IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, M'INOTI & J. MOHAMMED JJ.A.

CRIMINAL APPEAL NO. 107 OF 2013

BETWEEN

BENJAMIN MUTUNGA MULUVI ……..…….. APPELLANT

AND

REPUBLIC ..…….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Machakos (Makhandia, J) dated 28th September, 2011

in

HCCR.A. NO. 240 OF 2011)

****

JUDGMENT OF THE COURT

The appellant, ***BENJAMIN MUTUNGA MULUVI***, was charged in the subordinate court at Tawa with the offence of rape contrary to ***section 3 (1)*** as read with ***Sub-section 3 of the Sexual Offences Act*** and an alternative charge of indecent act with an adult contrary to ***Section 11(A) of the Sexual Offences Act*** in that on 23rd May, 2011, at ***[particulars withheld]*** sub-location in Mbooni East District within Makueni County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ***MM*** without her consent.

The particulars of the alternative count were that on 23rd May, 2011, at ***[particulars withheld]*** sub-location in Mbooni East District within Makueni County the appellant intentionally and unlawfully did an indecent act to ***MM*** by touching her private parts namely vagina with his penis without her consent.

The appellant took plea on the 3rd November, 2010, and denied having committed the offences. At the conclusion of the trial the appellant was found guilty as charged, convicted and sentenced to 25 years' imprisonment. He appealed to the High Court on the grounds that his identification by recognition was doubtful, that the charge-sheet was fatally defective and that his defence had not been considered.

The High Court dismissed his appeal for lacking in merit, giving rise to this, his second appeal. The

appellant, who was unrepresented, filed his "grounds of appeal" raising five (5) issues. Those grounds are:

1. *The charge was not proved to the required standard.*

2. *The charge sheet was defective.*

3. *The conviction was unsafe.*

4. *The complainant was mentally challenged and was therefore unfit to testify.*

5. *The sentence imposed was harsh and excessive.*

When the appeal came up for hearing, the appellant presented written submissions which he urged us to consider in determining the appeal.

Learned Senior Assistant Director of Public Prosecutions (SADPP), Ms Murungi, opposed the appeal and supported the conviction and sentence, submitting that there was overwhelming evidence that the offence was committed; that the evidence of PW1 (MM), is very clear that she was raped by the appellant in her kitchen; that although PW1 was mentally challenged, the trial court confirmed that she was able to give cogent evidence to lead to conviction; that PW1 was raped in broad daylight and testified that she knew the appellant as a neighbour; that it was PW2's, (J K M), testimony that she found the appellant leaving PW1's kitchen and that when she entered the kitchen she found PW1 without her blouse and pant; and that PW1 informed her that she had been raped by the appellant. The SADPP further submitted that PW2's evidence placed the appellant at the scene; that PW2 also knew the appellant as a neighbour; that the appellant was properly identified; that the evidence of PW4 (Geoffrey Mutie, the clinical officer) confirmed that PW1 had been raped; and that the medical report indicated the presence of spermatozoa in her vagina. The SADPP concluded that the offence was proved beyond reasonable doubt and the appellant was properly identified. She urged us to uphold the conviction and sentence. The appellant did not reply to the respondent's submissions.

This being a second appeal, this Court is restricted to address itself to matters of law. As this Court has stated many times before, it will not normally interfere 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 their findings. See ***DAVID NJOROGE MACHARIA V R, [2011] eKLR*** where this Court stated:

> ***"Only matters of law fall for consideration and the Court will not normally interfere 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."***

We have considered the grounds of appeal, the record of appeal, submissions and the law. What then are the points of law that arise in this appeal? Firstly, it is the appellant's contention that the High Court erred by concluding that he was not entitled to raise the issue of the charge being defective since the same was not raised before the trial court. The appellant contends in his written submission that the charge was defective in view of the fact that the charge of rape was against PW1 with no clarification in the charge-sheet that PW1 was mentally disturbed.

Section 134 of the Criminal Procedure Code requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It provides that:

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

Interpreting this provision in the case of ***ISAAC OMAMBIA V R, [1995] eKLR*** this Court held that:

> ***"the particulars of a charge [form] an integral part of the charge."***

Section 31 of the Sexual Offences Act, 2006 provides for the treatment of vulnerable witnesses, such as the complainant who was a person with mental disabilities. The learned trial magistrate does not, however, appear to have expressly relied on this provision.

We note that the learned trial magistrate was aware of the complainant's condition and stated in her judgment:

"The complainant is mentally challenged. This notwithstanding, she was able to testify without much problem. … However, this incapacity did not affect her ability to give clear and consistent evidence. I observed her in court and was satisfied with her ability to communicate without much difficulty. This is evident from the record of the proceedings. … As I have stated, the complainant's recollection of the events of the material date was consistent. She gave clear and detailed evidence of the events of that date. Having observed her demeanour, I am satisfied with her testimony. The same was not sufficiently challenged by the accused in cross examination."

We find that there was no requirement for the charge sheet to indicate that the complainant was a person with mental disabilities and was, therefore, not defective.

The second ground of appeal is that the High Court erred in law when it held that the appeal had no merit whereas evidence on record revealed that the charge was not proved to the required standard. PW1 testified that on the material date she was in the kitchen when the appellant confronted her, forced her to lie on the floor, removed her pair of underpant and biker and proceed to have sexual intercourse with her without her consent. This evidence was corroborated by PW2 who testified that on the material date she had left PW1 home and when she came back, she met with the appellant coming from the kitchen and that PW1 informed her that the appellant had raped her; that PW1 did not have her underpants and blouse on. Further, PW4 a clinical officer who filled the P3 Form testified that PW1 had been raped.

The learned trial magistrate stated in her judgment:

> ***"The complainant knew the accused person. PW2 told the court that the accused was her neighbour. The offence took place during the day.***
>
> ***… Although she gave unsworn evidence, the same was sufficiently corroborated by the testimony of the other prosecution witness."***

In sexual offences, where the only evidence is that of the alleged victim, the evidence of that victim, if believed by the trial court, can, without corroboration found a conviction. ***Section 124 of the Evidence Act*** makes this quite clear:

> ***"Notwithstanding the provisions of*** *section 19 of the Oaths and Statutory Declarations Act****, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***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 the 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."*** [Emphasis added]

Regarding the offence of rape, ***Section 3 (1) of the Sexual Offences Act*** provides:

"A person commits the offence termed rape if-

(a) He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;-

(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."

From the evidence on record we are satisfied that the first appellate court correctly held that the evidence on record revealed that the charge of rape was proved to the required standard and therefore that ground of appeal fails.

We now turn to the last ground of appeal where the appellant contends that the sentence imposed on him was excessive and not proportionate to the offence charged. ***Section 361 (1) of the Criminal Procedure Code*** provides:

"A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) …"

Accordingly, this Court's jurisdiction is limited to questions of law on second appeals in criminal matters. The appellant's complaint that the sentence was excessive and not proportionate to the offence charged, is, therefore, not open to us for consideration. See ***ALFRED MBISELU AVUTSWA V R, CR.A NO. 90 OF 2014***.

We are, therefore, satisfied that the appellant was convicted on sound evidence and the case against him proved beyond any reasonable doubt. In the result, we find that this appeal has no merit and we accordingly dismiss it in its entirety.

Dated and delivered at Nairobi this 21st day of November, 2014.

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR