IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 87 OF 2013

BETWEEN

BASILIO MWANIKI IRERI …….....…….. 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. 214 of 2011)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the judgment of the High Court (Majanja, J.) wherein the appellant's conviction and sentence for the offence of rape was confirmed. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- R, (1984) KLR 213*** at page 219 this Court held,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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."***

[2] It is imperative to briefly set out the essential background facts relating to this matter. The appellant was charged with one count of rape contrary to ***Section 3(1)(a),(c) & (3)*** of the ***Sexual Offences Act*** and an alternative charge of committing an indecent act with an adult contrary to ***Section 11A*** of the ***Sexual Offences Act*** in the Chief Magistrate's Court at Embu. The particulars of the offence of rape were that on 24th January, 2011 in Embu District within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JG by force. The particulars of the alternative charge were that

on the above mentioned date and place the appellant unlawfully and indecently assaulted JG by touching her private parts.

[3] The appellant denied both charges and the prosecution called a total of seven witnesses in support of its case. It was the prosecution's case that on 24th January, 2011 at around 9:00 a.m. PW1, JG (J), took her daughter to school and headed back home. At a distance of about ½ Kilometers from the school gate J noticed a man was following her; she had first seen the man digging a trench nearby. The said man who was later identified as the appellant caught up with her and dragged her into a maize plantation. The appellant removed J's underpants, lifted her skirt upwards and ordered her to kneel down. He then covered J's mouth with his hand and proceeded to rape her. J testified that while the appellant was in the process of raping her, his green hat fell on the ground.

[4] Meanwhile, PW3, A W K (A), who lived close by went to the said maize plantation and saw the appellant having sexual intercourse with J. A left because she was not sure whether the intercourse was consentual. After the appellant finished he ran away and J screamed for help. A went back to the scene wherein J informed her that the appellant had raped her. According to A, J informed her that her attacker was a man who she had seen digging a trench close by; J took her to where she had seen her attacker first; J pointed out the appellant as the attacker; when the appellant saw them he ran away.

[5] J reported the incident to the area sub-chief and thereafter to the police. PW5, CPL Isaiah Adero (CPL Isaiah) testified that J in her initial report indicated that she had been raped by someone she could identify; she first saw her attacker while he was digging a trench at [particulars withheld]. On the same day CPL Isaiah in the company of the area sub-chief and J went to where J had first seen her attacker; J pointed out the appellant who was found digging the trench as the person who had attacked her, he was arrested. Thereafter, CPL Isaiah and J went to the scene wherein he collected J's underpants which were soiled with mud. PW6, Dr. Kinyanjui Asaf (Dr. Kinyanjui), examined J and found that there were no injuries on her genitalia and there was no presence of spermatozoa. He testified that after carrying out a specular examination he noted a white discharge on the posterior fonix, that is, where the vagina meets with the cervix. Dr. Kinyanjui also testified that he noticed that J had mild mental retardation and mild cerebral palsy.

[6] Thereafter, the appellant was arraigned and charged in court. At the conclusion of the prosecution's case, the appellant was placed on his defence. He gave an unsworn statement. The appellant testified that on the material day he got a casual job of digging a trench. While he was digging, he saw a group of people approaching him; they assaulted him until he fell into the trench he had dug. He was later arrested and taken to the chief's camp wherein he found three other people who had also been arrested. The police asked the arrested persons to each give them Kshs. 2000/=; the three people gave out the said money and were released. He did not have the money so he was placed in custody and later charged. He denied committing any of the offences he was charged with.

[7] After taking into consideration the evidence on record, the trial court convicted the appellant for the offence of rape and sentenced him to 15 years imprisonment. The appellant was aggrieved with the aforementioned decision and preferred an appeal in the High Court which was dismissed vide a judgment dated 30th October, 2013. Unrelenting the appellant has filed this second appeal based on homemade grounds. During the hearing of this appeal, the appellant appeared in person and relied on his written submissions which were filed in this Court.

[8] The appellant submitted that both courts below erred in convicting him while placing reliance on the prosecution's evidence which was full of contradiction. He argued that J stated in her evidence that the woman who came to her rescue after she screamed was known as M while PW3 testified that she was the one who went to J's aid and her name was A W K and not M. He also submitted that J testified that the green hat which was produced in court was left by the appellant at the scene when he ran away while PW5 (CPL Isaiah) testified that the appellant was wearing the green hat when he was arrested. The appellant also faulted the two courts below for relying on the evidence of a single identifying witness. He maintained that there was no medical evidence connecting him to the offence he was charged with. This is because J testified that her attacker did not put on a condom and if that were the case Dr. Kinyanjui

would have noticed the presence of spermatozoa on J's genetilia. There was no evidence of penetration on J. Finally the appellant argued that he was placed in custody on 24th January, 2011 and was only arraigned in court on 26th January, 2011 beyond the requisite time frame hence his constitutional rights were violated. He maintained that the charges against him were fabricated. He urged us to allow the appeal.

[9] Mr. Kaigai, Assistant Deputy Public Prosecutor, appeared for the state. In opposing the appeal, he submitted that the offence of rape was proved by the prosecution to the required standard. He argued that PW1 (J) was able to identify the appellant as her attacker since she had spent some time with him during the incident. J's evidence was clear and cogent, moreover the appellant was caught red handed at the scene by PW3 (A). He urged us to dismiss the appeal. The minor discrepancy regarding the name of the person who caught the appellant in the act is curable under the provisions of ***Section 382*** of the ***Criminal Procedure Code***. After all the trial magistrate was satisfied that the complainant was a truthful witness. Counsel urged us to dismiss the appeal.

[10] Based on the foregoing summary, we have distilled the following three issues which we think are of law for determination: -

- ***Whether the appellant's constitutional rights were violated.***
- ***Whether the prosecution's case was full of contradictions. If so what is the consequence?***

- ***Whether the appellant's conviction was supported by the evidence on record.***

[11] On the allegation that the appellant's constitutional rights were violated when he was held in custody longer than the time provided for in the Constitution, we reiterate the provisions of :-

> ***Article 49(1) (f)*** of the ***Constitution*** *which* provides: -
>
> ***"49 (1) An arrested person has the right-***
>
> ***……..***
>
> ***(f) to be brought before a court as soon as reasonably possible, but not later than-***
>
> i. ***twenty-four hours after being arrested; or***
>
> ***(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."***

[12] Going by the information on the charge sheet on record, the appellant was arrested on 24th January, 2011 and was arraigned in court on 26th January, 2011, a day late. Therefore, what is the consequence of the said delay? In ***Dominic Mutie Mwalimu –vs- Republic - Criminal Appeal No. 217 of 2005*** this Court while considering the provisions of ***Section 72(3)*** of the former ***Constitution*** which are more or less similar to ***Article 49(1)(f)*** of the current ***Constitution*** observed:-

> ***"A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).***
>
> ***The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the***

court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity."

[13] The dicta in the above decision in our view is applicable in this case regarding the interpretation of ***Article 49(1)(f).*** *Moreover* the appellant never raised this issue in either of the two courts below; this matter was only raised for the first time before this Court; thus the prosecution did not have an opportunity to offer an explanation for the said delay which would have enabled the two courts below determine whether the delay of 1 day was reasonable. In ***Samuel Ndungu Kamau & Another –vs- R- Criminal Appeal No. 223 of 2006*** where this Court held:

"The provisions of Section 72 (3) (b) above are framed in a way which presupposes that a complaint with regard to violation would either be raised at the trial or in an application under Section 84 of the Constitution, where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual position. When such a complaint is raised for the first time before this court, it may not be possible to investigate the truth or falsity of the allegation. That being our view of the matter, this ground fails, more so when it does not relate to the question whether or not the 2nd appellant alone or together with other persons not before the court committed the offence he stands convicted of"

[14] On the issue of contradictions in regard to the name of the woman who first came to the complainant's aid and whether the appellant was wearing the green hat when he was arrested or whether the hat was recovered at the scene. ***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."

[15] The applicable tests in determining the weight to attach to discrepancies arising from the evidence in a criminal matter are well articulated the case of;-***Joseph Maina Mwangi -vs- R- Criminal Appeal No. 73 of 1993*** wherein this Court 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 agree with the submissions by Mr. Kaigai for the State that the aforementioned inconsistencies were not prejudicial to the appellant and were immaterial to his conviction. In our respectful view the discrepancies are curable under ***Section 382*** of the ***Criminal Procedure Code***.

[16] On the last issue whether the prosecution's evidence proved the case against the appellant. We wish to revisit the provisions of ***Section 3(1)*** of the ***Sexual Offences Act*** provides as follows:-

> ***"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/her genital organs; or***
>
> 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".***

An offence under the above provision, it appears the prosecution was supposed to prove there was penetration of the complainant, and that she did not consent to the penetration. The identity of the perpetrator of the offence is also crucial. Both courts below were of concurrent findings that the J's evidence proved that she was raped by the appellant.

[17] In this case J testified that the appellant dragged her into a maize plantation and raped her; the appellant penetrated her from behind. We note that Dr. Kinyanjui testified that J suffers from mild retardation and mild cerebral palsy. Therefore, was Juliet a competent witness? ***Section 125 (1)*** of the ***Evidence Act*** provides:-

> ***"125(1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause".***

The trial court had the opportunity to observe J when she gave her evidence and found that she was a truthful and competent witness. We therefore see no reason to interfere with the said findings. In ***Nelson Julius Irungu –vs- R- Criminal Appeal No. 24 of 2008***, this Court held:

> ***"As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses".***

[18] From the record, J gave a detailed account of what transpired on the material day. The appellant argues that from the medical evidence tendered by Dr. Kinayanjui there was no proof of penetration or presence of spermatozoa on J. He therefore argued that the offence of rape was not proved. J testified that the appellant penetrated her and the same was corroborated by PW3 (A) who saw the appellant having intercourse with J. The said evidence was sufficient to establish that there was penetration on J. The only evidence as to whether the penetration was with or without consent was that of J. She testified that the penetration was without her consent. The proviso to ***Section 124*** of the ***Evidence Act*** which provides:-

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".***

J informed Anastacia who had come to her rescue that the penetration was without her consent. Therefore, the prosecution did establish that the penetration was without J's consent. As to the identity of the perpetrator, J testified that as she was walking back home she noticed a man following her; she had seen the man earlier digging a trench nearby; the incident occurred at around 9:00 a.m. and, therefore, she got a good impression of her attacker. Time without number, this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In ***Kariuki Njiru & 7 Others –vs- R- Criminal Appeal No. 6 of 2001***, this Court stated:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."

[19] In this case, J informed Anastacia who arrived at the scene first that she could identify her attacker. She in fact took A to where she had seen the appellant digging a trench and pointed him out to her. However, the appellant ran away. From the record, PW5 (CPL Isaiah) testified that in her initial report which was recorded on the day of the incident J indicated she could identify her attacker. She took CPL Isaiah to where she had seen the appellant digging a trench and pointed him out to him and he was arrested on the same day. In ***Maitanyi -vs- R,*** (***1986) KLR 198,*** this Court while testing identification evidence expressed itself as follows: -

"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police……"

J pointed the appellant as her attacker on the same day of the incident while her impression of him was still fresh. Therefore, there was no possibility of a mistaken identity.

[20] Based on the foregoing this appeal lacks merit and it is hereby ordered to be dismissed.

Dated and delivered at Nyeri this 14th day of April, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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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