IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 146 OF 2012

BETWEEN

S K N ……………APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Meoli,J.) dated 15th March, 2012 in CR.A. No.35 of 2010.)

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JUDGMENT OF THE COURT

The appellant's appeal to the High Court having been dismissed he now brings this second appeal challenging his conviction and sentence for the offence of rape contrary to **section 3(1) (a)** of the Sexual Offences Act.

The prosecution relied on the evidence of the complainant, an adult male but with a retarded growth. He testified that on 31st October, 2009 at 2 a.m. while walking home from a bar he saw the appellant running towards him. The appellant grabbed him, pushed him to the ground and after undressing him raped him.

The complainant's screams attracted Indoke Naftali, (PW4) who rushed to the scene and found the appellant on top of the complainant. On seeing the witness the appellant disengaged from the act and sat on log as PW4 questioned them as to what they were doing. PW4 then called her daughter to come and witness what was happening but before she could arrive the appellant fled from the scene. PW4 and her daughter helped dress up the complainant. The matter was immediately reported to the police. At the station the complainant described the appellant as *S*, an alias by which the appellant appears to have been known generally, according to the complainant and PW4.

The complainant was then issued with a P3 form which was completed by the examining clinical officer, Jackson Mwale (PW3) who observed bruises on the anal region and other forms of soft tissue injuries which he attributed to sexual assault.

Because an examination of the appellant had revealed that he was HIV-positive, it became necessary to examine the complainant to ascertain if he was infected. Fortunately he was found to be free from infection, at least as at that stage. The examining officer as a result required the complainant to present

himself for a further examination after a few months. The finding that the appellant was HIV-positive formed the basis for the second count charging him with the offence of deliberately transmitting HIV contrary to **section 26(1) (b)** of the Sexual Offence Act.

The appellant disappeared for a few days immediately after the incident and was only arrested over two weeks later, on 18th November, 2009. He denied, before the court that he committed the offence insisting that he was arrested for no apparent reason when he went to attend a Merry-Go-Round group meeting and also to attend Garsen Health Centre, in view of his HIV status; that having earlier on lost his eye sight after being pierced by PW4's husband, he would not normally be out at night. In this regard we understand him to suggest that PW4 was driven by vendetta because her husband was arrested and charged with assaulting the appellant. The appellant's wife testified in his favour that it was not practically possible for the appellant to have committed the offence without her knowledge as they were always together and even on the material night.

Apart from the oral evidence received in court the trial court visited the *locus in quo* where the trial Magistrate observed that, given the proximity of the scene to a catholic church which had security light and in view of the light from various commercial and residential premises, the area must have been well lit when the offence was committed. In a well analyzed judgment the learned Magistrate after identifying the issues for his determination, found that, although the incident was at night the appellant was positively identified at the scene because he was well known to the complainant and PW4 prior to the morning of the incident; that the complainant's evidence was consistent and that the appellant's conduct of disappearing from the area for 17 days pointed to his guilt.

On the second count the learned Magistrate held that even in the absence of medical examination report that the complainant had been infected, in terms of **section 26(1) (b)** of the Sexual Offences Act, actual infection of the victim is not a requirement so long as the act is … "*likely to lead to another person being infected with HIV or such other disease.*" Upon convicting the appellant the learned Magistrate sentenced him to life imprisonment for the offence of rape, but without imposing any sentence on the second count ordered that it be held in obeyance. The High Court did not say anything about this. It is only after a sentence is imposed that it can be held in obeyance.

In dismissing the first appeal, as explained earlier the learned Judge (**Meoli, J**) largely agreed with the finding of the trial court, that PW4 was a credible witness; that the evidence presented by the prosecution was that of recognition; and that the complainant immediately supplied to the police the appellant's nickname, *S*.

On the question of sentence the learned Judge, was of the opinion that the trial Magistrate failed to consider the appellant's health and the fact that the complainant was not infected. With that she set aside the sentence of life imprisonment and in its place imposed twenty (20) years imprisonment.

Before this Court, on second appeal, and bearing in mind its jurisdiction under **section 361 (1)** of the Criminal Procedure Code, the appellant has challenged the decision of the High Court on the grounds that the offence of rape was not proved to the required standard; that without a DNA report the conviction was contrary to **section 36 (1)** of the Sexual Offences Act; that the evidence of identification was flawed as the intensity, distance and nature of the light was not disclosed; that the High Court lacked jurisdiction to substitute the original sentence and instead impose 20 year sentence; and that the learned Judge failed to appreciate that the appellant's defence was not considered.

There being no doubt that there is sufficient evidence that the complainant was sexually abused, both courts below correctly directed their minds to the question of identification, as the only issue requiring their determination. The complainant and PW4 presented evidence that it was the appellant who raped the complainant. The appellant for his part denied this. Where a suspect disputes his identification the prosecution is put to proof that the suspect is, beyond any reasonable doubt, the person who committed the offence. It is a settled statement of the law in **R** v **Turnbull** (1976) 63 Cr. App. R 132 that recognition as a type of identification may be more reliable than identification of a stranger. While that decision also recognizes that eyewitness identification is powerful evidence against a suspect, it warns

that errors do occur even in cases involving close relatives and friends because of the fallibility of human memory. To avoid miscarriage of justice, it is of vital importance that recognition evidence is examined closely and the court must warn itself of the special need for caution before convicting a suspect on such evidence.

The complainant testified that he saw the appellant running; that when he reached him, he grabbed him, wrestled him to the ground and raped him against the order of nature. The complainant admitted that although he was drunk, he was able to recognize the appellant. PW4 arrived at the scene shortly and found the appellant on top of the complainant. Both courts below made a concurrent factual finding that around the scene were commercial and residential buildings as well as a church all of which had electricity lighting, hence the two eye witnesses were able to see the appellant clearly. Though the visit to the scene by the trial court was during the day, we believe its value was to ascertain the distance between the scene and the buildings and not the intensity of light from those buildings as that could not, practically be achieved during the day. The two courts below also found, as a matter of fact, that the appellant was known to both the complainant and PW4 prior to the morning in question, who promptly supplied to the police the name by which he was locally known.

According to the complainant the appellant is a well-known person in the area as he supplies meat; that he would see him on a daily basis going about his business on a bicycle; and that he has known him for over five years. Indeed earlier in the day before the incident he had seen the appellant. In the case of PW4, apart from the fact that they both came from the same area, the appellant was also a frequent customer to her palm wine stall. She had also seen the appellant earlier in the day. Both courts below were satisfied with the accuracy of this evidence and the trial court having had the advantage of seeing the witnesses and assessing their demenour, we find no basis for interfering with those concurrent findings of fact. The appellant's defence was duly considered and, in view of the weight of the prosecution evidence, properly dismissed.

Regarding sentence, section 3(3) of the Sexual Offences Act provides that a person convicted of rape;

> **"…is liable.. to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life"**

The substitution of life with 20 years' imprisonment was within the law, so we hold.

The appeal fails and is dismissed.

Dated and delivered at Mombasa this 4th day of December, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR