REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.415 OF 2010

(Appeal against conviction and sentence in Naivasha Criminal Case No.402 of 2009 by T.W. Wamae - SPM)

DANIEL THIONGO KINYANJUI ……..……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

JUDGMENT

The appellant (DANIEL THIONGO KINYANJUI) was charged with robbery with violence contrary to **section 296 Penal Code** and also rape contrary to **section 3(1)** of the **Sexual Offences Act**. The charges were that on 8/2/2009 at *[particulars withheld]* FARM Gilgil, he jointly with another not before court, robbed **NJENGA KABUNYI** of two blankets valued at Kshs.1, 400/= and used actual violence. In the course of that robbery, he also intentionally and unlawfully did an act which caused penetration into the genital organ of **W.N** without her consent.

The appellant denied the charges, and after a trial in which 8 prosecution witnesses testified, and the appellant was the only defence witness, the first count was reduced to assault contrary to **section 215 Penal Code**, and he was convicted and sentenced to serve 6 months imprisonment. On the second count, he was convicted and sentenced to serve 15 years imprisonment.

NJENGA KABUNYI (PW2) was at home on 8/2/2009 at about 8.00 a.m., when he heard screams from the neighbour's home and went to check what was happening. He found the appellant and Gichu (both of whom he knew as his neighbours), and the lady neighbor known as W. The two men were standing near the chicken cage, and PW1 could see them very well as there was moonlight. The two men held his hand and beat him using pieces of timber, injuring him on the head and face, and breaking his dentures. Eventually they took him back to his house, where they raped his wife in his presence. The appellant stole blankets which were later recovered, and identified by the witness in court.

On cross-examination, PW1 said he did not know why the appellant attacked him, and that during the incident, he was dragged into W's house, forced to sit on a chair, and beaten up again. He further stated on cross-examination:-

"My wife was raped, but I didn't witness it."

WN (PW3) confirmed that PW2 rushed to the neighbour's home, having been attracted by screams from there. Later he was dragged back to his house by the appellant and Gichu – he could not stand or walk. PW2 told her, he'd been assaulted by the pair. The appellant then held her by the neck, and put her together with her husband (PW2) and their 22 year old son named M, then assaulted them using a rungu. The appellant then took her out of the house, tore her underpants and raped her. He forced her to suck his tongue, and she was categorical that during the ordeal, the appellant wore a condom. She was able to see him clearly because there was bright moonlight, and he was very well known to her as he lived with his grandmother who was their neighbor. On cross-examination she stated that she had never disagreed with the appellant before, nor was she aware of a love affair between the appellant's nephew Gichu and her daughter M. However she had found her daughter one time at the home of Gichu, and she'd made her disapproval of any amorous inclinations known.

J.M (PW4), the couple's son, confirmed that the appellant and one **GICHU** came into their home in the company of his injured father, and assaulted all of them. Thereafter the appellant ordered his mother out of the house and to lie down, then raped her. PW4 had followed his mother, and stood about 50m away and witnessed the rape, as there was moonlight.

LW (PW5) narrated how the appellant and Gichu went into her home at [*particulars withheld*] village on 8/9/2009 at about 8.30 p.m. The appellant had a stick which was sharpened at both ends, and he assaulted a child, causing all the children to get out of the house. They created such a racket, so PW5 and the children begun to scream, and that is when PW2 came to the scene. She witnessed the appellant and Gichu assault PW2; and as PW2 ran to hide inside her house, the appellant and PW5 followed him there, where appellant continued with the assault – PW5 fled.

She too knew the appellant as a neighbor and saw him well because there was a kerosene lamp burning inside the house. Apparently, her son,**FMM (PW6)** was attracted by the noise emanating from the house. He rushed there and found the appellant and another man. The appellant was in an agitated state, and when PW6 attempted to order him out, he turned on him, so PW6 fled back to his house. Shortly he heard screams coming from PW2's homestead, and together with other members of the public, they rushed there, only to find that PW2 had been beaten, and his wife raped. Eventually the appellant was apprehended as he tried to flee from his grandmother's home, and handed over to police.

PC RICHARD MAMAI, (PW7) who received the report visited the scene and found both appellant and PW2 seriously injured. He also learnt that PW3 had been raped, and he collected 2 blankets outside the house where the appellant lived.

DR. MARIAM MUKORA (PW1) who examined PW2 found that he had multiple cut wounds on the head, and both hands were swollen on the palm, the right ankle was swollen with difficulty in walking, and the degree of injury was classified as harm in the P3 form produced in court.

She also examined PW3 whose clothes were dirty and torn. She observed tenderness on the ears and cheeks with bruises on the right leg, right knee and ankle joint, and she had difficulty in walking. There was laceration on the vagina, the hymen was broken and there was a bloody discharge. The examination which was carried out on 18/2/2009 revealed no spermatozoa present.

In his unsworn defence, the appellant told the trial court that, he had visited his grandmother at *[particulars withheld]* Farm, on 8/2/2009. At 10.00 p.m., four men knocked at the door, and when he opened, they attacked him and took him to PW2's home. The complainant's son said he had recovered some blankets near the home the appellant lived in.

The trial magistrate considered the evidence and found that prosecution witnesses gave corroborated evidence regarding the assault on PW2. She noted that the appellant spent a considerable amount of time with the victims and there was no possibility of mistaken identity.

She did not find evidence to prove theft of the alleged blankets, so the charge of robbery failed, but the evidence sustained a charge of assault contrary to **section 251 Penal Code**.

As regards the rape, the trial magistrate took into consideration the medical evidence and noted that:-

"There is no evidence that PW3 was not sexually active before the material date, and unlike a child, a broken hymen on a mature victim such as PW3 cannot be proved (sic) that she was raped. PW3 has however testified that the lacerations on her private parts were occasioned during the rape ordeal. The incident was witnessed by PW4, and I have no reason to doubt that the tearing on complainant's private parts was not caused by any other force other than forceful and direct penetration into the complainant's vagina, by the accused person."

The appellant contests these findings on grounds that:-

1. The charges of rape were not proved beyond reasonable doubt.
2. The trial magistrate erred by heavily relying on the evidence of PW4 whose integrity was doubtful.
3. The trial magistrate created her own theory to fill gaps for the prosecution yet there was no evidence to justify the theory regarding forceful and direct penetration.
4. The evidence was uncorroborated.

The appellant submitted in writing, that from the evidence, PW3 was taken out of the house while PW2 and PW4 remained inside the house, so PW4's claim about witnessing the rape is doubtful. Further that it was obvious from the evidence by prosecution that the Njengas disapproved of a love relationship which had blossomed between their daughter and the appellant's nephew GICHU, and this case was just framed up so as to victimize the appellant.

He urged the court to find that PW4 was given to exaggeration, since he is the only one who claimed that their family was subjected to beatings for one hour, after which his mother (PW3) was ordered to go outside and carry manure, yet no other prosecution witnesses (not even the victim) mentioned anything of the sort – he referred to case of **NDUNGU KIMANYI V R**, **KLR 1979**. He also questioned the opportunity for identification, saying PW4's evidence showed it was a dark night when the incident took place.

It is the appellant's contention that upon realizing that medical examination found no spermatozoa, the prosecutor coached PW4 to say that the appellant was wearing a condom. He faulted the trial magistrate for concluding that the medical findings demonstrated forceful and direct penetration, saying this was not based on the weight of the actual evidence adduced and the trial magistrate was prejudicial. He argues that his defence was sound and was not challenged or dented by the prosecution case. He also argued that there was lack of corroboration in the evidence tendered by prosecution witnesses. He thus urges this court to allow his appeal.

The appeal is opposed, and Mr. Marete submitted that there is no evidence about PW2 being raped, saying the Doctor's findings on the matter offered conclusive proof, and this coupled with the evidence of PW2 and PW5 as to how the attack happened, placed the appellant at the scene.

He argues that, there was sufficient opportunity for identification; and this was a case of recognition, as the appellant was well known to the witnesses. He described the sentence as sufficient, and urged this court not to interfere with the trial court's findings.

It is apparent from the record that PW3 did not approve of her daughter's relationship with the appellant's nephew, and she had made her sentiments known. It is this disapproval which the appellant insists blossomed into a frame up of the charges; so as to victimize him and his nephew (the object of PW3's daughter's eye). That situation is amplified by the fact that, despite claims of being harassed by the same pair, PW5 Lillian Wanjiku did not make any complaint to the police. Further, although the alarm raised by the family which was under siege is said to have attracted other villagers, no other independent witness testified other than the members of the complainant's family. The investigating officer however, was never asked to explain this curious scenario, where despite members of the public witnessing or responding to the distress call, were not called as witnesses, and only family members testified. There are

only two possibilities:-

a. either the appellant and his nephew Gichu were so dreaded in the village, that no one wanted to risk antagonizing them by testifying in court.
b. or this was a frame up by the Njenga family to execute maximum damage as a way of ensuring that the disapproval of the budding amorous relationship by the family matriarch was felt.

To be able to establish whether what the appellant stated was true, the court had to consider other evidence, and the only other evidence available was the medical evidence. If indeed the attack never took place, then the question would be, who inflicted the injury on PW2? The witnesses knew the attackers, and were able to identify them with:-

a. the aid of a bright moon;
b. they spent a considerable time together, especially PW2 who was initially attacked outside PW5's house, and inside her house which had a kerosene lantern burning.

That opportunity for identification has not been dented at all.

The medical evidence clearly showed that PW3 had been sexually assaulted and there was nothing to suggest that she perhaps had indulged in sexual activity with the injured PW2 or anyone else on that night. The trial magistrate duly took into consideration the findings of the Doctor, which is why she stated it was evident that the penetration was forceful and direct. This was not a theory developed by the trial magistrate, but was an informed assessment made from the medical evidence available. Consequently I find that the conviction was safe and I uphold it. The sentence is legal and considering the nature of the offence and the circumstances under which it was committed, I find no reason to interfere with it.

The appeal is thus dismissed.

Delivered and dated this 14th day of February,2014 at Nakuru.

H.A. OMONDI

JUDGE