



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 546 OF 2009

PETER KAMAU WANJIRU..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 251 of 2009 in the Chief Magistrate's Court at Kiambu – K. Muneeni (PM) on 17th November 2009

JUDGMENT

1. The Appellant, **Peter Kamau Wanjiru** was brought to court on 17th February 2009 faced with two charges. In count 1 he faced a charge of rape contrary to **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative he was charged with indecent assault contrary to **Section 1(6)** of the same Act. In count II the appellant was accused of sodomy contrary to **Section 5(1) (a) (i)** as read with **Section 5(2)** of the same Act and in the alternative with indecent assault contrary to **Section 11A** of the same Act.
2. A brief summary of the case before the lower court was that **PW1**, the complainant herein left a bar and was walking home at 11 p.m. on 14th February 2009 when two men pounced on her and held her by the neck. They demanded money from her and threatened to kill her. They dragged her to a field where the appellant undressed her and first sodomised her, then he raped her. When the appellant fell asleep the complainant stole away and reported the matter to Karuri Police Station.
3. The police took her to hospital and from the hospital, she took them to the scene of the assault where they found the appellant first asleep and arrested him. Following investigations he was subsequently charged as read.
4. In his unsworn defence the appellant denied the offence and stated that on the material day he went to a club in the evening to take some beer and **PW1** joined him. That he bought her two beers and thereafter they rented a room for a sexual rendezvous. That he paid her Kshs.200/= as he had always done for such liasons, but this time she demanded for another Kshs.100/=. Further that he gave her some money to buy condoms and some food whereupon she left and returned with four people and identified the appellant for purposes of arrest. That he was arrested and taken to Karuri Police Station, where **PW1** said that he would not be released until he paid her Kshs.3,000/= although he had given her Kshs.1000/=.
5. The appellant subsequently filed an appeal against both conviction and sentence. He advanced six grounds of appeal which in sum were that the doctor's evidence and the circumstances under

which the purported rape occurred were not considered. He contended that this was a mere misunderstanding between him and the complainant and that his mitigation was not considered.

6. Miss Ndombi learned counsel opposed the appeal on behalf of the Respondent. She submitted that the sentences of 20 and 25 years respectively imposed on the plaintiff were lawful. That in the first count, the law provides for a minimum of ten years and a maximum of life imprisonment. That the second count carries similar punishment and that this implied that the sentences should run consecutively. She therefore urged the court to exercise its discretion and order the sentences to run consecutively because of the gravity of the offence and maximum terms provided for by the statute.
7. Miss Ndombi further contended that the prosecution proved their case beyond reasonable doubt in both counts, since there was medical evidence to corroborate the testimonies given by **PW1** that she was raped and sodomised. She urged that although the time of the offence was 11 p.m., there was sufficient light at the scene. That same night at 3 a.m. **PW1** took the police to the field where the appellant was lying and he was arrested. That he was therefore positively identified. Miss Ndombi also

urged the court to consider the report of **PW2** the Government analyst on the findings he made from the analyzing the stains recovered from **PW1**'s clothes she asked the court to dismiss the appeal and uphold the sentences.

8. From the record the undisputed facts are that the appellant and **PW1** knew each other before this incident. She knew him by the name of Kangethe and he knew her as someone who worked in a salon. There is also no dispute that they were involved in sexual activity on the night in question. Both said so.
9. **PW2** the government analyst also confirmed that an analysis of the blood sample of the appellant showed that it belonged to group B and that his saliva was of a group B secretor. Further analysis showed that the under pants of **PW1** were stained with semen from a person of group B secretion. His conclusion was that **PW1** had been involved in sexual activity with a person who was a group B secretor.
10. The point of departure is that whereas **PW1** said that the sexual act and the sodomy she was engaged in were forced upon her by the appellant, the appellant maintained that the acts were consensual. This then is the question for determination before this court and I have re-evaluated the evidence afresh to draw my own inferences and reach my own conclusion.
11. The evidence before me boils down to the word of the complainant against that of the appellant. It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care, the identification evidence of such a witness especially when it is shown that conditions favouring positive identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest yet be mistaken. See - the decision of Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA in **Ogeto v Republic [2004] 2KLR.**
12. The learned trial magistrate did duly warn himself of the dangers of placing reliance on the evidence of a single identifying witness before he analysed the evidence adduced before the court. **PW1** told the court that the appellant was with another when they grabbed her. He however, was alone when he took her to the playground of Karuri High School and raped and sodomised her. That was at 11 p.m. on the fateful night. The testimony of **PW1** was that the appellant was still fast asleep in the same field when she came back with the police at 3 a.m. and arrested him.
13. The testimony of **PW1** was corroborated by that of **PW4**, CPL Lucy Wanjiru of Karuri Police Post. She confirmed that **PW1** made a report at the police station at 3.30 a.m. and stated that she had been raped by a person known to her. Further that she escorted her to hospital and on their way back, they passed through Karuri High School playground, the stated scene of the assault and found the appellant still asleep. She arrested him.
14. I am alive to the fact that this being criminal charges the appellant was under no obligation to prove his innocence or to explain himself. That duty lay unshiftingly within the prosecution.

Having given his testimony however it forms part of the proceedings and must be considered in the context of the rest of the evidence on record and that is what I have done.

15. The appellant stated first, that he and **PW1** went to rent a room for their sexual liaison but later stated that **PW1** worked in a salon and had a mattress therein. He also stated that their usual agreed fee for such liaisons was Kshs.200/= but that on this night she demanded Kshs100/= more. It was not clear whether the extra Kshs.100/= was for her services or for the use of the mattress in the salon. In the end he stated that he gave her Kshs.1000/= to go and buy condoms and some food. That she left and returned with four people who arrested him.
16. If as he would have the court believe **PW1** left him at her salon to buy condoms and some food, it is not clear why he was found sleeping in a school playground at 4 a.m. as attested by the arresting officer. If also, he and **PW1** had a standing agreement in which she granted him sexual favours at a fee of Kshs.200/= from time to time, it beats logic that on a night when he had given her Kshs.1000/= and had not refused to pay the Kshs.200/= and an extra Kshs.100/= for her services, she should bring the police to arrest him.
17. From the evidence it is also clear that the two of them had already had sexual intercourse by the time **PW1** left him. There would therefore, have been no need for her to go and buy condoms. This would be like trying to shut the proverbial stable door after the horse had bolted. I therefore find that although the burden of proof did not lie with him, the appellant's version of events appears contrived and difficult to believe.
18. After a careful analysis of the evidence on record I have arrived at the same conclusion, as did the learned trial magistrate, that the sexual act and the sodomy that occurred between **PW1** and the appellant were not consensual.
19. On the sentence the appellant was convicted for rape contrary to **Section 3(1)** as read with **Section 3(3)** of the **Sexual Offences Act**, and of sodomy contrary to **Section 5(1)(a)(i)** as read with **Section 5(2)** of the same Act. These were two different offences and the court was right to sentence him separately on each. However since **PW1** was subjected to one continuous ordeal in the same place and on the same date and time the sentence for the rape in **count I** and sodomy in **count II** should have been ordered to run concurrently.

All in all the appeal is dismissed except for the order that the sentences on the two counts shall run concurrently.

SIGNED DATED and DELIVERED in open court this **26th** day of June **2014**.

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L. A. ACHODE

JUDGE