REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 72 OF 2014

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 408 of 2014 of the Chief Magistrate's Court at Naivasha – E. Kimilu, Ag. PM)

HENRY NJOROGE MUTHONI……..……..…...APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

1. The Appellant herein was charged with Gang Rape Contrary to Section 10 of the Sexual Offences Act. In that on the 25th February 2014 within Nakuru County he having a common intention to penetrate to the vagina of **B N N** without her consent was in company of **Peter Watatua** who intentionally and unlawfully caused his penis to penetrate the vagina of the said **B N N.** He denied the offence but following a full trial, he was found guilty, convicted and sentenced to serve 15 years imprisonment.

2. Aggrieved by the decision, the Appellant filed the present appeal through his advocate Messrs David K. Gichuki & Co. Advocates. The memorandum of appeal contains seven grounds of appeal. Grounds 1 and 2 take issue with the prosecutor's failure to call as witnesses a girl who accompanied the complainant at the material time, a man identified **as Kariuki (Karoki)** and the complainant's mother. These omissions, the Appellant argues should have drawn an adverse inference in his favour; and further that due to the omission the complainant's evidence lacked corroboration (ground 3).

3. In ground 4 and 5, the Appellant challenges the trial court's twin findings to the effect that the Appellant locked the door to the room where the offence occurred, and further, that he turned up the volume of the radio to muffle the complainant's cries for help. Finally in ground 6, the Appellant complains that the trial court did not give due consideration to his *alibi* defence; and finally in ground 7 that the court failed to apprehend the evidence regarding the layout of the barber shop and the studio where the offence occurred.

4. Through written and oral submissions, the Appellant lists a number of witnesses allegedly crucial, that were not called by the prosecution to testify. These include the girl who accompanied the complainant to the barber shop, the complainant's mother and father, one Kariuki -erroneously referred to in submissions as Karoki who lived near the barber shop, an assistant chief and one "Mama Dave" to whom the complainant made the initial report. Thus the Appellant argues that the trial court ought to have drawn the adverse inference that the evidence of these witnesses would have been favourable to the Appellant.

5. And further that, by failing to call these witnesses the prosecution failed to dislodge the Appellant's *alibi* defence. Although not explicitly stated in the submissions "set 1" therein appear relate to grounds 1 and 2 and partly ground 6. Grounds 3, 4, 5, 7 are tackled under the so-called "set 2" and "set 3" of the

written submissions. It cannot be said enough that an Appellant should clearly relate specific submissions to specific grounds of appeal, and no new grounds may be introduced in submissions that are not in memorandum of appeal. The state of the written submissions in this case is unsatisfactory as only 3 grounds 3, 4 and 5 are explicitly mentioned in the submissions.

6. Be that as it may the gist of submissions in the so-called "set 2" is that the complainant's evidence regarding the persons present at the barber shop; the person who locked the studio door; whether the radio volume was raised, the layout of the barber shop and studio lacked corroboration due to the prosecution's omission to call the girl companion of the complainant and the failure by the investigating officer to visit the scene of the offence, to confirm the layout of the scene and presence of a radio.

7. Further, the Appellant highlighted some "material contradiction" in the complainant's evidence in regard to whether she visited the barber shop alone, knew the offender **Peter Watatua,** and whether the radio was on when she arrived at the barber shop. Under "set 3" of the submissions the Appellant asserts that his defence was credible given that the complainant did not in the first instance make any complaint against him in particular.

8. And also that his conduct was consistent with innocence, namely that he remained at the shop and assisted police in searching for the offender **Watatua,** thus negativing any common intention between the Appellant and the said Watatua. Citing the case of **Dickson Mwangi Munene & Ano. -Vs- Republic [2014] eKLR**, the Appellant argued that no common intent had been proved. He urged the court to find his conviction unsafe, quash it and set aside the sentence.

9. On behalf of the Director of Public Prosecutions, Ms Kavindu opposed the appeal. She stated that the evidence of **PW1** was confirmed by the medical evidence and that, at any rate a conviction for the offence herein could be based on the testimony of a sole witness. She stated that the complainant identified the Appellant as the person who locked the studio door to facilitate the offence, and that the Appellant's presence in the company of **Watatua** at the barber shop was confirmed by the Appellant, and that the Appellant's actions proved common intent.

10. These actions included directing the complainant to the inner room (studio) for her phone and raising the volume of the radio in the barber shop during the assault. Miss Kavindu supported the finding of the trial magistrate in respect of the layout of the barbershop and the studio. She urged the court to uphold the conviction.

11. In the case of **Pandya -Vs- Republic [1957] EA 336** the predessor of the Court of Appeal laid out the duty of the first appellate court as follows:

> ***"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."***

12. Through its three witnesses, the prosecution presented the following case at the trial. The complainant **B N N (PW1)** was aged 17 years in 2014. She was working/apprenticing as a tailor at [particulars withheld], Gilgil. The Appellant was also known to her. He worked at a barber shop commonly known as a *kinyozi*, at Langalanga.

13. On 25/2/2014 at 3.00pm, the complainant took her phone to the Appellant's *kinyozi* to have it charged. In rural places where many homes do not have electricity, it is not unusual for people who own phones to charge them in homes or premises which have electricity. Thus **PW1** left her phone at the Appellant's *kinyozi* to charge. She returned at 4.00pm to collect it. She found the Appellant with a companion identified as **Peter Watatua** whom the complainant had previously seen with Appellant. The *kinyozi* had an adjacent room accessible through the *kinyozi*, referred to as the studio.

14. It was the prosecution case that when **PW1** returned, the Appellant directed her to the studio to collect her phone. Upon her entering the said studio the Appellant locked the door and turned up the volume of the radio in the *kinyozi*. **Peter Watatua** who had also entered the inner studio knocked her down, undressed her and had sex with her. **Peter Watatua** then opened a rear door to the studio allowing her to leave. Having spoken to one Karoki, a neighbour to the Appellant, she went home and reported to her mother, and eventually to police at Gilgil Police Station. The report was received by **PC Awiti (PW3)**. **PW1** was referred for treatment at Gilgil Sub-district hospital. The Appellant was arrested on the same date, and subsequently charged.

15. The Appellant gave an unsworn defence statement. To the effect that, he lived at Gilgil and was employed at the material *kinyozi*. He stated that on the material date, the complainant brought her phone to the *kinyozi* for charging. She returned later to pick it up and found the Appellant with one **Peter Watatua,** his boss, having lunch. The complainant joined them. Subsequently his boss sent him off to settle the lunch bill. This took time and upon return he found the complainant and **Watatua**, who were then joined by a neighbour indentified as **Karoki**, in a discussion. He did not hear the subject of the discussion. Then the complainant left, and **Watatua** returned to the *kinyozi*. He saw the complainant close up business for the day.

16. An hour later at 7.00pm the complainant's mother appeared shouting that her daughter had been defiled. **Watatua** escaped through the rear door of the *kinyozi*. Members of pubic and an assistant chief joined in with **PW1's** mother. The Appellant led the group in search of **Watatua** to no avail. Later at 10.00pm police visited the *kinyozi* and questioned him concerning the whereabouts of **Watatua**. He denied involvement in the offence.

17. As the trial magistrate correctly observed upon setting out the evidence, there is no dispute that the complainant, **Watatua** and the Appellant met when the complainant visited the *kinyozi* to collect her phone on the second occasion. The phone had admittedly been left by her earlier for charging. Evidently, the complainant was well known to the Appellant. Two disputed issues that the court grappled with in the judgment were the question whether the complainant was defiled and whether the Appellant participated in the said offence.

18. Section 10 of the Sexual Offences Act creates the offence of Gang rape in the following terms

> **"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."**

19. In this case, unchallenged evidence was tendered to the effect that the complainant was aged 17 years at the time of the offence having been born on 18/8/1997 thus the offence charged herein is in respect to defilement. The complainant's narration concerning the events of 25/2/2014 was principally confirmed by the Appellant, upto the moment when he claims to have left for an errand, on instructions of his boss. He also stated that on return he found the complainant, **Karoki** and **Watatua** engaged in a conversation. **PW1** said that the Appellant was the person who locked the door to the studio, a kind of back room to the *kinyozi* and turned up the volume of the radio to mute her cries for help.

20. **PW1** gave lucid details of her encounter with Watatua in the so called studio:-

"That gentlemen fell me down and pulled out my skirt and pant and raped me. I tried to call their neighbour- Kariuki but he could not hear because of the volume of radio. He never used any protective contraceptive. He penetrated my private part…… he raped me for 15 minutes……"(sic)

21. The PRC forms [Exhibits 2b] presented in court indicate that the complainant was seen at the hospital about 4.00pm. Notes on genital examination indicate bruised and inflamed vagina with broken hymen. And though her underpants were stained, no spermatozoa was detected in the vaginal swab. The account recorded in the PRC forms regarding the circumstances of the offence are in tandem with the complainant's evidence, namely, that one of the "boys" at the *kinyozi* trapped her by locking her in the studio to facilitate another to defile her.

22. The Appellant in this appeal has gone to great lengths to discredit the complainant's evidence for alleged lack of corroboration. In my view, the said submission ignores the provisions of the proviso to Section 124 of the Evidence Act stating:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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."

23. The trial magistrate who heard the complainant's evidence was entitled to and did believe her evidence and also found corroboration in medical evidence regarding penetration. The fact that one Karoki or Kariuki, the complainant's mother and the complainant's girl companion were not called to testify does not in any way detract from the evidence of the complainant. All Karoki, the mother and other girl could have said concerning the rape is what **PW1** may have told them. As regards her presence at the *kinyozi*, at the material time there was no dispute. Neither was it disputed that **Watatua** was also present at the same place and time. Besides, an adverse inference in respect of witnesses not called is made only where other evidence tendered is barely adequate.

24. In that regard, in the case of **Bukenya & Others -Vs- Uganda (1972) EA 549**.

"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, <u>while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case</u>." *(Emphasis added)*

25. Regarding common intention, the trial court was alert to the provision of Section 10 of the Sexual Offence Act. She sought direction on common intention in the case of **David Opedhi Oima -Vs- Republic [2014] eKLR** wherein the decision of **Njoroge -Vs- Republic [1983] KLR 197** was cited.

26. The latter case involved a case of murder. The Court of Appeal stated interalia that:-

"……Common intention (of persons combined for an unlawful purpose) may be inferred

from their presence, their actions and the omission of either of them to disassociate himself from (the offence)."

27. On this aspect, the trial court, again accepted the evidence of the complainant and concluded that the Appellant was aware of the intention of Watatua, and aided the same through locking the studio door and raising the volume of the radio to muffle the complainant's screams for help.

28. Section 20 (1) (b) of the Penal Code defines principal offenders to include:-

"every person who does or omits to do any act for the purpose of enabling or aiding another to commit the offence".

Regarding the prosecution of a common purpose by more than one person Section 21 of the Penal Code states:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

29. In her evidence **PW1** set out the role of the Appellant who was admittedly present with **Watatua** in the *kinyozi* when **PW1** returned to collect her phone. Firstly, he directed the complainant to pick up her phone from the studio room adjoining the *kinyozi* where the said **Watatua** followed her. Secondly, the complainant stated that she saw the Appellant lock the door and heard him raise the volume of the radio in the *kinyozi* in a bid to muffle her cries for help.

30. This evidence was attacked during the appeal, principally on the basis that **PW1** contradicted herself concerning whether the radio was on or off when she arrived, the fact that police did not visit scene to confirm the radio's existence, and further that the complainant never stated that she actually turned around after entering the studio to see the Appellant lock the door.

31. Starting with the latter question, the Appellant did not raise it during cross-examination of **PW1**. Besides, her evidence was that on that critical moment, which, he too admitted in his defence he and **Watatua** were at the *kinyozi*. It seems also that his alleged going away just before the material incident was an afterthought raised in his defence. Having suggested to **PW1** that he, **Watatua** and **PW1** shared lunch, at the *kinyozi* which the latter denied, the Appellant did not further suggest to her that **Watatua** sent him away to go pay for the lunch and he was gone a while. The complainant's description of the layout of the *kinyozi* and studio is clear and easy to follow. The offence occurred in day time, events occurring in quick succession from the *kinyozi* into the studio.

32. In the circumstances, it is believable that **PW1** did notice the Appellant lock the door of the studio; after all he is the one who directed her there for the ostensible purpose of getting her phone. Regarding the radio, police did visit the scene of the offence, and while **PW3** did not make specific reference thereto, **PW1** maintained that such a radio was at the *kinyozi* and that the Appellant raised its volume after trapping her with the offendor in the studio, after locking the door.

33. As for the presence of another girl or not in the *kinyozi* or whether the radio was on or off when **PW1** got to the *kinyozi*, nothing turns on these matters. If indeed another girl had accompanied **PW1** to the *kinyozi*, there is no suggestion that she entered the studio room with her. The so called contradictions do not go to the core of **PW1's** evidence. Not every contradiction is material enough to destroy a witness's evidence.

34. The Court of Appeal stated in that regard in the case of **Erick Onyango Ondeng -Versus- Republic (2014) e KLR:**

"As noted by the Uganda court of appeal in Twehangane Alfred –Versus- Uganda, Criminal

Appeal No. 139 of 2001, (2003) UGCA 6 it is not every contradiction that warrants rejection of evidence. As the court put it: with regard to contradiction in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

35. The gist of the complainant's evidence which the trial court properly accepted is that the Appellant lured **PW1** to an inner room adjoining the *kinyozi*, and locked her in with **Watatua**, before raising the volume of the radio within the *kinyozi* with the evident intention of muffling any cries by **PW1**. Immediately, **Watatua** knocked her down, undressed and defiled her. These actions and their sequence clearly point to a preconceived plan by the two men, and an inference can be made that they were by their actions executing a common purpose.

36. The Appellant's role in this case is clear: what other reason would he have other than aiding **Watatua** to molest or defile **PW1** by locking her up in a room with him and raising the volume of the radio? The trial magistrate appears to have accepted that he may have gone away after these actions but that changes nothing as he had already played his role. Little wonder that upon his "return" the Appellant did not bother about an ongoing conversation between **PW1**, **Watatua** and one **Karoki**. The trial magistrate properly commented on this alleged disinterest on the part of the Appellant.

37. The Appellant's counsel pointed to the fact that the Appellant remained at the *Kinyozi* after the offence and his stated involvement in searching for **Watatua** to be evidence of his innocence and negativing any common intention between **Watatua** and the Appellant. With respect, that is a tenuous suggestion. He and **Watatua** stayed at the *kinyozi* where **PW1's** mother was to later confront them at 7.00pm. While **Watatua** escaped, the Appellant remained behind under the eye of members of the public who were later joined by the assistant chief, and eventually he was handed over to the police. That he did not escape or that he helped police to look for **Watatua** could be a function of his mistaken belief that only the person who actually defiled the minor was guilty. Or that he had no opportunity to escape.

38. Section 10 of the Sexual Offences Act does not distinguish the actual defiler from those who aid him, such as was proven to be the Appellant's role herein. In **James Gichuki Magu -Vs- Republic [2016] eKLR** two men were convicted for offence of Gang rape although only one of them physically raped the victim. Their appeal to the High Court was dismissed. On a second appeal to the Court of Appeal, the Court of Appeal stated *interalia*:

"The complainant recalled how the Appellant and his accomplices went to her house, carried her outside the house and took her behind the house where the Appellant and two others (raped) her. She explained the role of each one of them. In particular the Appellant removed her underwear, and against her all had sex with her as the rest held and gagged her……

……the complainant was struggling from the ground where she was lying……it was the Appellant who was raping the complainant while the rest were assisting him by restraining and gagging her……

It is gang rape under Section 10 of the Sexual Offences Act where a person committing the offence of rape or defilement does so in association with another or others, or where a person is in the company of another and share a common intention to commit rape or defilement…….

Even though there is evidence that only the Appellant did the Act, his companions as accomplices, were just as guilty of the actual offence of rape for their active role in assisting the act. An aider or abettor of a crime is just as guilty as the actual perpetrator. See Dracaku s/o Afia & Another –Vs- Republic [1963] EA 363."

39. In the same way, the various roles played by **Watatua** and the Appellant in the execution of their

common intent were clearly established through the evidence of **PW1**. The Appellant aided and abetted the defilement of **PW1** as the trial court currently found. The Appellant and **Watatua** combined for an unlawful common purpose or intention as their proven actions amply demonstrate. At no time did the Appellant disassociate himself from such intention in the course of the transaction. He was properly convicted. In the circumstances I do not find any merit in any of the grounds of his appeal and I dismiss appeal accordingly.

Delivered and signed at Naivasha, this **23rd** day of **February, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Mr. Gichuki for the Appellant

C/C – Barasa

Appellant – present

C. MEOLI

JUDGE