



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO. 112 OF 2016**

**B L .....APPELLANT**

*Versus*

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in*

*Maralal Senior Resident Magistrate's Court Criminal Case No. 688 of 2011*

*by Hon. Ag. S R M B S Khapoya on 13<sup>th</sup> May 2013*

**JUDGMENT**

1. **B L** has appealed against his conviction on two counts by Senior Resident Magistrate Court at Maralal. **On the first Count** the appellant was charged with the offence of Rape Contrary to Section 3 (1) as read with Section 3 (3) of the Sexual Offences Act with alternative offence of committing indecent act Contrary to **Section 1 (6) of the Sexual Offence Act**. **On Count two** he was charged with the offence of causing actual bodily harm Contrary to Section 251 of the Penal Code. After his conviction on the main charge on count one and on count two appellant was sentenced to 15 years imprisonment on count one and to 2 years imprisonment on count two; both sentences running consecutively. When the appellant filed his appeal he indicated that he was only appealing against hi sentence by the trial court. However when he appeared for hearing of his appeal he sought, through his written submissions to appeal against conviction and sentence.

2. This is the first appellant court. The duty of the 1<sup>st</sup> appellant court set out by the Court of Appeal in the case of **KARIUKI KARANJA VS REPUBLIC [1986] KLR 190** that :

***“On first appeal from a conviction by a Judge or Magistrate, the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the Judge or Magistrate with such materials as it may have decided to admit.”***

3. The appellant pleaded not guilty to the charges before the trial court. When the trial commenced N L (P W 1) stated that on 4<sup>th</sup> August, 2011 she left her home at Opiroi, in Samburu County, at 8.00a.m in the company of a young boy (**K**). They were herding goats. At 5.00pm while returning home they met the appellant who ran toward N L, hit her with his club on her shoulder and the back which cause her to fall down. N L stated that the appellant took off her ‘shuka’ (wrapping cloth) and her dress and raped her. N L screamed and when people arrived at the scene the appellant ran away

K, by his unsworn evidence, due his tender age, stated that he was in the company of N L with whom they had been herding goats. K saw appellant emerge from behind them. He noted appellant had a club (rungu) . He saw appellant hit N L on her back which caused N L to fall down. On seeing that, K said that he ran away and as he did so he met some women and informed them that someone was assaulting N L. They all ran to the scene and K noted that the appellant had run away. K also noted that N L's 'shuka' she had been wearing was missing.

5. Both N L and K stated before the trial court that N L's yellow shuka, which the attacker took away from N L, was the very one the appellant was wearing before the trial court.

6. P W 3, S L, was one of the women who responded to K's request for assistance when N L was attacked. P W 3 stated that K told her that there was a man assaulting a woman in the bushes. She in the company of another lady ran towards the place K led them. They found N L lying on the ground. They also saw appellant run away from the scene. P W 3 stated that N L complained of pain on her shoulder's and her back. They also noted that N L only had her skirt without her 'shuka'. N L informed them that the appellant had beaten her and had raped her. They took N L to her home, administered traditional herbs and the following day N L was taken to hospital. P W 3 stated that she previously knew the appellant and that he had grown up in her village. She knew him as B. She confirmed that she saw the appellant's face as he ran away from the scene.

7. P W 4, the Clinical Officer at Maralal district hospital treated N L on 4th August, 2011. He observed that N L had superficial bruises on her face and upper and lower limb. Her genitalia was normal except there was whit vagina discharge which revealed N L had an infection.

8. When the evidence of N L, K, P W 3 and P W 4 was adduced in chief during the trial the appellant was given an opportunity by the trial court to cross examine each witness and on each occasion the appellant stated that he had no question to ask. In other words he did not cross examine those witnesses. At the end of the testimony of P W 4, the Clinical Officer, the trial Magistrate noted that the appellant appeared erratic and disoriented. The trial Magistrate ordered the appellant to be mentally examined to determine his fitness to proceed with his trial.

The appellant was taken to Maralal District hospital where upon the Medical Officer of that hospital gave his finding of his examination of the appellant. In his report dated 2<sup>nd</sup> November 2011 the Medical Officer stated thus:

**Presentation: Conscious and generally cooperative.**

**Orientation: Disoriented in the time and place.**

**Memory: Distorted.**

**Cognitive Status: Affected**

**Thought process and content: Affected mood: Incongruent.**

The report concluded that the appellant was of unsound mind and required psychiatric review before his trial could proceed.

9. The trial court on 8<sup>th</sup> November 2011 ordered the appellant to undergo psychiatrist review.

10. The appellant was taken to Mathari hospital, in Nairobi, for psychiatrist review. The consultant psychiatrist of that hospital by his report dated 16<sup>th</sup> January, 2012 stated thus:

***A mental status examination revealed a young man, unkempt with long hair, and sat pensively holding his chin and avoided eye contact.***

*Speech was spontaneous but would only respond to questions put to him. He described himself as loner prefers isolation and no noise. He described long standing experiences where he sees people attacking him and he would run and hide in the forests spending days and nights in isolation hiding,*

*Other times he would experience voices of unseen people talking to him and scaring him. Though he is aware of these experiences he has no insight what they are and his orientation for place is fair in that he knows he is in Nairobi and can recall being in Nakuru at one time. He cannot tell the date. His judgement is also influenced by the experiences such as the visual and auditory hallucinations.*

### **OPINION**

*This patient has features suggestive of chronic schizophrenia and recommendations are:*

*1. Start him on treatment*

*2. He is not fit to plead*

*3. He will benefit from inpatient treatment*

11. The appellant continued to undergo inpatient treatment for mental illness at Mathari hospital until 4<sup>th</sup> February, 2013 when the said hospital found that the appellant was capable of making his defence. The trial court ordered the appellant to be committed at GK Prison Maralal and to proceed with his trial. On resumption of his trial the appellant after twice being notified of his right to recall any witnesses chose not to recall any witness.

12. The trial court received the evidence of the investigating officer. The officer (P W 5) gave evidence in chief of his recording of witness statements and the arrest of the appellant. The appellant did not cross examine him. The prosecution proceeded to close its case.

13. On the trial court finding that there was a prima facie case to answer called upon the appellant to give his defence. The appellant chose to give unsworn statement without calling any witness.

14. At the defence hearing the appellant stated:

*“My names are B L. Am a herder. I stay at Opirori. I have nothing to say.”*

15. The prosecution’s evidence proved beyond reasonable doubt that the appellant struck NL on her shoulder and her back on falling down the appellant raped her. NL, k and P W 3 categorically identified the appellant as the attacker and the rapist. N L had seen the appellant previous to the attack. P W 3 knew the appellant because the appellant grew up in her village. The clinical officer confirmed the rape of N L. The appellant in giving his history to the psychiatrist of Mathari hospital stated that he recalled murdering someone by hitting them with the club and also admitted raping a woman in Maralal. It follows that prosecution proved its case against the appellant on both counts.

16. The trial court, however, in its considered judgment failed to interrogate the mental health of the appellant during the commission of the offences. In this court’s view the trial court was under obligation to consider the same. This is what was stated by the court of appeal in the case.

**NYAWA MWAJOWA – V- REPUBLIC [2016]eKLR** where the court stated:

*“The second matter of concern is that although there was evidence that the appellant could have been of unsound mind at the time of commission of the offence, the High Court restricted its consideration of his mental status only to the time of the appellant’s trial. In Leonard Mwangemi Munyasia – v- Republic (supra), this Court reiterated that it is the duty of the trial*

*court where the defence of insanity is raised or where it becomes apparent from the accused person's history and antecedent, to inquire specifically into the question and that the trial court cannot ignore evidence on record suggestive of the appellant's insanity merely because the defence has not specially raised it. (See also Julius Wariomba Githua – V- Republic, Cr App. No. 261 of 2006 and Marii V Republic [1985] KLR 710.)”*

17. The offences which the appellant faced were committed on the 4<sup>th</sup> August, 2011. His trial commenced on 19<sup>th</sup> October, 2011. During the trial the appellant unusually failed to cross examine all the prosecution's witnesses. As the trial proceeded the trial Magistrate on 1<sup>st</sup> November 2011 noted the appellant was erratic and disoriented. On 2<sup>nd</sup> November, 2011 the Medical Officer of Maralal District hospital found the appellant to be of unsound mind and in need for psychiatrist review. That review on being carried out at Mathari hospital confirmed appellant to suffer from chronic Schizophrenia. Appellant was under treatment at Mathari hospital until 4<sup>th</sup> February, 2013 when he was found to be capable to defend himself. All those positive tests confirming mental illness suggest that the appellant was suffering from unsoundness of the mind and could have been entitled to a defence under the M'Naghten Rules, namely that by reason of unsoundness of mind at the time of the commission of the offences, the appellant was either incapable of knowing the nature of the act or was incapable of knowing that it was wrong or contrary to the law: see **NYAWA MWAJOWA – V - REPUBLIC (supra)**.

18. It is important to note that the appellant through his written submissions in support of this appeal submitted that the trial court erred to have convicted him when he was suffering from chronic schizophrenia.

19. It is because of this court's finding that the appellant was suffering from unsound mind which rendered him incapable of knowing what he was doing, when he attacked and raped N L, was wrong that the trial court's conviction must be quashed and sentenced be set aside.

20. The order of this court is that the trial court's convictions of Bunge Lelemusi on both counts are hereby quashed. The trial court's sentence of both counts are hereby set aside. Bunge Lelemusi as provided under Section 166 (1) of Criminal Procedure Code is found guilty of both counts but was insane when he committed those offences. **I hereby direct the Deputy Registrar, Pursuant to Section 166(2) of the Criminal Procedure Code, to have this special finding reported for the order of the H. E. the President. The appellant shall be kept in custody of the Government of Kenya Prisons at the pleasure of H. E. the President.**

**Dated and Delivered at Nanyuki this 24<sup>th</sup> MAY 2017**

MARY KASANGO

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant: Njue/Maria Stella

Appellant: Bunge Lelemusi

For state: .....

**COURT**

Judgment delivered in open court

MARY KASANGO

**JUDGE**