REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 44 OF 2015

(From Original Conviction and Sentence in Criminal Case No. 62 of 2013 of Chief Magistrate's Court at Kakamega)

ERIC OBUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon SM Shitubi, Chief Magistrate, Kakamega, of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge against the appellant were that on the night of 27th/28th August 2013 in Kakamega Central District within Kakamega County while in the company of another not before court he intentionally and unlawful caused his penis to penetrate the vagina of MK without her consent.

2. He had also been charged with alternative charge of committing an indecent act with a child contrary to Section 11 (A) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally touched the vagina of MK with his penis against her will.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court had to conduct a trial. The prosecution called four (4) witnesses.

4. The complainant, MK, testified as PW1. She explained how she had hired the appellant, a *boda boda* operator, to convey her by motor cycle to her residence at [particulars withheld] on the material night at 2.00 am. He took her close to her residence, made her alight then held her by the neck until she lost consciousness. She came to in hospital at 7.00 am, and was informed that she had been raped. She was treated and discharged, whereupon she made a report to the police. Kevin Mmesi (PW2), was resident of Jua kali. He heard commotion outside his house at about 3.00 am. He got out to investigate. He found two men and woman at the scene. One of the men was mounting the woman. When they saw him they ran away. One of them, who turned out to be the appellant, tried to mount his motorcycle, KMCQ 393P, but PW2 stopped him and he took off without it. The woman, PW1, was unconscious and muttering incomprehensible things. He called the police who came to the scene. The appellant also came back with a group of people that he had mobilized on the grounds that he had been robbed of his motorcycle. The people he brought apparently knew PW2 and disbelieved the story of the appellant. He was arrested by the police. Corporal Danson Mwasho (PW3), was the police officer who received the first report, went to the scene accompanied by other officers, took the complainant to hospital, and later apprehended the appellant. Patrick Mambili (PW4) was the clinical officer who attended to the complainant and prepared the Police Form 3 which was put in evidence. He stated that she was brought in drunk and unconscious. She had injuries on her back and elbow. Her clothes were muddy, her hair had saw dust and wood chips, and there was mud covering her buttocks. A laboratory test was done which showed that there was spermatozoa in her urine. He concluded that she had been raped given the injuries on her.

5. The appellant was put on his defence. He conceded that he had been hired by a woman to take her to Jua Kali. When he dropped

her near her house, he was attacked and beaten by a group of people he abandoned his motorcycle and ran to the village for help. When he went back to the scene he found a group of people who accused him of raping her. The police came and he was arrested.

6. After reviewing the evidence, the trial court convicted him of the main charge of gang rape contrary to Section 10 of the Sexual Offences Act, and sentenced him to fifteen (15) years imprisonment.

7. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He cited contradictions and inconsistencies in the evidence, argued the court relied on the evidence of a single witness, claimed that his identification was unreliable due to poor lighting conditions at the scene, claimed that there was hearsay and fabrications which suggested mistaken identity, he argued that deoxyribonucleic acid (DNA) test was not conducted on specimens taken from both parties, among others.

8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

9. The appeal was canvassed on 27th September, 2018. The appellant relied on written submissions that he placed before me, while Mr. Juma, Prosecution Counsel, made oral submissions, which he opposed the appeal on grounds that he advanced and elaborated. All these are on the record.

10. The appellant has not pointed out any inconsistencies and contradictions in the testimony of the state witnesses. I have perused through the record of the trial court. The record is fairly consistent and the narratives flowing. There were a few inconsistencies and contradictions, but the same were minor. They did not go to the core of the matter. I am persuaded that the said inconsistencies and contradictions do not materially affect the authenticity of the proceedings and the probative value of the evidence tendered.

11. On the submission that the trial court relied on the evidence of a single witness, it must be observed that the offence charged is sexual in nature. It happens not in the public eye, but in secret and dark places. It often just involves the victim and the perpetrator. It follows therefore that there is almost always a single principal eye witness to the events. It is with that in hindsight that the law requires corroboration of the evidence of the victim. In the instant case, the evidence of the victim, PW1, was corroborated by the evidence of the other witnesses, especially PW2 and PW4. PW2 is the person who came to the scene, caught the perpetrators in the act, and had an altercation with one of them who later turned out to be the appellant. PW4 treated PW1, he described the condition she was in when he attended to her and he concluded that the injuries she had and the condition of her clothes and body suggested rape. It cannot therefore be said that the court relied solely on the evidence of a single witness..

12. He challenges his identification. It was the evidence of PW2 that points directly at the appellant as a perpetrator of the offence. He saw him at the scene, he had an altercation with him when he tried to escape with his motorcycle. He later came back for it while accompanied by a group of people, but got arrested. It was night time, but PW2 had a torch. He interacted closely with PW2 as they struggled over the motorcycle, and therefore there was opportunity for identification. I note too that he came back after the altercation to retrieve the motorcycle. His identification is not in doubt. In any event, his own statement in defence squarely placed him at the scene. It cannot be said that there was mistaken identity

13. He argues that the samples of both parties ought to have been taken and subjected to DNA testing. The charge that the appellant faced was gang rape. The allegation would be that there were other persons involved. PW2 talked of finding two men with PW1. One of the men was on top of the woman, but he could not tell whether that person was the appellant or another. For the appellant to be found guilty of the offence it ought to be established that he penetrated the vagina of PW1 with his penis, or that his penis touched that vagina. There is no positive evidence that the man that PW2 saw on top of PW1 was the appellant, so it cannot be said that he caused any penetration with her. Secondly, PW1 was unconscious and told the court that she did not identify any of the

persons who penetrated her. Indeed, according to her evidence she only found herself in hospital and could not tell why she was there or how she ended up there. Spermatozoa was allegedly found in her vagina, but no tests were done on the spermatozoa in an effort to link it to the appellant. It was critical that further tests be done to try to link the appellant with the offence.

14. There is overwhelming evidence that the appellant was the person who carried PW1 on his motorcycle and took her to her doorstep, where she was allegedly assaulted. PW2 gave positive evidence that the appellant was amongst the persons he found at the scene where PW1 was being sexually violated, but he did not identify the man who was mounting PW1 at the time, and therefore it could not be said whether the person that was found penetrating PW1 at the time was the appellant or the other person who was never apprehended. The spermatozoa found on PW1 would have helped to resolve the riddle had it been subjected to DNA testing with other samples taken from the appellant. The omission to subject the same to DNA testing was no doubt fatal to the prosecution's case.

15. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No. 62 of 2013 was unsafe. I shall accordingly allow the appeal, quash the said conviction and set aside the sentence imposed. The appellant shall accordingly be set free from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF DECEMBER 2018

W MUSYOKA

JUDGE