IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 9 OF 2008

KENNEDY LUSAKA WANJALA ....APPELLANT

AND

REPUBLIC ....RESPONDENT

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

at Kitale (Ochieng, J.) dated 29th January,2008

in

H.C.CR.A. NO. 59 OF 2006)

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JUDGMENT OF THE COURT

Kennedy Lusaka Wanjala was convicted by Kitale Senior Principal Magistrate, Mrs. Juma, for the offence of rape contrary to *section 140* of the Penal Code. The particulars of the charge were as follows: -

"On the 7th night of July, 2005 at M. Estate, Kitale, of Trans Nzoia district within the Rift Valley Province unlawfully had carnal knowledge of LM without her consent."

Upon his conviction, he was sentenced to serve 30 years imprisonment. His appeal to the superior court (Ochieng J.) was dismissed, hence this second and final appeal. The appellant has been unrepresented throughout and it is understandable therefore that in this second appeal he has raised issues of fact and mixed facts and law upon which the two courts below made concurrent findings. This Court is not at liberty to indulge in fresh evaluation of the evidence unless the concurrent findings are perverse. As was stated in **M'riungu v Republic [1983] KLR 456:**

"**Where a right of appeal is confined to questions of law, 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 that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings – The Times of March 30, 1983)

The following issues were raised by the appellant:

"2. the High Court erred in law and facts when it relied on the opinion of the clinical officer that I was involved in the offence without good reason.

3. according to the examination of laboratory test, there was no spermatozoa, no trauma or swelling or tenderness, on the complainant amounted to nothing more than speculation which was without any proper foundation.

4. the prosecution side failed to prove their case beyond all reasonable doubt, because the name Ndovu was not my name.

5. the High Court judge erred in law and fact when he relied on the evidence of PW1 alone without consideration that the time of incident was dark and if PWl was raped inside the corridor means inside the building was really dark and no secure positive identification was there.

6. the High Court erred in law and facts when he shifted the burden of proof on me without considering my submission which I handed before the honourable court.

7. the High Court erred in law and facts by not warning himself for (sic) the danger of uncorroborated evidence was inconclusive on the allegation of rape (sic)..

8. the case was not proved against me beyond all reasonable doubts because the court convicted me on the evidence of a single witness."

In summary, grounds 2 and 3 challenge the medical evidence relied on; grounds 4, 5, 7 and 8 challenge the sufficiency of evidence to prove the offence beyond reasonable doubt; while ground 6 alleges the shifting of burden of proof. We shall revert to the submissions made before us by the appellant on those issues. What facts led to his conviction?

On 7th July, 2005, at about 8 p.m. ***LM*** (PW1) (***LM***) left her house at M estate in Kitale to buy some tomatoes and onions from a kiosk barely 100 metres away from the house. She left her two children in the house with her husband, SS (PW4) (***SS***), who was unwell. After making the purchase, **LM** heard someone calling her by name. She thought it was her uncle calling her, and so she went towards the direction from which the voice came. She saw a person standing on a small side road and then the person grabbed her and threatened her with a knife he held. When she screamed, the assailant boxed her in the left eye and head and she fell down. She was held and pushed into a corridor of a fence and kiosks where she was ordered to stand up. The assailant ripped off her skirt and pulled down her petticoat and panty. He pushed her against a wall and had sexual intercourse with her in a standing position. The ordeal lasted 10 minutes after which she was ordered to sit down. For about one hour she remained seated while the assailant stood by threatening to stab her if she screamed. She then put on her skirt and petticoat, leaving her panty at the scene and the assailant led her to the main road. He released her after kicking her backside and ordered her to go but not to talk about it. She headed to her house. According to **LM**, it was not very dark and she was able to recognise the assailant. She knew him physically though not by name, as she was his customer in his kiosk where he sold mandazi and referred to him as "*Ndovu",* a heavily built, bearded person. She was close to him during the ordeal and was able to recognise him.

In the meantime, back in the house, after **LM** had left, her husband, **SS**, drifted into sleep because of the medication he was taking. He woke up with a start at about 10 p.m. when a

sufuria was burning on the fire. The children were asleep, the T.V was on, but his wife was not in the house. He checked with the neighbours but she was not there. He headed for the house of his wife's grandmother in the same estate but did not find her. As he prepared to go to the police, with a neighbour, he saw his wife coming home crying. She told them she was raped by Ndovu, which was a nickname of a person she knew. They went to her grandmother's house. Lucia Kiboi Muchiro (PW3), was the grandmother who brought **LM** up after the death of **LM**'s mother. **LM**'s eyes were swollen and she told her grandmother that she was raped by one Ndovu. They went to the Chief's office to report but were told it was late. At 1 a.m., they went to Kitale Police station where the report of rape was made to ***Pc. Tom Juma*** (PW5) and a P3 form was issued to **LM**. ***Pc. Juma*** noted the injuries on **LM**'s face and advised medical treatment. The name of the suspect as given to him by **LM** was "*Ndovu",* an alias.

The P3 form was completed the following day by ***Reuben Munyasi Sakari*** (PW3), a clinical officer at Kitale District Hospital. Before her medical examination, **LM** had not bathed since her rape ordeal the previous night. The clinical officer found that **LM** was bilaterally swollen on both sides of her face and lower part of the eyes. There was tenderness on the anterior and posterior chest. On examining her private parts, the clinical officer found that there was no swelling or tenderness. There was wetness over the labia and a foul characteristic smell of semen. That confirmed that she had been with a man. She had pus cells and many epithelial cells, a sign of friction. She had no syphilis or HIV. The hymen was old broken and no spermatozoa were seen. The clinical officer expressed the opinion that **LM** had been raped.

The appellant was not arrested until after two weeks on 21st July 2005 at 1 a.m. when ***Pc. Juma*** and other police officers in the presence of **LM** and **SS**, surprised him in his sleep. They had been looking for him at his kiosk where he sold mandazi without success. When the grandmother (PW3) saw him she confirmed that he was the mandazi seller at a kiosk in M. estate.

The appellant denied in his unsworn defence that he ever committed the offence. Instead he suggested that it was **LM**'s husband, **SS**, who had raped her. He further suggested in cross-examination of **SS** that he had a business relationship with **SS** which had gone sour thus pushing **SS** to frame him on false charges. **SS** denied that suggestion on oath. As for his names, the appellant protested that he had never been known as "Ndovu"which is an animal's name, and said his name was ***Kennedy Lusaka Wanjala***. That is why the police used that name to charge him and there was no "alias". He also protested that he was not a mandazi seller as purported by **LM** and other witnesses, affirming that he was a mason by profession. He was not the only heavily built man with beards in Kenya and there was nothing special about **LM**'s description of her attacker. Denying that he was ever involved in the alleged crime, the appellant explained how he was found at his home by policemen on 21st July, 2005 and woken up at 1 a.m. in the night only to be told he was under arrest for a fabricated crime. He fell ill from 7th July, 2005 (when the offence is alleged to have been committed) and was advised by a doctor in Kitale District Hospital not to go out in the cold but to keep warm. That is why he remained in his house for two weeks up to 20th July, 2005 when the police arrested him. He had an outpatient card to show for the visit to the doctor which he produced in evidence.

Both courts below believed **LM** and the clinical officer in making the finding that rape was committed. They also believed **LM**'s husband S., that he did not have sexual intercourse with her until she was examined by the clinical officer. When the appellant disputed the fact of rape before the superior court, the court dealt with the issue as follows: -

"**The question as to whether or not PW1 was actually raped is vital. That is because the appellant insists that in the absence of spermatozoa, on the person of PW1, rape had not been proved.**

Pursuant to section 139 of the Penal Code, rape is defined as follows: -

"***any person who has unlawful carnal knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape."***

In this case PW1 was first threatened with harm, if she screamed. The person issuing the threat was armed with a knife, which he said he would use to stab PW1, if she screamed. And when she screamed, PW1 was boxed in the left eye and head. Thereafter, her skirt, petticoat and pant were removed by her assailant. As the assailant did so, and even when he opened his own trouser, he was holding the knife.

In effect, there were a combination of several ingredients, all of which indicate that PW1 was threatened with harm; was harmed; and was forced into sex. She definitely did not consent to the sexual intercourse.

The fact that PW1 had had sexual intercourse was verified by the clinical officer, who found her with;

"***Wetness over the labia and a foul characteristic smell of semen."***

His explanation was that the many epithelial cells-parts and pus cells which were found when the discharge on PW1 was examined, showed that there had been friction. The clinical officer further explained that the smell of semen meant that PW1 had been with a man.

During cross-examination of both PW1 and PW4, the appellant implied that he was not disputing the fact that PW1 had had sexual intercourse. If anything, he only indicated that PW1 may have had intercourse with her husband.

Although PW2 said that no spermatozoa was found on PW1, he made it clear that the foul smell of semen indicated that PW1 had been with a man.

The appellant's assertion that spermatozoa can last within the body of a female for more than 3 days is not supported by any medical evidence. Therefore, I find it to be an argument that is without any factual or legal backing. For that reason, it can only be disregarded, as I hereby do.

In similar vein, I disregard the appellant's contention that rape or sexual intercourse can only be deemed complete if there was ejaculation. The law certainly does not lay down any such an ingredient in the definition of the rape."

In his grounds of appeal No. 2 and 3, reproduced above, the appellant has revisited the issue before us and maintains that there was no proof of rape as alleged in the charge sheet. Without belabouring the point we find no substance in those grounds of appeal. We concur with the two courts below that the elements of rape as defined in the Penal code were proved. The challenge on the clinical officer's findings has no basis and his opinion was properly accepted by the two courts. Those grounds of appeal are rejected.

The bulk of the appellant's submissions before us were directed at grounds 4, 5, 7 and 8 relating to his identification and proof of the case beyond reasonable doubt. He submitted that identification of the appellant was difficult in the circumstances; that there was only one identifying witness; that the identification was of a stranger and there was no evidence of how "relatively dark" the night was; that there was no other source of light and no description of distance; that no other evidence was adduced to confirm that he was the person known as "*Ndovu"*; and that his alibi was rejected without any sufficient reason. He cited some authorities

which we have considered. For his part, learned Senior State Counsel Mr. Chirchir submitted that the identification of the appellant was through recognition of a known person and not a stranger. There was sufficient time, more than an hour, of unhindered closeness between the appellant and the complainant to facilitate positive identification. The complainant also reported her assailant by name to relatives and the police. Finally, he submitted that the act of disappearance by the appellant from his place of work was not out of innocence and his alibi was thus properly rejected by the two courts below. As for the omission to use the name "*Ndovu"* as an alias in the charge sheet, Mr. Chirchir submitted that there was no need to do so since the appellant gave his full name to the police and it was used in the charge sheet.

We have considered those grounds of appeal in as far as they raise issues of law. Identification has, of course, been held to be an issue of law and we have examined the evidence in relation thereto. The two courts below were indeed alive to the issue and examined it at length. The trial court, in particular, was alive to its duty to make a finding on the credibility of the complainant because she was the only eye witness to the offence. On such credibility, the trial court is the best judge and it stated: -

"**All in all therefore the evidence which points at the accused is the evidence of PW1. She was the victim and eye witness. She says it was not very dark and the fact that she stayed at the scene with the rapist for quite sometime enabled her to recognize the suspect as the accused. It appears that after the rape PW1 was not manhandled in any way, they just sent (sic) there the culprit with his knife. PW1 has been consistent in other aspects of the case and I do not see how she can be inconsistent on this issue of identity.**

She was not just pinning on anybody to victimize, or guess, because of that went so, (sic) for the two or so weeks the accused was being sought she could have framed any other person as the culprit. In other words I am satisfied that PW1 has struck the court as credible and her explanation of how she may have identified the accused is a believable explanation considering that she was with a person she knew before and with someone she stayed with at a scene for about one hour."

The superior court, in admirable fashion, re-evaluated the evidence on record and stated as follows on the issues:

"**Having summarized the evidence, I note that both PW1 and the appellant do acknowledge that at the time the complainant was being raped, she and her assailant were definitely in very close proximity. The question is whether the said proximity was a hindrance or an added advantage, for purposes of PW1 positively identifying her assailant.**

PW1 said:

"***I had recognized this person, inspite of the darkness. It was not very dark, but I knew this person before. He was a customer who used to sell mandazi to me. I was near him and saw him well for sometime."***

From that piece of evidence, I am convinced that the close proximity between the complainant and her assailant was not a hindrance to the identification of the assailant. Instead, it enabled the complainant to positively identify the appellant as her assailant."

With respect, we defer to those findings as we have no reason to fault the credibility of the complainant. The surrounding circumstances were also conducive to positive identification. Those grounds of appeal also fail.

On the whole the appeal on conviction has no merits and we reject it.

That would have been the end of this judgment but for the issue of the sentence meted out to the appellant, in this case 30 years imprisonment. We have examined the same issue in no less than four other cases from this area where the two courts appear to have been unduly influenced by the **Sexual Offences Act 2006** and erroneously applied the principles of sentencing provided in that Act when the offences were committed long before the Act. We make reference to two of them: **Fred Michael Bwayo v Republic** **Cr. App. No. 130/07** and **Lazaro Kundu Simiyu v Republic** **Cr. App. No. 8/07**.

The offence in this case was committed on the 7th July, 2005 and therefore the applicable law is the Penal code as amended by **Act No. 5/03**. By parity of reasoning in the earlier cases, we interfere with the sentence to the extent that the sentence of 30 years is set aside and substituted with a sentence of 15 years imprisonment. The appeal is otherwise dismissed.

Dated and delivered at Eldoret this 29th day of May, 2009

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR