REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 1 OF 2016

KIBE PETER KARANJA …….....….....……. APPELLANT

versus

REPUBLIC ……....…….....….....……..……. RESPONDENT

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

Chief Magistrate's Court Criminal Case No. 49 of 2015 by Hon. W. J. GICHIMU

Principal Magistrate on 3rd December 2015)

JUDGMENT

1.**KIBE PETER KARANJA** was convicted before the chief magistrate's court at Nanyuki with the **offence of rape contrary to section 3(1)(a)(b)(3) of the Sexual Offence Act.** On being convicted on that charge he was sentenced to serve 15 years imprisonment. He was aggrieved by both that conviction and sentence.

2.This court is the first appellant court. As such this court has a duty as has been set out in the case **NYANDO MUKUTA MWAMBANGA V REPUBLIC (2008)** where it was held:-

> ***"This court as the first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so we have to appreciate that we do not have advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that – Soki vs Republic* (2004) 2 KLR 21; *Kimeu vs Republic* (2002) 1 KLR 756. *Moreover, we are guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it was shown that the findings of the trial court are erroneous in law (Republic v Oyier (1985) 2 KLR 353; Burn v Republic (2005) 2KLR 533."***

3.**LNK** the victim in this case was a fifty year old woman. She stated in evidence that on 15th January 2015 at 10.p.m. she was at her place of residence. At that time as she opened her front door while holding a torch she saw the appellant in this case. She stated that she was able to identify the appellant whom she previously knew since they both lived in the same Internally Displaced Persons (IDP) camp. In her evidence she said that the appellant held her by the neck and put her on the ground. He removed her underclothes and undressed himself and then sexually assaulted her by force. After that sexual assault the appellant then lifted an iron sheet which was used as building material of her house and entered LNK's house. All along the appellant held LNK on her throat. LNK said that she was unable to scream because the appellant was strangling her. Once in the house the appellant continued to sexually assault LNK and

at some point deliberately injuring her in private parts. At one point LNK lost consciousness. When she regained consciousness she tried to persuade the appellant not to rape her again but the appellant threatened that he would kill her. LNK said that it was not until 5 am that the appellant left her house.

4. At daybreak LNK went to her neighbour called K and told her what the appellant had done. Thereafter LNK reported the matter to the chief and at the police station.

5. **John Ngunju Muchiri PW 2** was the assistant chief to whom LNK reported the assault. The assistant chief in evidence stated that LNK identified the appellant as Karanja. LNK informed the assistant chief that she was experiencing pain on her throat and in her private parts. The assistant chief advised LNK to report the matter to Wiyumirie Police Post. As she walked the assistant chief noted that she had difficulty in walking. The assistant chief also visited the home of LNK and noted that one iron sheet of the house had been removed and was damaged. He also advised LNK to seek medical attention.

6. **Doctor Joseph Karimi** based at Nyahururu district hospital attended to LNK on 16th January 2016. In his evidence he stated that the complainant complained of having been raped by a person she knew. She complained of pain in the knees. On further examination the doctor found that she had a swelling on labia majora and that she had bruises. Her hymen was missing. He also found that she had had a vaginal penetration.

7. **PW 4** was **Inspector of Police Moses Kinora.** It is him who received the report by LNK of her allegation of rape. The police officer stated in evidence that she identified the attacker as Peter Karanja. This police officer also went to the home of LNK. He too noted that one iron sheet had been removed in her house.

8. The trial court on finding that the appellant had case to answer called upon him to defend himself. In a sworn statement the appellant stated that on 10th January 2016 he found LNK in his home. She was in company of her mother in law. When the mum saw the appellant he ran away. The appellant then stated in evidence that LNK was his sexual friend. He further restated that he had given her kshs. 3,500 and that on 10th January 2015 he asked her to return the money. On being cross examined he stated that he had had a serious relationship with LNK for 5 years.

9.The appellant in his amended grounds of appeal raised the following

issues:-

> ***(a) That the trial court's conviction was in error because there was no first report tendered in record.***
>
> ***(b) That the trial court erred in law and in fact in relying on the evidence of LNK yet she had lost consciousness.***
>
> ***(c) That the prosecution failed to produce photographic evidence of the damaged iron sheet.***
>
> ***(d) That the trial court in relying on the evidence of LNK failed to note that she was influenced by alcohol.***
>
> ***(e) That the trial magistrate erred in law in rejecting the appellant defence.***

10. I have considered the written submissions tendered by the appellant

in support of those grounds. I shall proceed to consider those grounds holistically in my analysis.

11. It is clear that when the offence was committed it was late in the night. It was therefore under difficult circumstance that LNK identified the appellant. In the English case of **R. v Turnbull (1976) 3 WLR 445,** the court laid out the test to be applied when receiving evidence of identification under difficult

circumstances. The court stated that a court should consider the following:-

> ***"How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or procession of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused ....."***

12. In applying those tests to this case the prosecution's evidence is clear that LNK at the time when the appellant approached her outside her door had a torch. She said that she shone the light of the torch on the appellant and not only did she identify him she recognised him. The ordeal that LNK went through took place from 10 pm to 5 am. During that time she was clear in her evidence that she engaged the appellant in conversation. At one time she begged the appellant not to rape her again. In response he threatened to kill her. From the evidence it is therefore clear that LNK observed the appellant albeit under difficult circumstance but was for a very long time. It is therefore clear that LNK identified the appellant as the person who committed the offence against her.

13. LNK when she first reported the matter to the assistant chief named the appellant. She also gave his name to the police officer who received her report. Her evidence on how the appellant first raped her outside her house then dragged her through broken iron sheet into her house was corroborated by the evidence of the assistant chief and the police officer. Both of them saw the broken iron sheet of her house. Further her evidence of rape was corroborated by the doctor who on examination determined that there had been penetration.

14. The prosecution's evidence analysed above was overwhelming. It was not displaced by the defence offered by the appellant. Although the appellant denied the offence the evidence he gave clearly showed that he too knew LNK. LNK said they had known each other for 5 years when they were in IDP camp together. The appellant in his defence confirmed that he also know LNK for 5 years. The defence offered by the defendant was not put to LNK in cross examination and the learned trial magistrate was correct to treat it as an afterthought.

15. In my view having analysed the trial court evidence it is clear that the prosecution proved the case against the appellant beyond reasonable doubt. The learned trial magistrate in my view arrived at the correct finding in convicting the appellant.

16. There is no basis in my view to interfere with the sentence of the trial court. The trial court considered the gravity of the offence and proceeded to sentence the appellant to 15 years. In sentencing the appellant the trial court did not err in law, fact or material.

17. Accordingly the appellants appeal against conviction and sentence is hereby dismissed. The trial court conviction is hereby upheld and the sentence is hereby confirmed.

DATED and DELIVERED at NANYUKI this 31ST day of OCTOBER 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: Kibe Peter Karanja ……..……

For the State: ….....

Language: ……..

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE