REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CRIMINAL APPEAL NO. 94 OF 2013

BETWEEN

LETTO MACHAKI MBITI ……...…… APPELLANT

AND

REPUBLIC ……... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu

(Majanja, J.) dated 30th October, 2013

in

H.C.CR.A No. 223 of 2011)

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JUDGMENT OF THE COURT

1. The appellant was charged in the Senior Principal Magistrate court at Siakago with one count of rape contrary to ***Section 3(1) (a)*** of the ***Sexual Offences Act;*** an alternative count of indecent act with an adult contrary to ***Section 11(6)*** of the ***Sexual Offences Act*** and one count of stealing contrary to ***Section 275*** of the ***Penal Code.***
2. The particulars of the offence of rape were that on 22nd January, 2011 at around 9:00 a.m. in Mbeere District within Embu County, the appellant caused his penis to penetrate the vagina of PNN without her consent. On the alternative count, the particulars were that on the aforementioned place and date the appellant committed an indecent act with PNN by rubbing his penis against PNN's vagina. The particulars of the offence of stealing were that on the aforementioned place and date the appellant stole a mobile phone make Nokia 1200 valued at Kshs. 2,500/= the property of PNN.
3. The appellant pleaded not guilty to all counts and the prosecution called a total of six witnesses in support of its case. It was the prosecution's case that on 22nd January, 2011 at around 9:00 a.m. while PW1, PNN (P), was on her way to church she met a man who was armed with a panga; the said man accused P of defecating in a bush that was nearby. The said man pulled P into the bush and threatened her not to scream. He lifted P's skirt, took off his trousers and raped her.

Meanwhile, while PW3, Justin Murimi Njeru (Justin), was on his way to his friend's house he heard noise coming from the said bush. He went closer and saw the appellant who was known to him on top of P. He decided to stay near the scene since he was not sure of whether P had given her consent.

4. After 15 minutes P came out of the bush crying and the appellant ran towards his home. P informed Justin what had transpired and they reported the incident to the police. It was P's evidence that after the incident she noticed that her mobile phone make Nokia 1200 had been stolen by the appellant. PW2, John Mwangi, a clinical officer, testified that P had been examined on the same day of the incident by his colleague, Mr. Amos Muthomi, who had filled in the P3 Form. The P3 form indicated that his colleague had observed that P had a discharge on her vagina and her hymen had been broken. The appellant was subsequently arrested and charged.
5. In his defence, the appellant gave an unsworn statement. He denied committing the offences he was charged with and maintained that he was framed by his brother one Thomas Mugo and the area Chief. After considering the evidence on record, the trial court convicted the appellant for the offence of rape and acquitted him on the charge of stealing due to lack of evidence. The appellant was sentenced to life imprisonment.
6. Aggrieved with the trial court's decision, the appellant preferred an appeal in the High Court which was dismissed by a judgment dated 30th October, 2013. It is that decision that has provoked this second appeal before us. At the hearing of the appeal the appellant appeared in person while the state was represented by Mr. Kaigai, Assistant Deputy Public Prosecutor.
7. The appellant relied on his written submissions which were filed before this Court. The appellant submitted that the charge was defective because it did not provide for the provision of law that stipulates the punishment for the offence of rape. According to the appellant, ***Section 3(1) (a)*** of the ***Sexual Offences Act*** only defines the offence of rape, therefore, the prosecution ought to have also included ***Section 3(3)*** of the ***Sexual Offences Act*** which prescribes the punishment in the charge sheet. He argued that the said omission was fatal. He submitted that the charge sheet did not indicate whether the act of penetration on Purity was intentional and unlawful contrary to the provisions of ***Section 3(1)(a)*** of the ***Sexual Offences Act.*** Therefore, the charge sheet did not disclose reasonable information of the actual nature of the offence charged.
8. The appellant contended that the medical evidence did not link him to the offence of rape; medical evidence showed he was HIV positive while the complainant was HIV negative. He submitted that the identification evidence was not safe to justify his conviction; the police ought to have conducted an identification parade to exclude the possibility of a mistaken identity. He urged us to allow the appeal.
9. Mr. Kaigai in opposing the appeal submitted that the evidence was clear; PW1 testified that she was attacked by the appellant who was armed with a panga; PW2 witnessed the offence and recognized the appellant; the clinical officer confirmed that the complainant had been raped.
10. We have considered the grounds of appeal, the record, submissions by counsel and the law. By dint of ***Section 361*** of the ***Criminal Procedure code*** this Court is restricted to consider only points of law since this is a second appeal. This Court is also restricted from interfering with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***Chemangong -vs- R [1984] KLR 611***.
11. We have looked at the charge sheet on record and note that on the first count the appellant was charged with the offence of rape contrary to ***Section 3(1(a)*** of the ***Sexual Offences Act.*** We also note that the charge sheet did not indicate ***Section 3(3)*** of the ***Sexual Offences Act*** which prescribes the punishment to be meted out in the case of a conviction for the offence of rape. Ideally the provision prescribing the sentence of an offence ought to be included in the statement of offence in the charge sheet. So what is the consequence of this omission?
12. ***Section 382*** of the ***Criminal Procedure Code*** provides***:-***

> ***"Subject to the provisions herein-before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or***

irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The test for making a decision on cases with discrepancies is established in ***Joseph Maina Mwangi -vs- Republic Criminal Appeal No. 73 of 1993*** wherein it was held***:-***

"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."

We are of the considered view that the said omission did not prejudice the appellant and did not render the trial a nullity.

13. The appellant also contended that the charge of rape was defective because the particulars did not indicate that the penetration on the complainant was intentional and unlawful contrary to ***Section 3(1) (a)*** of the ***Sexual Offences Act***. According to him, the charge did not disclose reasonable information of the nature of the offence he was charged with. ***Section 3(1)(a)*** of the ***Sexual Offence Act*** provides:-

"3(1) A person commits the offence of rape if-

a. ***he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; .."***

The particulars for the charge of rape read as herein under:-

"LETO MACHAKI MBITI: On 22nd January, 2011 at about 9:00 a.m. at Riandu Location Mbeere District within Embu County in the republic of Kenya caused his penis to penetrate the vagina of Purity Njoki Nyaga <u>without her consent."</u> Emphasis added.

14. We take note that the particulars did not mention that the appellant intentionally and unlawfully caused penetration on the complainant with his penis. However, we are of the considered view that the aforementioned particulars did disclose another ingredient which establishes the offence of rape, that is, that the penetration was without the complainant's consent. ***Section 3(1)(b)*** of the ***Sexual Offences Act*** provides:-

"3(1) A person commits the offence of rape if-

(a)…

(b) other person does not consent to the penetration."

We are of the view that the particulars in the charge did disclose the nature of the offence the appellant was charged with. We find that the charge was not defective. ***Section 134*** of the ***Criminal Procedure Code*** provides:-

"Every charge or information shall contain, and shall be sufficient if it contains a statement of 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."

15. From the evidence on record it is not in dispute that the P had been raped on the material day.

Medical evidence tendered by PW2, the clinical officer, revealed that P was examined on the same day; she had a discharge on her vagina and her hymen had been broken. The issue in contention is the identity of the perpetrator. The prosecution's evidence was clear and consistent to the effect that the incident occurred at around 9:00 a.m. in broad daylight; P was raped by a man unknown to her; PW3 (Justin) witnessed the whole incident, he saw the appellant on top of P without his trousers. We note that the appellant never denied that Justin knew him prior to the incident. Therefore, the identification evidence by Justin was that of recognition. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566,*** this Court held at page 1568,

> ***"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

We find that the recognition evidence was sufficient to justify the appellant's conviction.

16. The appellant argued that medical evidence exonerated him since the same established that the appellant was HIV positive while the complainant was HIV negative. We take judicial notice that in certain circumstances the HIV virus is not transmitted from one person to another despite sexual intercourse. We find that the appellant's HIV status did not in any way displace the overwhelming evidence against him. We further concur with two lower courts finding that it was the appellant who had raped P.
17. The upshot of the foregoing is that we find that this appeal lacks merit and is hereby dismissed.

Dated and delivered at Nyeri this 20th day of January, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO- ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR