IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, SICHALE & J. MOHAMMED, JJA.)

CRIMINAL APPEAL NO. 24 OF 2015

DENNIS LESKAR LOISHIYE …….. APPELLANT

AND

REPUBLIC…….. RESPONDENT

(Being an appeal against the judgment conviction and sentence by Justice Mbogholi Msagha J delivered on the 14th day of May, 2014

in

H.C.CR.A. NO. 2773 OF 2007*)*

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JUDGMENT OF THE COURT

The appellant **DENNIS LESKAR LOISHIYE** was charged with the offence of rape contrary to **section 3(1)** as read with **section 3 (3)** of the **Sexual Offence Act No. 3 of 2006.** The particulars of the charge were that on the 17th April 2007 at ***[particulars withheld]*** Estate within Kayole Division in Nairobi Area, intentionally and unlawfully committed an act which caused penetration with his male genital organ into the female genital organ of **C M N** without her consent. He was arrested on 9th June 2007 and arraigned in court on 22nd June 2007. He pleaded not guilty. Thereafter the trial proceeded before T. Ngugi the then Principal Magistrate Nairobi who on 22nd June, 2011 found him guilty and sentenced him to 20 years imprisonment.

The appellant was dissatisfied by the conviction and sentence and he filed an appeal in the High Court. On 14th May, 2014 Mbogholi J dismissed the appellant's appeal and hence this appeal.

In his memorandum of appeal filed on 24th August, 2014, the appellant raised several grounds which can be summarised as follows:-

i. That the medical evidence produced by PW2 and PW3 did not link him to the offence.

ii. That the charge sheet was defective as it failed to indicate the year the offence was committed and neither was the age of the complainant given

iii. That his fundamental rights as enshrined in Article 72 (3) (b) of the 2010 Constitution were violated.

iv. That the prosecution case was not proved beyond any reasonable doubt.

This being a second appeal, our mandate is as stipulated in section 361 of the Criminal Procedure Code which provides that:

"361(1) 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. ***Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

The above provision of the law was amplified in the case of **Hamisi Mbela & Another v. Republic** Mombasa Court of Appeal Criminal Appeal No. 319 of 2009 (UR) wherein this Court held:-

"8. This being a second appeal, this court is mandated under section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in *M'Riungu vs Republic [1983] KLR 445.*

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**)."***

However, before we deal with the issue as to whether we have the mandate to entertain this appeal we shall first determine the issue of the alleged infringement of the appellant's constitutional rights.

One of the grounds of appeal raised by the appellant was that his constitutional rights under section 72(3) of the old Constitution had been violated as he was not arraigned before the court within the required time. In our view, the position in law on this aspect is now well settled. In the case of ***Julius Kamau Mbugua vs Republic – Criminal Appeal No. 50 of 2008*** (unreported) this Court considered alleged contravention of an appellant's right to personal liberty under section 72(1) and 3 of the retired Constitution and had this to say:

"The underlying question arising in this appeal is whether an unconstitutional extra judicial incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested, or if tried, whether he is entitled to a discharge or acquittal. Simply put in another way, whether a breach of Section 72(3)(b) by depriving a suspect of his personal liberty by police before being charged in court entitles the suspect to go scot-free for the offence allegedly committed or about to be committed. This is a fundamental question of great public importance."

The court went on to say:

"……. the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72(6) expressly compensatable by damages."

By parity of reasoning, the appellant herein would not be entitled to an acquittal if his constitutional rights were violated as his remedy if at all, lies elsewhere.

Having come to the above conclusion, we shall proceed to determine whether on the evidence the trial court and the first appellant court should have arrived at the conclusion that the appellant was guilty or put it in another way, was the decision bad in law, and hence vesting us with jurisdiction as per the provisions of section 361 (1) of the Criminal Procedure Code. What was the evidence analyzed by the trial court and re-evaluated by the first appellate court"

PW1 M N a waitress at a local restaurant in Nairobi and an adult female of about 26 years old was on her way home on 17th April 2007. The time was about 11 p.m. She lived at a place called ***[particulars withheld]*** which according to her was not safe and she usually asked Maasai watchmen to escort her home. On this night when she asked them to escort her home they declined and assured her that they had patrolled the area and it was safe. With this assurance and the Maasai guards having declined to escort her she had no option but to proceed on her own. Shortly thereafter while on her way home she was accosted by a man who forced her into an incomplete building and raped her. Her assailant also attempted to sodomize her. She told the trial court that she was able to see the assailant when she was being led to the incomplete house as there was electric light from the nearby houses. She was also with the appellant for long hours as apart from raping her the appellant made her suck his penis several times. In her examination in chief she was categorical that ***"I go (sic) to know him at the time of the incident. I did not know him before the incident."*** She later reported to the police and sought medical attention. Sometime in early May 2007, one of the Maasai guards who used to escort her home led the police to the house of the appellant as this Maasai had told her he knew where her assailant lived.

PW2 Adan of Nairobi Women's Hospital testified that PW1 was seen by her colleague on 18th April 2007. PW1 was also examined on 30th April 2007 by PW4 Dr. Zephania Kamau. Both reports indicated absence of spermatozoa. PW4 Pc Martin Otoyi accompanied PW1 to a house where PW1 ***"--- pointed to us a man who had raped her"***. The appellant was arrested and placed in custody. It was whilst PW4 was testifying that the appellant requested that the Occurrence Book (OB) of 2nd May 2007 of Mwiki Police Post be availed and PW4 was stood down so as to enable the prosecution avail the (Occurrence

Book (OB). PW5 Pc Pamela was also an investigating officer. In cross examination she told the trial court that there was also another suspect who was released and treated as a prosecution witness. According to her this other suspect

"--- was released because you are the one who was identified by the complainant" and that this witnessed had ***"--- since gone to Tanzania and could not be traced."***

We have found it necessary to recap the evidence of the prosecution because we think that the trial court failed to evaluate and the High Court failed to re-evaluate the evidence properly. We are of the considered view that had the evidence been evaluated and re-evaluated the conclusion arrived at should not have been made. Why do we say so" Firstly, the appellant who was alleged to have committed the offence on 17th April, 2007 was not arrested until on the 9th June, 2007. PW1 did not know the appellant before but she got to know him at the time of the incident. Having not known the appellant before, there is no way that she knew where he lived. According to PW1 the appellant was arrested after one of the Maasai guards led the investigators to the house of the appellant. This Maasai guard was not called as a witness. How did this Maasai guard know that it was the appellant who had committed the heinous act" There is also the evidence of PW5 that there was one other suspect who had been held in custody and who was released as PW1 identified the appellant, and not the other suspect. Further, PW5 testified that this other suspect was released and treated as a witness but unfortunately he did not testify as he had gone to Tanzania.

In our view there is a lacuna in the evidence linking the appellant to the commission of the offence, particularly as regards the circumstances that led to his arrest. In his re-evaluation of the evidence, Mbogholi J in his judgment states that when the appellant ***"……. led the police to where the appellant lived she was able to identify him easily."*** This was a wrong summation of the facts as PW1 did not lead the police to where the appellant lived as this was done by a guard who was not called to testify. Moreover we note that there was no identification parade that was held for PW1 to identify her assailant. We have therefore come to the conclusion that on the evidence the trial court and the 1st appellate court ought not to have come to the conclusion that the appellant was guilty of the offence charged and hence the decision was bad which then becomes a matter of law and gives us the justification to entertain this appeal.

It is also disturbing to note that the appellant asked for the Occurrence Book (OB) of 2nd May, 2007 of Mwiki police station. This led to the court standing down the evidence of PW4 for purposes of availing the Occurrence Book (O.B). Thereafter no mention was made of the Occurrence Book (O.B). In our view this was a case of mistrial. The provision of the law is that when there is a mistrial an appellate court may order a retrial or set an appellant free depending on the circumstances of the case.

In the case of **Muiruri v R [2000] KLR 552** the court ordered a retrial in the subordinate court after observing that:

"3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.

4. ***It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not***

…..”

In this case, and without doubt, the ordeal of the complainant must have been harrowing. However, we note that the appellant has been in custody for a period close to 8 years now. What are the chances that the witnesses will be available" The chances are minimal given that the Maasai guards served as watchmen in the area. It is highly unlikely that they can still be found.

Secondly, and as pointed out above, the trial and the first appellate court failed to properly evaluate the evidence thus entitling the appellant to an acquittal.

The upshot of the above is that there was no proper evaluation of the evidence by the trial court and neither was there proper re-evaluation of the said evidence by the first appellate court. In view of what we have stated above, this appeal is allowed and the conviction of the appellant is quashed and the sentence imposed on the appellant is set aside. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 31st day of July, 2015.

J. W. MWERA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR