 pm and 8.00 pm.

19. In concluding its submissions, the respondent reiterated that the defence evidence was considered by the two courts below and properly rejected. That the two courts below arrived at concurrent findings of fact that the prosecution case was neither shaken nor dented by the defence evidence.

ANALYSIS and DETERMINATION

20. We have considered this appeal, the grounds in support thereof and the contending submissions by the parties. This being a second appeal, our jurisdiction is limited by ***Section 361*** of the ***Criminal Procedure Code*** to considering matters of law only. As was stated in **Karani vs. R [2010] 1 KLR 73**:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law." See also Karingo -vs- R (1982) KLR 213;*** **Njoroge -v- Republic [1892] KLR 388 and Chemagong –v- Republic [1984] KLR 611).**

21. In the instant appeal, the appellant was charged with the offence of rape. The ingredients of the offence are provided for in ***Section 3*** of the **Sexual Offences Act in** following terms:

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

22. A reading of ***Section 3*** of the **Sexual Offences Act** surmises that the ingredients of rape are penetration with a genital organ, lack of consent by the victim, or where consent is obtained by force, threat or intimidation. The prerequisite for the offence of rape is penetration and lack of consent.

23. The appellant contends that the learned judge erred in failing to find that the charge sheet was defective. ***Section 134*** of the **Criminal Procedure Code** provides for the components of charge sheet. It states:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

24. In **Sigilani vs. Republic (2004) 2 KLR, 480**, it was held that:

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence."

25. The appellant contends that the charge sheet was defective for two reasons. First, that the name of the complainant as indicated in the charge sheet was ***T J R*** as opposed to ***T R*** that was indicated on the medical P3 Form tendered in evidence. Secondly, that the charge sheet gave only two names of prosecution witnesses yet more than two witnesses testified for the prosecution.

26. We have examined the charge sheet as drafted. The particulars of the offence of rape as charged was disclosed in the charge sheet and the provision of law that was violated clearly stated. The statement of the specific offence of rape and the date and time when the alleged offence was committed and the victim thereof are stated in the charge sheet. The record of proceedings before the trial court shows that the appellant understood the charge and pleaded to it.

27. Nevertheless, we have considered the contestation by the appellant that the charge sheet was defective. Founded on the appellant's submission, we state firstly, that all the three specific names of the complainant are not an essential ingredient for the offence of rape. Secondly, in this matter, the physical identity of the person raped is not in dispute. There is no dispute that the person who gave evidence as **PW2** was the complainant and whether all her three names are stated in the charge sheet or P3 Form is immaterial to the offence of rape. Thirdly, there is no dispute that the person who was medically examined by **PW1** is the one and same person who is the complainant. Fourthly, as correctly stated by the learned Judge, a P3 Form is not the charge sheet. Any error in the P3 Form goes towards its admissibility or weight and cannot vitiate the charge sheet or the trial process. For the foregoing reasons, we are satisfied that the absence of the complainant's middle name in the P3 Form is immaterial to the proof of the offence of rape as charged and does not render the charge sheet to be defective. In any event this is a matter of fact.

28. The appellant further contends that the charge sheet gave only two names of prosecution witnesses yet more than two witnesses testified for the prosecution. That due to this fact, his constitutional right to a fair trial was violated. The trial magistrate in considering the submission stated that there is no law that requires that all prosecution witnesses must be listed on the charge sheet. In this appeal, the prosecution submitted that the appellant was given all witness statements before any of the witnesses testified. The submission has not been controverted. Further, the appellant has not demonstrated to our satisfaction that he was prejudiced in any way by the failure to indicate all the names of prosecution witnesses on the charge sheet. In our view, there is no scintilla of evidence that the appellant was ambushed by any of the prosecution witnesses who testified. We thus find that the right of the appellant to a fair trial was not violated.

29. Pertaining to the ingredients of the offence of rape, an issue for our consideration is whether the appellant was placed at the scene of crime and if he was sufficiently identified as the perpetrator of the offence as charged.

30. In ***Nzaro*** **vs. Republic (1991) KAR 212,** *this Court held that evidence of identification by recognition must be absolutely watertight to justify conviction.* Our analysis of the evidence of **PW2** satisfies us that the appellant was not only placed at the scene of crime but was recognized by the complainant (**PW2**) as the person who committed the offence. We *are thus satisfied that the recognition of the appellant by the complainant was absolutely watertight.*

31. The appellant denied he raped the appellant. In the persuasive Tanzanian case of **Suleiman Maumba vs. Republic, Criminal Appeal No. 94 of 1999,** it was correctly stated:

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in the case of any other woman where consent is irrelevant, that there was penetration. (Emphasis supplied).

32. In the present case, we have the testimony of the complainant (**PW2**) in which she graphically described how the appellant knocked her

down; removed her underclothes; spread her legs and had sexual intercourse without her consent from 6.00 pm to 8.00 pm. The complainant narrated how the appellant dragged her for about 100m; how he undressed her; how she was forced to engage in sex and how the appellant strangled her and stepped on her ribs. The evidence of **PW2** not only placed the appellant at the scene of crime but identifies him through recognition as the person who committed the offence. The graphic details narrated by **PW2** leaves no doubt that it was the appellant who raped the complainant. As correctly noted by the learned judge, the appellant engaged in sex with the complainant for about two hours and this was sufficient time for the complainant to see and recognize the appellant.

33. In this matter, the appellant further strenuously submitted that he was not the person who raped the complainant. That the complainant in her testimony stated the person who raped her was ***Wilson Tarus Kipcherowo***. The appellant fervently submitted that his name is not ***Wilson Tarus Kipcherowo*** but he is ***Wilson Tarus Kandie***. That due to the differing names, the complainant was mistaken and the proper person who raped her was the said ***Wilson Tarus Kipcherowo*** who is not the appellant. We have considered this submission. Peremptorily, the submission seems credible. However, when considered from the evidence of identification of the appellant through recognition by the complainant, the merit and substance of the submission vanishes. We find the difference in names as urged by the appellant has no merit.

34. It is also contended that the evidence of the complainant was not reliable and there is no corroboration. In this matter, the only narrative of the rape ordeal is the testimony of the complainant. Previously, the relevant law in Kenya was succinctly set out in **Chila vs. The Republic (1967) EA 722 at page 723:**

> ***"The law of East Africa on corroboration in sexual cases is as follows: the judge should warn …. himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice."***

35. The foregoing rendition in **Chila vs. Republic** (supra) must be read in view of **Section 124 of the Evidence Act**. ***Section 124*** of the **Evidence Act** provides as follows:

> **"."**
>
> **"."** (Emphasis supplied)

36. In the instant matter, the two courts below made a finding that the evidence of the complainant was corroborated by the medical report tendered in evidence by **PW1**. In our considered view, there is nothing on record to cast doubt on the credibility of **PW2** as a witness. The items of clothing produced in court as exhibits coupled with the injuries stated in the P3 Form confirm that indeed the complainant was raped. Tied to this is the evidence of recognition of the appellant by the complainant. From these evidence, we see no reason to interfere with the findings of fact by the two courts below.

37. The appellant has also urged that the prosecution evidence was riddled with contradictions and inconsistencies. We have considered this ground of appeal. In **Peter Ngure Mwangi vs. Republic [2014] eKLR**, this Court when dealing with the question of alleged inconsistencies in evidence took the position that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. Not every minor contradiction is fatal to the prosecution's case. In this matter, we find that the complaints of contradiction and inconsistencies by the appellant are not substantial; they were not only minor but are not contradictory to the material issue of rape as the offence charged had already been committed. The alleged contradictions do not weaken the prosecution case at all.

38. In penultimate, the appellant submitted that the medical report produced before the trial court was of doubtful admissibility as it failed to meet the provisions of ***Section 170*** of the **Evidence Act.** That the report was incomplete; it did not have the section "B" part of it and did not have the rubber stamp of the medical facility from which the complainant alluded to. That such a document contravened the provisions of **Sections 66** and **68** of the **Evidence Act**. (See **A.N.N vs. Republic [2017] eKLR** and **Seif Juma Mohammed vs. Republic [2007] eKLR).**

39. We have considered the submissions by the appellant on the doubtful admissibility of the P3 Form. In our view, the evidence of the complainant and the graphic details of the rape ordeal as narrated is adequate to prove the prosecution case. Even in the absence of the P3 Form, in this matter, the complainant's evidence is sufficient to convict the appellant. The critical ingredient for the offence of rape is penetration and lack of consent. These two elements were proved by the testimony of the complainant and given the proviso in ***Section 124*** of the **Evidence Act,** the prosecution proved its case to the required standard.

40. For the foregoing reasons, we affirm and uphold the conviction and sentence meted upon the appellant. This appeal has no merit and is hereby dismissed in its entirety.

Dated and delivered at Eldoret this 17th day of October, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR