IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 623 OF 2010

BETWEEN

NYAMAI MUTIA.....…….....…….1ST APPELLANT

MUSEE KATEE.....2ND APPELLANT

AND

REPUBLIC.……..…….……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi

(Ojwang & Lenaola, JJ.) dated 21st April 2008

in

H.C.CR.A. Nos. 33 & 34 of 2006)

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JUDGMENT OF THE COURT

On 13th June 2004, at about 2.00 am, ***KM (PW1)*** was sleeping in her house at ***[particulars withheld] Village in Kitui County***, when she was woken up by the loud barking of her dogs. Immediately thereafter a group of people, armed with *pangas*, iron bars and axes, broke down the door, assaulted and injured her before robbing her of cash Kshs 1,500, 10 *pieces of lessos*, a *sony* radio, a plastic digital watch, a pair of leather shoes, a torch and a bow and 4 arrows. On the material night, PW1's daughter, ***SK (PW3***) was sleeping in a different house in the same compound. The same people broke into that house too and assaulted PW3 before taking her away, purportedly to open her mother's shop at [particular withheld] market from which they intended to steal more property. Instead of proceeding to the shop, however, four of them took PW3 to a bush and raped her in turns.

The two appellants in this appeal, with another, were subsequently arrested and charged with robbery with violence contrary to ***section 296(2)*** of the ***Penal Code***, rape contrary to ***section 140*** of the Penal Code, and an alternative count of indecent assault on a female contrary to ***section 144(1)*** of the Penal Code. Its apt to point out that the provisions relating to rape and indecent assault under which the appellants were charged have since been repealed and re-enacted in the ***Sexual Offences Act, 2006***. The ***Principal Magistrate's Court, Kitui***, tried the three and in a judgment dated 29th March 2006; acquitted the co-accused and set him at liberty. For their part, the appellants were acquitted of the charge of robbery

with violence in circumstances that are not entirely clear, but convicted of rape and sentenced to 40 years imprisonment each.

Aggrieved by the conviction and sentence, the appellants lodged a first appeal in the High Court. By a judgment dated 21st April 2008, ***Ojwang and Lenaola, JJ***. (as they then were), dismissed the appeal against conviction but allowed the appeal against sentence and reduced it to 20 years imprisonment. It is against that decision that the appellants have lodged this second appeal.

The following are the concurrent findings of the trial and first appellate courts, which we are obliged to pay homage to, unless we are satisfied that they are perverse or that no reasonable tribunal would have come to those conclusions. (See ***M'Riungu v. Republic [1983] KLR 455).*** PW1 was able to identify the ***Nyamai Mutia, the 1st appellant***, among the robbers when she flashed her torch after the robbers had entered her house. She knew him because she had occasionally employed him as a casual labourer. That very day he had been at her home and had even eaten lunch there. He was the first to enter the house and demanded money from her. She gave him Kshs 5,500 and he assaulted her when he realized that she had recognized him. The robbers were in PW1's house for about one hour.

As regards the rape of PW3, the concurrent findings of fact were that when the robbers broke into the house in which she was sleeping, she was able to identify ***Musee Katee, the 2nd appellant*** with the aid of his own lit torch, which he placed on her bed as she tried to pack her clothes. She knew him by name because he was a regular customer in her mother's shop and lived in the same neighbourhood. The 2nd appellant demanded from PW3 her caps and mobile phone and when she feigned that she did not own such property, he retorted that he had seen her with it in the shop.

Shortly, the 2nd appellant was joined by the 1st appellant and they demanded that PW3 accompanies them to the shop from which they intended to steal more property. Outside the house, two others, who PW3 could not identify, joined them. Before reaching the shop, they however diverted into a bush were the four raped PW3 in turns. During the ordeal, the 2nd appellant was talking continuously asking her whether she could identify him and demanding that she should not look him in the eyes. As for the 1st appellant, he was the last to rape her. PW3 knew him well because he used to work for her mother and earlier that very day he had been at their home where he ate lunch. As he raped her, he attempted severally to kiss her.

The two courts below also made concurrent findings that the evidence of PW3 was corroborated by the medical evidence adduced by ***Dr. Joshua Matu (PW6),*** a consultant surgeon who testified that he examined PW3 on 13th June 2004, a few hours after the rape and found that she had bruises on the inner thighs; laceration of the inner wall of the left *labia majora* and presence of numerous spermatozoa. He concluded that PW3 had been sexually assaulted and that there had been penetration. He classified the injuries she sustained as harm.

When put on their defence, the 1st appellant stated that he was asleep in his house on 21st November 2004 when he was woken up and arrested by the police for allegedly committing the offence of robbery with violence. Subsequently he was charged with the offence, which he knew nothing about. As for the 2nd appellant, his defence was an alibi to the effect that he was away in Nairobi on the material day, where he was working. He could not remember the name of his employer in Nairobi. When he went home to help his grandmother dig her *shamba* in September, he was arrested by the police and charged with the offence, which he had not committed. He knew PW1 and PW2 because he used to see them in their shop.

Whereas this appeal is premised on 8 grounds, they all raise only three issues, namely whether the first appellate court erred by sustaining the conviction of the appellants without corroborating medical evidence; by relying on identification of the appellants that was not safe and reliable; and by failing to re-evaluate the evidence and arrive at its own independent conclusion.

Urging the appeal, ***Mr. Byaruhanga,*** learned counsel submitted that the medical evidence that was adduced by PW6 merely proved that PW3 was raped, but it did not prove that it was the appellants who raped her. In his view, it was imperative for the medical evidence to establish that vital link by confirming

that it was the appellants who ejaculated the spermatozoa found in the SK. Instead, counsel contended, the appellants were not subjected to any medial examination, making their conviction unsafe. He relied on the judgment of this Court in ***Benjamin Mugo Mwangi & Another v. Republic*** ***(1984) eKLR*** in support of the proposition that rape must be corroborated and that of the High Court in ***Frederick Wadia Masanju v. Republic*** ***(2014) eKLR*** to urge the view that medical evidence must be adduced to corroborate rape. Counsel also attacked the medical evidence on the basis that PW6 examined PW3 on 13th June 2004 but filled the medical report on 12th October 2004. He submitted that the PW6 ought to have produced in court his medical notes, which enabled him to fill the report four months latter.

Turning to identification of the appellants, counsel submitted that it was not safe because the rape took place at night and that although PW1 and PW3 stated that they had identified the appellants with the aid of torch light, the two courts below had failed to undertake an evaluation of the factors set out in, among others, ***Regina v. Turnbull*** ***[1976] 3 All ER 549*** and ***Wamunga v. Republic*** ***[1989] KLR 424)*** such as how long they had the appellants under observation, the distance from which the observations were made, whether there was any obstruction, the nature and intensity of the lighting and the position of the light relative to the appellants. Counsel also contended that the identification of the appellants was not safe because no identification parade was conducted to determine whether PW1 and PW3 could actually identify them. Further, counsel argued, although PW3 testified that the 2nd appellant was talking too much, there was no voice identification. He also faulted the recognition of the appellants by PW1 and PW3, submitting that there was no evidence that the witnesses gave the names of the appellants at the first opportunity. In support of the last proposition he relied on the judgment of this Court in ***Francis Muchiri Joseph v. Republic*** ***(2014) eKLR*** and submitted that failure to name the appellants in the first report weakened the evidence of identification.

Lastly it was submitted that the first appellate court failed in its duty to evaluate the evidence and come to its own independent conclusion and that had it carried out a proper evaluation of the evidence it could have noted the infractions regarding the identification of the appellants and the insufficiency of the evidence linking the appellants with the rape of PW3.

Mr. Omirera, learned Senior Assistant Director of Public Prosecutions opposed the appeal, submitting that the appellants' identification was proper and safe. He contended that the identification of the appellants as the rapists was safe and sound and that no additional medical evidence was necessary to corroborate the evidence of PW3. In addition, counsel urged that it was not necessary to subject the appellant to medical examination in order to prove they had raped PW3. As regards PW6's medical notes, it was submitted that the witness had testified to the existence of the notes and had offered to produce them in court if they were required.

Further on identification, counsel submitted that the identification of the appellants was through recognition, which was more reliable, and that in the circumstances an identification parade was not necessary. He further submitted that the trial court properly considered the evidence of identification and the source of the light, which enabled PW1 and PW3 to identify the appellants. Specifically regarding identification by PW3, it was contended that she identified the appellants in the house before they raped her subsequently in the bush.

Counsel concluded by urging us to find that the first appellate court had properly evaluated the evidence, as it was its duty to do, and to make no adverse inference regarding PW6's medical notes.

We have carefully considered the record of appeal, the memorandum of appeal, the submissions by learned counsel and the authorities that they cited. We shall address the issues in this appeal in the order the appellants addressed them. The first issue is whether it was necessary to adduce medical evidence linking the appellants to the rape of PW3 before they could be convicted. From the outset we have no hesitation in answering that question in the negative. The view urged by the appellants, namely that the evidence of the victim must be corroborated by medical evidence before it can be relied upon to convict them is the pre-2006 position and is the position articulated in the judgment of this Court in ***Benjamin Mugo Mwangi & Another v. Republic*** (supra), a judgment which was rendered on 19th October 1984. That position was changed by amendments to the ***Evidence Act***, which were effected in 2003 and 2006.

The proviso to ***section 124*** of the Evidence Act was introduced by the ***Statute Law (Miscellaneous Amendments) Act No. 5 of 2003*** and further modified by the ***Statute (Law Miscellaneous Amendments) Act No. 3 of 2006***. The combined effect of those amendments is that in a prosecution involving a sexual offence, the trial court can convict the accused person on the evidence of the victim alone if it believes the victim was truthful and recorded the reasons for that belief. In ***Kassim Ali v. Republic (2006) eKLR***, this Court stated:

> ***"...the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."***

And in ***George Kioji v. Republic, Cr App. No. 270 of 2012*** this Court stated as follows regarding proof of sexual offences:

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."***

See also ***Robert Mutungi Muumbi v. Republic, CA No 5 of 2013*** and ***Williamson Sowa Mbwanga v. Republic, Cr App No 109 of 2014).***

With great respect, the judgment of the High Court in ***Frederick Wadia Masanju v. Republic*** (supra), which the appellants heavily relied upon is wrong law and totally ignored the proviso to section 124 of the Evidence Act. In that judgment, delivered on 4th February 2014, ***Odero, J.*** stated as follows:

> ***"Finally I note that no samples of blood or blood typing was done to prove that the semen found inside the complainant's vagina came from the appellant. This was remiss of the prosecution. Such testing is necessary to prove a charge of rape conclusively. For this reason I find that the trial magistrate erred in convicting the appellant on the main charge of rape. As such I quash do quash that conviction."***

That judgment is clearly *per incurium*.

In this case both the trial court and the first appellate court made concurrent findings of fact that PW3 was a witness of truth and that the two appellants were among the four men who raped her. The trial court had the advantage of seeing and hearing PW3 testifying. Not only did PW3 have the opportunity to see the appellants with the aid of torchlight, but also she knew both of them well beforehand. Indeed, the 1st appellant had been employed regularly by PW3's mother as a casual labourer and had been at their home earlier the same day where he even took lunch. The 2nd appellant was also known to PW3 because he lived in the same neighbourhood and was a regular customer in her mother's shop. It was also the evidence of ***Yator, CID, Kitui, (PW5)*** that when PW3 made her report, she stated that she had identified two of the rapists.

As regards PW6's medical notes, the record shows that he testified that he was the one who examined PW3 immediately after the rape and that he kept his notes which he used subsequently to prepare the report which he produced in court. He was categorical that he had his notes in his office and offered to bring them to court if they were necessary, a matter which the appellants did not pursue. Taking all the foregoing into account, we have no hesitation in finding that the first ground of appeal has no merit.

The second ground is identification of the appellants. It cannot be overemphasized that evidence of identification under difficult circumstances must be treated with great care and circumspection before it is admitted because the identifying witness could be honest but genuinely mistaken. (See ***Maitanyi v.***

***Republic** [1986] 1 KLR 198* and ***Wamunga v. Republic**, supra).*

The trial court is therefore obliged to consider very carefully the circumstances under which the witness claims to have made the identification of the accused person to satisfy itself that there was no possibility of mistake. The duty of the court was explained as follows in ***Anthony Kangethe Mwangi v. Republic**, Cr. App. No 24 of 2010:*

> ***"It is well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult**."*

In this case, we are satisfied that the trial court was alive to its duty as regards evaluation of the evidence of identification. This is how the trial court delivered itself:

> ***"Having warned myself of the dangers of convicting under the circumstances available as to identification, its evident from the record that the complainant (SK) PW3 was able to identify the 2nd and 3rd accused. She knew them. She recognized them.***
>
> ***Besides further PW1 also saw the 3rd accused enter the house.***
>
> ***She flashed a torch. She recognized him. That I have no doubt to the truth as leveled (sic) by the 3rd prosecution witness herein."***

We would also agree with the respondent that this was not merely a case of identification, but one of recognition. As was stated in ***Anjononi & Others v Republic** [1976-80] 1 KLR 1566,* recognition of the accused person by the witness is more assuring and reliable than the visual identification of the accused by a total stranger, because the identification in the former case is based on the witness's familiarity and personal knowledge of the accused. We add further that since the identification of the appellants was based on recognition by PW1 and PW3, no purpose would have been served by conducting an identification parade in the circumstances. In ***Githinji v. Republic** [1970] EA 231* it was held that once a witness knows who the suspect is, an identification parade is valueless.

What we have said above is enough to dispose of the entire appeal including the claim that the first appellate court failed to re-appraise the evidence. Having closely examined the record, we are satisfied that the High Court went about it duty as expected of it and it did not commit any error or ignore any pertinent evidence.

The prescribed sentence for the offence of rape at the material time was life imprisonment. The appellants were sentenced to 40 years imprisonment, which on appeal was reduced to 20 years imprisonment. That sentence is lawful and no basis has been laid why we should interfere with it. The approach of this Court regarding appeals against sentence was explained as follows in ***Bernard Kimani Gacheru v. Republic**, Cr. App. No. 188 of 2000:*

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

The up short is that this appeal has no merit and the same is dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 29th day of September, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….....…….

JUDGE OF APPEAL

K. M'INOTI

…….....…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR