



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 223 OF 2013

DAVID GITHINJI NGARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein, David Githinji Ngara, was charged and convicted for the offence of rape contrary to **Section 3(1)(b)** of the **Sexual Offences Act**. He was found to have raped the complainant, C M, without her consent, on 7/6/09 at N Location. He was sentenced to serve 15 years imprisonment. He had been charged with committing an alternative charge of indecent act contrary to **Section 11(A)** of the **Sexual Offences Act**. No finding was made on this alternative charge.

The appellant is aggrieved by the conviction and sentence and preferred this appeal which is based on the grounds found in the amended grounds of appeal filed in court on 17/6/2014. The appellant filed submissions and made further oral submissions. The grounds upon which the appeal is premised are that:-

1. **The evidence on identification was weak and unreliable;**
2. **That the prosecution evidence was contradictory;**
3. **That his defence was not considered;**
4. **That the case was not proved to the required standard.**

The appellant therefore urges the court to quash the conviction, set aside the sentence and set him at liberty forthwith.

This being the first appeal, it behoves this court to re-evaluate and assess all the evidence that was adduced before the trial court and arrive at its own conclusion and determinations.

On the issue of identification, the appellant submitted that PW2 testified that the incident happened about 7.00 p.m., she was about 30 metres away and she claimed to have seen the appellant because he was wearing white clothes. It is his contention that the conditions were not conducive to proper identification. On the allegation that the appellant normally dressed in white, he submitted that there are neighbours who dress in white; that the evidence of identification having been by a single identifying

witness, should have been examined carefully. The appellant relied on the cases of **R v Turnbull** (1976)3 ALL ER 549, **Roria v R** (1967) EA 583 and **Abdalla Bin Wende v R** (1953) 20EACA 166.

The appellant also challenged the evidence adduced by PW4 the Clinical Officer, who examined the complainant as not being conclusive.

As regards the medical evidence, it was submitted that though the Doctor saw the complainant's torn and soiled skirt, the same was not produced in evidence.

The appellant also complained that his defence was not considered especially that of his father (DW2) who testified that there was some relationship between the appellant and PW3.

Learned counsel for the State, Mr. Chirchir conceded the appeal. He submitted that the appellant was convicted of an offence of indecent act contrary to **Section 11(1)** of the **Penal Code** and acquitted him of rape; that no witness testified that the complainant was indecently assaulted; that having acquitted the appellant of the main charge, should have acquitted him of the alternative charge.

A brief summary of the case before the trial court is that on 7/6/2009, Ann Wangoi (PW1) sent her grandchild, CM to the river. C took too long to return and she sent her other grandchild, PN (PW2) to go and get her sister.

PW2 told the court that it was about 7.00 p.m. when she was sent to the river to find out what had happened to C. As she approached the river, she heard her sister's cry. C did not respond to her call. When at the river, she found the appellant who she knew as a neighbour, raping the complainant. She said that the appellant was dressed in white as he normally did in a white coat and white trouser. She saw him about 30 metres away but it was not so dark and he ran off. She helped the complainant dress up and took her back home. The next day PW2 with PW3, B escorted the complainant to Njoro Health Centre and reported to police station. PW1 told the court that C was born abnormal.

PW3, B N, testified to having responded to noise from PW1's home on 7/6/2009. On going to the home was told that Githinji had raped C. PW3 accompanied PW2 and the complainant to the Health Centre and to report at police station on 8/6/2009. PW3 saw the complainant after the ordeal and her clothes were soiled. PW3 also examined C her private parts.

PW4, Tabitha Ngugi, is a Clinical Officer at Njoro Health Centre. She recalled having attended to CM aged 22 years who had a history of rape. Her skirt was torn, hymen was perforated, a shallow laceration to the perineum and redness at entry to vagina but lab tests were negative. PW4 said that the complainant was not a virgin because she had taken part in a sexual act before.

PW5, PC Peter Wangumia, accompanied the OCS to Ngata where the Chief of the area pointed out the appellant who had been in hiding.

PW6, PC Richard Mureithi, of Njoro Police Station was the Investigating Officer in this matter. He said that he wrote the complainant's statement as she narrated in the Kamba language and she led him to the river where the incident occurred but there was no evidence. PW6 said the complainant referred to the appellant as '**Kanyama**' which is the name by which he was known by at home.

When called upon to defend himself, the appellant denied the offence saying he never ran away and that he was mentioned because PW2 saw somebody dressed in white like he used to dress. What he made in his defence were the submissions.

The appellant called his father as a witness; DW2, David Ngata, testified that he was at home on the evening of the alleged offence and nobody went to his home alleging that the appellant had committed any offence. He said that even next day he did not hear of it and that the appellant was just at home till his arrest. He also said that the appellant used to be a friend to the complainant's mother and there was no dispute between them.

Having considered the evidence and submissions, the key issue that the court has to determine is whether the appellant was properly identified as the person who committed the offence.

The complainant, C M, who was said to be aged 22 years did not testify. She was examined by the doctor and found to be mentally retarded. PW1 and PW6 confirmed that fact and hence she could not testify.

According to PW2, the complainant's sister, she found somebody actually raping the complainant at the river and PW2's evidence is that she inspected the complaint at the river and found her skirt torn, soiled and that her private parts were interfered with; then the evidence of the Clinical Officer, PW4, I am satisfied that the complainant was raped. Somebody took advantage of her mental incapacity.

The only question is, the incident having taken place about 7.00 p.m., was PW2 able to see who the rapist was? PW2 said it was about 7.00 p.m. and that it was not so dark. It means that darkness had set in. I appreciate that during some seasons darkness sets in more than other. For example during rainy days, it seems to get darker earlier. She told the court that she was about 30 metres away when she saw the appellant ran away. She identified him by the white coat and white trouser that he had worn and that he normally wore white. In the leading case on identification, **R v Turnbull and Others (1976)3 ALL ER 549**, the court said:-

“...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. 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 a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

This case turns on identification and in my view, it was under difficult circumstances and the trial court should have warned itself of the dangers of relying on the evidence of PW2 alone on identification, unless there was other corroborative evidence. PW2 saw the rapist from about 30 metres away. There is no specific identification mark on the white clothes that the appellant allegedly wore that PW2 pointed out. The court was not told exactly how dark it was. In cross examination, she replied; “it was not so dark”. So how dark was it? In my view, the prosecution failed to establish how much light there was and whether PW2 was able to see the appellant. There is no other evidence corroborating PW2's evidence that the appellant is the person she saw raping the complainant. PW1 and PW2 did not say whether the complainant told them who had raped her. PW3 said the complainant told her it is the appellant who raped her but having been told that she was mentally retarded, the court was not told whether she recognized people or how she was able to communicate. PW6's evidence is that the complainant talked to him in Kikamba and told him that “**Kanyama**” raped her. None of the witnesses talked of “**Kanyama**” or that the appellant was known by that name. PW2's evidence stands alone on identification of the appellant and I find that even if the appellant was known to PW2, there was a possibility of mistaken identity at 7.00 p.m. at a distance of 30 metres. Identification of the appellant as the rapist was not watertight and was too weak to sustain a conviction.

The submissions by Mr. Chirchir, Counsel for the State, were totally misplaced and it was clear that the submissions did not relate to this case. Counsel submitted that the appellant was acquitted of the offence of rape and convicted of committing an indecent act but the record does not bear that out.

The appellant's defence was like submissions whereby he was trying to discredit the prosecution case. The appellant never really explained where he was on the said date. Instead it is DW2 who did the

explaining and even alleged that the appellant had a relationship with the complainant's mother, something the appellant never alluded to. Unlike the appellant, DW2 claimed that the appellant was at home the whole time, but the appellant himself said he was working somewhere. In my view, the defence evidence was quite at variance and was not plausible.

The defence notwithstanding, the duty rests on the prosecution to prove its case beyond any doubt and at no time does that burden shift to the appellant. Having found that the identification of the appellant as the rapist to be in doubt, I find that the prosecution has failed to meet the required threshold of proof in a criminal case i.e. beyond any doubt. I therefore fault the trial court's finding that the prosecution had proved its case against the appellant. Of course, the appellant is a prime suspect but suspicion alone cannot be a basis for a conviction. In the end, I find merit in the appeal, the conviction is unsafe and is hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 25th day of July, 2014.

R.P.V. WENDOH

JUDGE

The appellant in person

Mr. Chirchir for the State

Kennedy – Court Assistant