REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 40 OF 2013

ALBERT NGETHA NYAMU…….…….....….APPELLANT

-VERSUS-

REPUBLIC ……..RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 1224 of 2007 in the Resident Magistrate's court at Gichugu – HON. B.J.NDEDA (SRM)

JUDGMENT

Albert Ngetha Nyamu, the appellant herein was tried and convicted with the offence of Rape contrary to **Section 3(1) (a) (b) (3)** of the **Sexual Offences Act** by the Senior Resident Magistrate's Court at Gichugu .

The particulars of the offence alleged that on the 19th day of August 2007 in Kirinyaga District of the Central Province, the appellant had unlawfull carnal knowledge of ***EWN*** without her consent.

Following his conviction on 26th August 2010, the appellant was sentenced to twenty years imprisonment. He was dissatisfied with the conviction and sentence and he subsequently lodged this appeal raising nine grounds which can be summarized as follows:-

1. That the learned trial magistrate erred in law and in fact by convicting him on the basis of insufficient and contradictory evidence.
2. That the learned trial magistrate erred in law and infact by not considering his defence.
3. That the learned trial magistrate erred in law and in fact by failing to consider that he had been detained in police custody for more than 24 hours.

When the appeal came up for hearing, the appellant chose to rely entirely on written submissions which he presented to the court.

In his written submissions, the appellant urged the court to find that his identification as the complainant's assailant was unsatisfactory; that the evidence tendered by the prosecution witnesses was contradictory and unsufficient to prove the charges preferred against him beyond reasonable doubt. He urged the court to allow the appeal.

The state through learned state counsel ***Mr Sitati*** opposed the appeal on grounds that the prosecution presented before the trial court cogent and reliable evidence which proved the charges against the appellant beyond any reasonable doubt; that the sentence imposed on the appellant was lawful and that

therefore the appeal should be dismissed for lack of merit.

Briefly, the case for the prosecution is that on 19th August, 2007 at around 7p.m, the complainant ***EWN*** was walking from Kianyaga Town towards Rwambiti carrying her three year old son on her back when she met a man she allegedly recognized to be the appellant . That she knew the appellant before as a Mr Maina who used to live in the same compound as her sister. Her sister ***WW*** testified as PW4.

According to the complainant (PW1), when they met, the appellant pulled her to a nearby coffee plantation and at the same time removed a knife threatening to kill her and her child if she screamed. He then ordered her to remove her innerwear which she did. He unzipped his trousers and as she was still carrying her child on her back, she bent and the appellant penetrated her private parts with his male organ from the back. After a while he stopped and after collecting her underwear, the appellant led her back to the road.

While at the road, a motor vehicle passed by and PW1 again saw and identified the appellant through the lights of that motor vehicle. After walking with her for a short while, the appellant ran away.

When on her way home, she met with two men who after hearing her ordeal escorted her to PW4's house within Kianyaga market.

PW4 on her part escorted her to Kianyaga police station where she reported the matter and she was referred to Kerugoya District hospital for treatment.

According to PW1, she was admitted at Kerugoya Hospital for three days between 9th and 21st day of a month she did not expressly disclose but it would appear from her testimony that she was referring to the month of October 2007 because she stated the following in her evidence at line 35-37.

"While still in hospital the accused was seen by my sister who shouted. The accused was carrying a jacket and knife on his bicycle and my sister called for help reinforcement. Accused was arrested and the same jacket and knife were found……"

From this evidence taken together with the evidence of PW3 and PW4, it is clear that the accused was arrested by members of the public on 14th October, 2007.

The P3 form produced by PW2 ***Stephen Ngige,*** a clinical officer at Kianyaga sub-District hospital on behalf of a ***Mr Kabiru*** who had examined the complainant after her rape ordeal also confirms that she was admitted in hospital on 19th October 2007 and discharged on 21st October 2007. It is not clear why the appellant was admitted in hospital since it was not alleged that she had suffered any substantial injuries during the alleged rape.

In his defence, the appellant gave a sworn statement in which he denied having committed the offence as alleged. He claimed that PW1 framed him with the offence for undisclosed reasons.

Having considered and re-evaluated the evidence on record in it's entirety as I was required to do this being the first appeal and having considered the submissions made by the appellant and the learned state counsel, I find that only PW1 gave direct evidence implicating the appellant with the commission of the offence. PW 2 only produced a P3 form on behalf of the clinical officer who examined PW1 while PW3 and PW4 only testified on how the appellant was arrested.

After analysing the evidence of PW1 especially on the issue of identification and or recognition of the appellant as the person who had sexually assaulted her at the time alleged, I am unable to agree with the learned trial magistrate's conclusion that PW1 was a reliable and credible witness and that she had properly and satisfactorily identified and/or recognized the appellant as her assailant.

The evidence on record shows that PW1 materially contradicted herself in her evidence in chief in a manner that casted doubt on her credibility.

In her evidence on line 30-34, PW1 testified that she was escorted to Kerugoya hospital for examination and treatment on the evening the offence was committed and she was admitted for three days. However in line 35-37 of her recorded evidence, she claimed that she was still in hospital when the appellant was arrested.

It is not disputed that the appellant was arrested on 14th October 2007 almost two months later. If indeed the complainant was admitted in hospital in relation to the rape incident by the 14th October 2007 when the appellant was arrested , this would necessarily mean that she did not seek treatment on the date of the alleged rape on 19th August 2007 as earlier stated in her evidence and if this were so, I find it difficult to understand why she would have delayed for two months before seeking examination and possible treatment if indeed she had been raped by the appellant who according to information allegedly received from PW4, the appellant was suspected to be HIV positive.

The confusion regarding the dates PW1 sought treatment is further compounded by the indication in the P3 form that she had been admitted at Kerugoya hospital from 19th October 2007 to 21st October 2007 meaning that according to the information in the P3 form, she was not in hospital on 14th October 2007.

On the issue of identification, PW1 claimed that she identified and recognized her assailant as a man known as ***Maina*** who used to live in the same compound as PW4. She identified that man to be the appellant in this case. She went further to add that she saw and identified him at around 7pm before he led her to a coffee plantation. She did not indicate whether or not it was dark at that time and if so how she was able to see and identify him at that time.

Secondly, her claim that she was able to see and recognize him through the lights of a motor vehicle which had already passed by the time they got back to the road after the ordeal is untenable because it is common knowledge that the rear lights of a motor vehicle cannot produce light bright enough to clearly illuminate anything or anyone.

It is also important to note, as stated earlier, that the person who PW1 claims to have recognized as the one who sexually assaulted her that fateful evening was a man known as ***Maina***. From the court record, the appellants name is ***Albert Ngetha Nyamu*** and the name ***Maina*** does not feature anywhere in his identity.

In the charge sheet, the appellant then the accused in the lower court is not described as ***Albert Ngethe Nyamu alias Maina***. The prosecution did not avail any independent evidence to prove or confirm PW1 and PW4's allegations that the appellant was also known as **Maina.** If the two witnesses knew the appellant as well as they claimed, they would have known him by his official names. And if the appellant had ***Maina*** as an alias name it would have been included in his description in the charge sheet.

It is therefore my finding that the identification of the appellant as PW1's assailant was neither sufficient nor satisfactory. It cannot be said to have been credible, reliable or free from error.

In view of the foregoing, considering that the appellant had denied having committed the offence as alleged and the burden of proof lay solely on the prosecution, I have come to the conclusion that the evidence availed to the trial court by the prosecution in this case fell short of proving the charges preferred against the appellant beyond any reasonable doubt.

It is my finding that the trial magistrate failed to carefully and properly evaluates the evidence before him including the defence presented by the appellant with the result that he reached an erroneous finding that the appellant's guilt as charged had been proved beyond reasonable doubt. I find that the inconsistencies in the complainant's evidence raised reasonable doubts whether the complainant had indeed been raped on the date alleged and if she had been so raped whether the offence had been committed by the appellant herein. The appellant ought to have been given the benefit of those doubts. Consequently, I am satisfied that this appeal is merited and it is hereby allowed.

The appellant's conviction is hereby quashed and the sentence set aside.

The appellant will be set free forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED AND DELIVERED, SIGNED AT KERUGOYA THIS 16TH DAY OF MAY 2014

in the presence of:-

The appellant

Mr Sitati for state

Mbogo Court Clerk