REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

HIGH COURT CRIMINAL APPEAL NO. E001 OF 2020

MOHAMED BORU GUYO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence by E.K.Too,PM,

in MoyalePM`s Court sexual offence case No. 15 of 2019)

JUDGMENT

1.The appellant was convicted of the offence of rape contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act No.3 of 2006 and sentenced to serve 20 years imprisonment. The particulars of the offence were that on the 19th October 2019 at around 14:30 Hrs within [Particulars withheld] location in Wajir North sub-county within Wajir County he intentionally and unlawfully caused his penis to penetrate the vagina of F.A.A. (herein referred to as the complainant) by use of force.

2. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are, inter alia, that the trial magistrate erred in law and in fact by: relying on the uncorroborated and contradictory evidence of the prosecution witnesses; failing to infer that the investigations were not conducted to the required standard; failing to note that there was possibility of mistaken identity; failing to consider the appellant`s defence and that the trial magistrate imposed a harsh and excessive sentence.

3. The case for the prosecution was that on the material day the complainant was grazing her goats in the bush. The appellant was grazing camels near the place where the complainant was grazing. That the appellant went where the complainant was and greeted her in their vernacular language. He then went away. He went back to her after about 30 minutes and got hold of her. He started to beat her and threw her to the ground. He removed his shorts. Her clothes fell off. He then raped her for about one hour after which he went away. The complainant went home and reported to her husband, PW2. She went to hospital and reported at Gurar police station. Her husband called the area chief PW4 and informed him of the incident. On the 27th October 2019 the appellant was arrested by members of the public at Godoma. PC Halkano Dacha PW5 of Gurar police station re-arrested him. The complainant was issued with a P3 form at Gurar police station. It was completed by Dr. Adan Hussein PW5 of Bute sub-county hospital. He found her with bruises on the head. He did not find anything on the genetalia. The appellant was charged with the offence. During the hearing the doctor, PW5, produced the P3 form and the treatment notes as exhibits, Pexhs. 1 and 2 respectively.

4. When placed to his defence, the appellant gave sworn evidence in which he stated that a certain person had stolen a gun belonging to the complainant`s husband and disappeared with it. The complainant`s husband falsely accused him of stealing the gun and vowed to fix him. He took refuge at a place called Waliti and stayed there for 10 days. He was then arrested and questioned about the gun. Members of the public assaulted him and wanted to kill him. He was saved by a policeman. He was charged with raping the complainant. He denied the charge. He said that the charges were a frame up.

5. The appeal was canvassed by way of written submissions. The appellant submitted that the complainant was examined at hospital after 9 days. He questioned why she delayed for that long and why she did not seek for medical attention immediately after the incident. That it could only mean that the charges were an afterthought and a fabrication.

6. He submitted that the doctor who examined the complainant did not adduce any evidence linking him to the offence. That the Chief PW4 gave contradictory evidence as to the time when he was called by the complainant`s husband. That in his evidence-in-chief he stated it was 5 pm. while in cross-examination he said it was 4:30 pm. That the contradiction shows that the evidence was fabricated.

7. The appellant submitted that the trial court had no reason to dismiss his defence that the charges were fabricated due to the grudge over a lost gun. That the sentence imposed on him of 20 years imprisonment was excessive.

8. The learned prosecution counsel, **Mr. Ochieng**, on his part submitted on behalf of the state that the evidence of the prosecution witnesses was flawless and cogent. That the trial court found the evidence of the complainant to have been honest and believable. That her assertion of having been raped was corroborated by the evidence of the doctor PW3 who examined her. That no evidence was adduced during the trial to allude any malice on her part in accusing the appellant. That the trial court warned itself on the dangers of relying on the single evidence of the complainant though the court was at liberty to rely solely on her evidence in accordance with the provisions of section 124 of the Evidence Act. Counsel relied on the case of **J.W.A. vs Republic** (2014) eKLR where the court reiterated that corroboration in sexual offences is not mandatory where the victim`s evidence is convincing enough.

9. Counsel submitted that the story about the lost firearm had nothing to do with the complainant. That there was no contradiction in the evidence of the prosecution witnesses. That the investigations in the case were conclusive and to the required standard. That the ingredients of the offence of rape were captured in the evidence adduced at the trial. That it was proved that there was penetration on the complainant and that there was use of force. That the offence was committed in broad day light by a person that the complainant recognized. That the evidence of recognition was buttressed by the appellant in his defence wherein he conceded to knowing the complainant`s husband and having had a disagreement with him over a lost gun.

10. It was submitted that the appellant`s defence was a mere denial that did not respond to the accusations levelled against him. That the sentence meted out on him was fair and just as he not only raped the complainant but also assaulted her. That the sentence was within the confines of the law. Counsel urged the court to dismiss the appeal.

Analysis and Determination -

11. This is a first appeal this court has a duty to evaluate, re-consider and analyse the evidence afresh and come up with its own independent decision but bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify -see **Okeno –v- Republic (1972) E.A32 and Kiilu & Another vs. Republic [2005] 1 KLR 174.**

12. The trial magistrate in his judgment found that the complainant had been raped. That this was corroborated by the findings in the P3 form that there were bruises in the vagina. That the offence was committed during the day

and that the complainant clearly saw and identified the appellant. That the complainant appeared forthright in her evidence while the appellant did not appear convincing. That the appellant disappeared from Gurar after the incident and re-located to Waliti. That if he was running away from a false accusation he would have reported to the police which he never did. That his defence amounted to a mere denial.

13. I have considered the grounds of appeal and the submissions by the appellant and the prosecution counsel against the evidence adduced at the trial court. The appellant argued that he was convicted on evidence that was uncorroborated by medical evidence. However, there is no requirement in law for the evidence in sexual offences to be corroborated by medical evidence before a conviction can be reached. **In Kassim Ali v Republic** (2006)eKLR the Court of Appeal held that examination to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence. Also in **AML v Republic** (2012)eKLR, the same court held that the fact of rape is not proved by way of a DNA test but by way of evidence. In ***J.W.A v. Republic 2014*** *(supra) the court held that* corroboration in sexual offences is not mandatory. It is therefore clear from these authorities that medical evidence to connect an accused person to the offence of rape is not necessary for a conviction to be entered. The law is that the court can convict on the basis of oral or circumstantial evidence. More so, the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused. The Court of Appeal in **Chila v. Republic (1967) E.A 722** articulated this position and held that:

"**The Judge should warn … himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."**

In the premises, the argument by the appellant that the evidence was uncorroborated was not sustainable in law if there was some other evidence to support the charge even in the absence of medical evidence.

14. The learned trial magistrate found that the complainant had bruises in her vagina as evidenced by the P3 form. However, the doctor (PW3) who examined the complainant did not observe any such bruises. His evidence was that the complainant had previously been examined by a nurse at a health centre who had noted some bruises in the vagina together with deposits of semen. The doctor PW3 produced the treatment notes made by the nurse as exhibit. The nurse who made these findings did not testify in the case nor was her health centre disclosed. Before the doctor could produce the treatment notes as exhibit he was required to show that he knew the nurse who wrote the treatment notes and that he was familiar with his/her handwriting. The doctor did not identify the particular nurse who made the treatment notes nor did he adduce evidence that he was familiar with the handwriting of the nurse. The trial magistrate relied on the treatment notes to find that the complainant had bruises in her vagina. The evidence on the treatment notes was not properly admitted. It amounted to hearsay evidence. The contents of the treatment notes ought therefore to have been disregarded. There was thereby no evidence that the complainant had bruises in her vagina nor that there were deposits of deposits.

15. The trial magistrate held that the complainant identified the appellant during the ordeal since the incident took place in broad day light. The prosecution counsel Mr. Ochieng submitted that identification of the appellant by the complainant was by recognition.

16. I have keenly gone through the evidence of the complainant as recorded by the trial court. The complainant was the only identifying witness in the case. Nowhere in her evidence did she say that she knew the appellant before the date of the incident. If anything, she said in her evidence-in- chief that she "identified (him) from his clothes and technical (sic) appearance." In cross-examination she stated that she did not know the name of the appellant. More

so, part 1 of the P3 form that was filled by the police on the brief details of the alleged offence indicated that the report received was that the victim was "raped by unknown person while looking after her goats in the field near Burkus area within Gurar location." It is then apparent from the above that the complainant never knew the appellant before the date of the incident. The question is whether she identified the appellant as her assailant.

17. It is well settled that evidence on identification should be treated with a lot of care so as for the court to satisfy itself that it is safe to act on the evidence and to ensure that it is free from the possibility of error. The Court of Appeal in **Wamunga v. Republic (1989) KLR 424** had this to say on the issue:

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

18. In ***Roria v Republic*** the Court of Appeal for East Africa discussed the danger of relying on such evidence and stated that:

"A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

19. In **Abdala bin Wendo & Another v Republic (1953), 20 EACA 166** it was held that:

Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

20. As earlier stated, the complainant did not know the appellant before. Her evidence therefore ought to have been treated with a lot of caution as there was a possibility of mistaken identity. The complainant was not present when the appellant was arrested nor is she the one who led to his arrest. The appellant was arrested by members of the public none of whom testified in the case to shed light on why they arrested him. After the appellant was arrested, there was no identification parade conducted to test whether the complainant could actually identify the appellant as her assailant. In **John Mwangi Kamau v. Republic (2014)eKLR** the Court of Appeal stressed the importance of conducting identification parades and held that:

"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008.

21. In my view, the failure to test whether the complainant could identify the appellant in an identification parade left her evidence weak and unreliable. Her evidence, in the final end, was based on dock identification which evidence is one of a very weak kind. In ***Gabriel Kamau Njoroge –vs Republic (1982-1988) 1KAR 1134****, the Court of Appeal observed the following on this kind of evidence:-*

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade."

See also the same court in Ajode vs. Republic (2004)eKLR.

22. It is clear from the foregoing that the trial magistrate was wrong in relying on the evidence of dock identification as the basis of the conviction of the appellant. Though the magistrate did try to warn himself of the dangers of relying on the evidence of a single identifying witness, he failed to consider that the evidence on dock identification was of little probative value nor did he address his mind to the fact that there was a possibility of a mistaken identity.The fact that an offence is committed during the day does not mean that a witness cannot be mistaken on identity. In my view the evidence was not free from the possibility of error. The benefit of doubt ought to have been accorded to the appellant.

23. The appellant complained that the investigations in the case were not conducted to the required standard. The treatment notes made by an unidentified nurse indicated that there were some semen deposits in the vagina of the complainant. No investigations were conducted such as a DNA test to ascertain whether the semen could be connected to the appellant.It was unprofessional for the police to ignore such crucial evidence.

24. The duty to prove a criminal charge against an accused person is always on the prosecution and does not shift to the accused. The appellant in this case was under no duty to explain why he re-located to Waliti from Gurar. It was the duty of the prosecution to prove that he did so in an attempt to escape after committing the offence he was accused of. There was no sufficient evidence to prove that.

25. The upshot is that there was no sufficient evidence adduced before the trial court to sustain a conviction on the appellant. The appellant was wrongly convicted of the offence. The appeal is thereby upheld. Consequently, I quash the conviction entered against the appellant and set aside the sentence of 20 years imprisonment. I order that the appellant be set at liberty forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 10TH DAY OF NOVEMBER 2021.

JESSE N. NJAGI

JUDGE

PRESENT VIRTUALLY: .

FOR RESPONDENT AT MARSABIT LAW COURTS APPELLANT:

IN PERSON AT MARSABIT LAW COURTS COURT ASSISTANT :

KASHANE AT MARSABIT LAW COURTS

14 DAYS R/A.

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