IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA , OUKO & GATEMBU, JJ.A)

Criminal Appeal No. 116 Of 2013

BETWEEN

DAVID MASESE MOGAKA ……. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi, (Msagha, J.) dated 19th December, 2011

in

HC. CRA. NO. 68 OF 2009)

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JUDGMENT OF THE COURT

1. On 19th February 2009 the appellant David Masese Mogaka was convicted by the Magistrates' court at Makadara, Nairobi for the offence of rape under section 3(1) of the Sexual Offences Act, Act No. 3 of 2006 and sentenced to 15 years imprisonment. His first appeal against the conviction and sentence was rejected by the High Court (A. Mbogholi Msagha, J) in a judgment delivered on 19th December 2011. Dissatisfied with the decisions the two courts, he has appealed to this Court.

The Facts

2. On 8th July 2007 at about 6.00 am, S W M (PW 1)(we shall refer to her as S) was on her way home from a birthday party in Kayole, Nairobi. She was crossing a road to take a matatu when the appellant, accompanied by two other men, held her at gunpoint and escorted her to a house. Inside the house, the appellant placed her on a carpet. He raped her until midday. Pretending to be going to the toilet, S managed to escape from the house.

3. S reported the incident to Police Constable Ruth Maithya (PW5) at Kayole Police Station. She proceeded to Nairobi Women's Hospital for treatment where, on the same day, Dr. Ketra Muhombe (PW2) examined her. A vaginal examination revealed tender perineum; some clear discharge at the introitus and bruises at what she described as 7 o'clock vestibular position. Anal examination revealed tender perianal area. No spermatozoa were seen. Dr. Ketra Muhombe's

diagnosis was rape and sodomy. She prepared a medical report, which she produced before the trial court.

4. Police Constable Ruth Maithya recovered S's undergarment and submitted it to the Government Chemist. Stephen Matinde Joel Waibe (PW6) a Government Analyst who was attached to the Government Chemist examined S's undergarment as well as blood and saliva samples taken from the appellant to establish if there was any relationship. He found that the undergarment had no seminal stains or spermatozoa.

5. On 11th July 2007, that is three days after the ordeal, S saw the appellant at a place known as Jack and Jill. She immediately alerted a police officer, Corporal Maurice Ochieng Owang (PW4) who was on patrol. Corporal Owang arrested him. The appellant was later taken to Kayole Police Station and subsequently charged with the offence.

6. Dr. Zephania Kamau (PW3) who subsequently examined S on 17th July 2007 did not see any physical injuries other than tenderness on her pubic area.

7. In his defence, the appellant stated that on 10th July 2007 he was on his way from town to pick a relative when a police officer took him to Kamukunji Police Station. After five days he was taken to Kayole Police Station where he was held for 10 days before being charged with an offence he did not know anything about. He denied having taken any woman to his house on 8th July, 2007 or having seen the complainant.

8. The trial court (Mr. K. Muneeni, Acting Principal Magistrate) after evaluating the evidence was satisfied that S had indeed been raped and that the critical question that he had to determine was whether the appellant is the one who raped S. The learned magistrate had this to say in that regard:

> ***"The only point of determination is whether the accused was the one who raped her as alleged.***
>
> ***This concerns the issue of identification by a single witness. I warn myself of the danger of relying on the evidence of a single witness.***
>
> ***From the evidence adduced the incident took place during the day. She (PW1) says she was arrested by her captors at 6.00 am she then was subjected to the sexual ordeal for around six hours. Accused intended to lock her to the room but she managed to escape with the accused in hot pursuit.***
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> ***The complainant appeared of a good demeanor and very consistent in her testimony. She was the one who later saw the accused kilometers away from the scene in the city centre and alerted police officer. Given all the above scenario I am satisfied that indeed she positively identified the accused as among the men who captured her. He was the one who raped her till midday."***

9. Accordingly, the learned magistrate found the appellant guilty of the offence and convicted him.

10. Before the High Court the appellant challenged the conviction on the ground that trial court wrongly relied on the evidence of a single witness that required corroboration and that the evidence tendered was contradictory and inconsistent. After re-evaluating the evidence the High Court concluded that **"the evidence adduced by the prosecution was sufficient to justify the conviction of the appellant for the offence of rape as charged."** The High Court did not consider the sentence of 15 years to be excessive and also upheld it.

11. Against that background the appellant has lodged the present appeal.

Submissions by counsel

12.Although the appellant set out eight grounds of appeal in his memorandum filed in this Court on 3rd January 2012, learned counsel Mr. A. H. Khamati who appeared for him during the hearing of the appeal urged that the prosecution did not prove its case to the required standard; that if the High Court discharged its role on a first appeal to re-evaluate and analyze the evidence it would have acquitted the appellant; that having regard to the evidence that there was gang rape the identification of the appellant is doubtful; that the appellant was held in custody prior to being charged for longer period than allowed under the Constitution and that the appeal should therefore be allowed and the appellant should be released forthwith.

13. Opposing the appeal learned counsel for the respondent Mr. B. L. Kivihya submitted that the prosecution proved its case to the required standard; that the offence occurred in broad daylight; that there is medical evidence showing that the victim was sexually interfered with; and that the appellant was positively identified.

Determination

14. This being a second appeal, our mandate by reason of section 361 of the Criminal Procedure Code is to consider matters of law. In **M'Riungu v R [1983] KLR 455** this Court stated:

> ***"...Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

15. We have considered the appeal and submissions of learned counsel. There are three issues that require determination. The first is whether the identity of the appellant was mistaken. In other word was the appellant positively identified? The second is whether presence of spermatozoa upon examination of the complainant was necessary for the offence of rape to be proved. The third is whether the appellant is entitled to an acquittal for having been held in custody prior to arraignment for a period longer than permitted under the Constitution.

16. According to counsel for the appellant if the High Court had discharged its duty as the first appellate court to re-evaluate the evidence it would have concluded that the complainant was gang raped and that the identification of the appellant was therefore mistaken. The evidence does not however support the contention that the complainant was gang raped. In her evidence PW1 identified only the appellant as her rapist, when she stated, "*...As I crossed the road to get a matatu accused held me. He produced a gun. He hit me with the gun on the head, chest and back. There were three men. They took me to a house. Accused placed me on a carpet. He raped me till 12 mid day*."

17. There is no suggestion by PW1 in her testimony that those who accompanied the appellant participated in the rape. Although there were three attackers who accosted her, PW1 was clear that it was the appellant, and the appellant alone who committed the offence with which he was charged. There is therefore no merit in the assertion that the High Court should have ordered a re-trial on the basis that there was evidence of gang rape and that the identity of the offender was mistaken.

18. In our view the learned trial magistrate proceeded on the correct basis and warned himself of the danger of relying on

the evidence of a single witness. As this Court stated in **Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989 at Kisumu**

> ***"Evidence of visual identification in criminal cases can bring about a miscarriage of***

justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

19. The complainant was captive of the appellant for a long time. As the learned Judge of the High Court observed, an offence of this nature entails close proximity between the suspect and the complainant and there is no doubt that there was sufficient time and opportunity for the complainant to identify the appellant and to, three days later, point him out without hesitation to a police officer when she spotted him at Jack and Jill.

20. We are satisfied that the circumstances surrounding the identification were favourable and the finding by courts below that the appellant was positively identified is supported by sufficient evidence. There is, for the same reason no merit in the complaint that the High Court failed to evaluate the evidence and to draw its own conclusions.

21. The appellant further complained that the ingredients of the offence of rape were not established because Dr. Ketra Muhombe testified that no spermatozoa were seen upon examination of the complainant. Dr. Muhombe was however categorical that vaginal examination of the complainant revealed tender perineum and bruises and that the complainant was raped and sodomized. As this Court stated in **Andrew Apiyo Dunga and another v R [2010] eKLR**:

"That F was raped was confirmed by the medical report and there was no need to match the spermatozoa found inside her with that of each appellant as the offence of rape is complete once there is penetration of the female's genital organ with the male's penis. It is not necessary that spermatozoa be released. In this case medical evidence confirmed F's evidence that there was penetration of her vagina by a male organ. According to her evidence which both courts below accepted, the persons responsible were both appellants."

22.It is therefore not necessary, as the appellant argued, that presence of spermatozoa be established for the offence to be complete. We uphold the submission by Mr. Kiviyha for the respondent that the offence of rape was indeed proved. In any case according to Section 124 of the Evidence Act, it was sufficient for the trial magistrate to proceed to convict on the evidence of the complainant upon being satisfied that she was a truthful witness.

23. The last complaint advanced by counsel for the appellant was that the appellant was held in custody for a period longer than permitted under Section 49(f) (2) of the Constitution. That would not however entitle the appellant to an acquittal. The appellant would have a remedy in damages for the violation of his constitutional rights. See **Julius Kamau Mbugua v Republic [2010] eKLR** and also **Fappyton Mutuku Ngui [2014] eKLR**.

24. For those reasons we find that the appeal has no merit and it is dismissed.

Dated and delivered at Nairobi this 8th day of May, 2015.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU,

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR