**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, OKWENGU & SICHALE JJ.A)**

**CRIMINAL APPEAL NO. 91 OF 2016 (R)**

**BETWEEN**

**PETER NJAU KAMAU .....APPELLANT**

**AND**

**REPUBLIC ..... RESPODNENT**

**(**Appeal from the judgment of the High Court of Kenya at Nairobi (Ogola & *Kamau J.J) dated 14th November, 2013* In **H.C.CR.A No 163 of 2011)**

**************************

**JUDGMENT OF THE COURT**

On the afternoon of **5th August 2007**, **MWK** was walking from Ruku to Kahura to attend a women's merry-go-round at the home of one **Mama S**. She had just come from Church. Along a deserted path she realised that there was a man behind her running towards her. The man was a stranger to her; unconcerned, she kept walking. It did not occur to her that the man might pose a threat to her. Alas, the man caught up with her, held her by the throat while brandishing a knife and for the next two (2) hours proceeded to terrorise her. He robbed her of her mobile phone, her watch and the money that she had, a sum of about Kshs. 325/=.

His mission apparently not completed, he revealed to MWK that he was thirsty for human blood, of which he planned to drain from her, after which he would chop off her head. The pleas for her life landed on deaf ears as he also declared his intention to rape her before drinking her blood. She resisted his attempts to undress her. For her resistance, she was cut with the knife on her right wrist but she did not desist. Ultimately, though, he got the upper hand when she fell down in their struggle.

At this point her assailant was unable to rape her as her inner wear hampered him. He used her phone to call someone with whom he had a coded conversation that MWK was unable to understand. Undeterred, he led her deeper into the forest, revealing as they walked, that he was a member of 'Mungiki' and then forced her to undress a second time. This time he succeeded in raping her.

When he was done with her, he began interrogating her. As she tried to answer his questions, her phone, which was in his possession, rang. She identified the caller as Mama **S** and she was ordered to give her final farewell to the caller. She was too scared to speak. Eventually he switched off the phone and pocketed it once more so that he could continue with his questions. Sometime later he walked a distance off to make another phone call.

When he returned, he ordered her to wear her clothes again, with her blouse worn on the inside out, then instructed her to walk back the way they had come.

Once she was free and back on the main road, she sought help. She was escorted to Nazareth Hospital for first-aid treatment where she was met by her father **AK** (P.W.2) and her neighbour **Jackson Ndirangu** (P.W.4).

From there, they went to Kikuyu Police Station to report the attack. The police referred her to Nairobi Women's Hospital where she was also examined and treated. **MWK** also reported the incident at Gikuni AP Post. The report from the Women's Hospital as well as a subsequent P3 Form filled by **Dr. George Mwaura Kungu** (PW5) confirmed the presence of spermatozoa and the fact of penetration.

Taking the hospital results back to the police, she admitted that though her attacker was not someone known to her, she would be able to identify him if she saw him again. The police advised her to be on the look-out for him and to report any sighting of him.

About two months later on **21st October, 2007** at about 9:00 pm, as if guided by the hand of providence, **MWK** spotted her attacker. As the place he was in was well lit and illuminated by surrounding buildings, she was able to recognise him. She immediately reported the sighting to Gikuni AP Post. **Cpl. James Wambua** (PW3) accompanied by **APC Koome** and **MWK**, they arrested Peter Njau Kamau (the appellant herein). Though they searched his house nothing was recovered and he was eventually surrendered to Kikuyu Police Station.

After concluding investigations, **Sgnt. Catherine Omollo** (P.W.6) preferred charges against the appellant**.** The appellant was thus charged with one count of robbery with violence contrary to Section 296(2) of the Penal Code and a second count of rape contrary to Section 3(1) of the Sexual Offences Act, 2006.

The appellant was convicted of both offences by the trial court (**Hon. D. Mulekyo P.M)** and sentenced to ten (10) years for the offence of rape; and a death sentence for the offence of robbery with violence.

Aggrieved, the appellant appealed to the High Court against both conviction and sentence. The High Court (**Ogola & Kamau ,JJ**) concluded that the evidence showed that **MWK** had indeed been assaulted and raped. The issue for determination was therefore whether the appellant was responsible. The Court was confident in relying on **MWK's** uncorroborated identification evidence as the attack happened during the day and she had ample time to recognise her attacker. Based on the evidence, the Court found no reason to interfere with the convictions entered on both counts and dismissed the appeal, save to suspend the sentence on the second count of rape as the appellant had already been sentenced to death on account of the first count.

Undeterred, the appellant has lodged this appeal on seven (7) grounds that the trial court:

i. failed to adequately evaluate and analyse the evidence to arrive at their own conclusion,

ii. to address the issue of identification in difficult circumstances,

iii. failed to consider the issues of the initial description of the assailant in the first report prior to subsequent identification,

iv. erred in holding that the presence of unknown semen whose DNA had not been tested could constitute corroboration for rape,

v. erred in finding that the conviction based on the uncorroborated evidence of a single witness was safe,

vi. failed to consider that corroboration would have come from tracking the complainant's phone and finding out from Safaricom the number the assailant had twice called; and

vii. failed to consider that the complainant's identification evidence could only have been a case of mistaken identity.

When the appeal came up for plenary hearing on **7th April, 2019**, learned counsel **Ms. B. Rashid** for the appellant, expounded on the grounds of appeal.

On the failure to re-analyse evidence, counsel submitted that the charge was duplex as it contained both offences of robbery with violence as well as rape.

Relying on the decision of **Cherere s/o Gukuli v R (1955) 22 EACA 478** counsel submitted that the appellant was prejudiced as he was unable to make out what offence he was being charged with.

On identification, counsel submitted that caution should have been taken with the complainant's identification evidence considering the terrifying ordeal she had gone through; and the fact that no description of her assailant was given to the police. Counsel argued that in the circumstances, the identification was a case of mistaken identity. Counsel cited the decision of this Court in **Gabriel Kamau Njoroge v R [1987] eKLR** that the evidence of a single identifying witness has to be tested with the greatest care, which cannot be done unless the identifying witness made a report as to whether he or she could identify the assailant and give his description, which in this case was not done.

On corroboration, counsel submitted that the trial court misdirected itself since the semen was not positively matched to the appellant and consequently, without DNA evidence, the evidence was insufficient for conviction. Counsel pointed out the failure to follow-up investigations in order to trace the person the complainant's assailant had called in order to determine the assailant's identity. Counsel reiterated that this was a case of mistaken identity.

**Ms. Wang'ele,** Senior Public Prosecution Counsel (SPPC) opposed the appeal submitting that the appellant was convicted on cogent evidence.

Counsel denied that the charge against the appellant was duplex as it complied with Section 135 of the Criminal Procedure Code.

On identification, counsel argued that conditions were favourable for making a positive identification as the complainant spent about two (2) hours in the day time with the appellant. In opposition to the appellant's assertions, counsel submitted that the complainant did give a description of the assailant to the police. Counsel further pointed out that though it was desirable to give a description of an assailant to the police when reporting a crime, the same was not mandatory.

On the issue of corroboration, counsel explained that corroboration was not mandatory for sexual offences as provided for under Section 124 of the Evidence Act and the medical reports placed before the Court was both material and sufficient corroboration. Counsel urged the Court to dismiss the appeal.

In a brief rejoinder **Ms. Rashid** reiterated that no description was given of the assailant and that the identification evidence was one of dock identification.

The appeal before us is a second appeal. Our mandate in a second appeal is as provided in **Section 361 (1) (a)** of the **Criminal Procedure Code** which provision enjoins us to consider only matters of law. It provides:

> **" 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-**
>
> **a. on a matter of fact, and severity of sentence is a matter of fact; or**
>
> **b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."**

The above provision of the law has been restated in many decisions of this Court. In **Karani vrs. R. [2010] 1 KLR 73** this Court expressed itself thus:

> **"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."**

It is also the position of the law that we must pay homage to concurrent findings of facts of the two courts below us not unless it is demonstrated that the conclusions arrived therein were perverse. In its Judgment the 1st appellate court stated:

> **"For us, however, the issue is whether, during the period of attack, the P.W.1 had ample time to know and later on recall her attacker and rapist. To address this issue, we have noted the offence took place during the day. Besides, the offence took place in two different locations over a long period of time. During that time, P.W.1 and her attacker were in some kind of conversations. These conversations involved demands by the attacker for her to remove her panties, undress, dress again. There were also phone calls which the attacker allowed P.W.1 to receive. From the initial place of crime, the attacker moved P.W.1 into a bush where he concluded the offence of rape. We are satisfied that there was very good and clear opportunity for P.W.1 to see the features of her attacker, which would enable her later to clearly recognize him when she saw him. It must be noted that P.W.1 did not just choose to point at anybody. It took her time to find her attacker. If P.W.1 wanted to frame any man for this offences, she could have done that as soon as the offence had occurred, but this she did more than 60 days later, and only when she was satisfied that she had recognized the right person. Although the trial court based conviction on uncorroborated evidence of a single witness, we are satisfied that the said single witness had the opportunity to correctly recognize the appellant, having had ample time running into two hours and in broad daylight, during which time, the appellant and P.W.1 had time to talk. We find that the appellant was properly recognized and that the trial court properly convicted the appellant with the offence that was alleged to have been committed. The conviction was therefore safe. We also find that the trial court carefully considered the defence offered by the appellant, and rightfully rejected the same.**

We too are of a similar view. The appellant was with P.W.1 for a long period of time. It was during the hours of daylight. We have no doubt that she was able to identify and later recognize her assailant.

The appellant's counsel also raised the issue of duplicity of the charge which was not raised in the grounds of appeal. Moreover, the charge sheet provided for two counts of independent offences that were committed simultaneously. There was no duplicity.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed.

Be that as it may and in view of the recent developments as regards the mandatory sentences as enunciated in the case of **Francis Karioko Muruatetu & another vs. Republic SC Petition No. 16 of 2015**, where the Supreme Court of Kenya held that the mandatory death sentence for the offence of murder contrary to section 204 of the Penal Code is unconstitutional, this Court has had occasion to apply the dictum in the above case in Sexual Offences. In **Christopher Ochieng vs. Republic [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011**, this Court 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 vs. 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".**

In mitigation, the appellant told the trial court that he was a first offender. He also asked the trial court to consider the period he had been in

custody. However, as the trial magistrate's hands were tied, she had no option but to give the mandatory sentence which was life imprisonment. However, given the change in jurisprudence as stated above, we substitute the life sentence to a sentence of twenty five (25) years from the date of conviction on **22nd June, 2011.**

It is so ordered.

**Dated and Delivered at Nairobi this 8th day of November, 2019.**

**M. KOOME**

**……...…**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**…….....**

**JUDGE OF APPEAL**

**F. SICHALE**

**…….**

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR