REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 521 OF 2009

LUKA JUMA WAFULA……..……..……APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1124 of 2009 in the Chief Magistrate's Court at Kiambu – Mrs. A. Ongeri (SPM) on 9th November 2009

JUDGMENT

1. The Appellant, **Luka Juma Wafula** was charged with the offence of rape contrary to **Section 3(1)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on 6th August 2009 at about 9.30 p.m. at ***[particulars withheld]*** village in Kiambu District within Central Province he committed an act with his genital organ, namely penis, which caused penetration into the genital organ namely vagina, of M.V. In the alternative he was charged with indecent assault contrary to **Section 11(1)** of the same Act. And it was alleged that he did an indecent act to her by touching her private parts namely, vagina.
2. In sum, the prosecution case was that **PW1** and the appellant are related. That the appellant brought **PW1** from Western Kenya to ***[particulars withheld]*** on the outskirts of Nairobi to help her find a job. She did find a job as a house help but was required to reside with her employer. After three weeks of working the appellant instructed her to leave that job and find one which would enable her to live with him and she obliged.
3. On the evening of 6th August 2009 at about 9.30 p.m. **PW1** and the appellant finished their supper and **PW1** retired to bed in the living room where she usually slept. The appellant came in and held her by the throat and tore open the pair of trousers she was wearing, together with her underpants. **PW1** fought him and screamed but he over powered her and inserted his penis into her vagina and raped her. He also hit her with a plank of wood in the hip area immobilizing her. He then locked her up in one of the unoccupied units for the night.
4. The following morning the appellant carried **PW1** and laid her down on the verandah, locked the door to the house and went away locking the gate behind him. **PW1** was rescued by some girls who noticed that she had been lying outside in the sun all day. They called the area chief and the police who took her to hospital. She was treated and a P3 form filled in her regard and the police traced and arrested the appellant and subsequently charged him.
5. In his defence the appellant gave unsworn testimony and denied the offence. He attributed the charges to a vendetta from **PW1** and **PW2** because he had interfered with an illicit love affair between them. In essence therefore the charges against him were fabricated and were intended to fix him.

6. The learned trial magistrate analysed all the evidence on record and found that the prosecution had proved their case against the appellant beyond reasonable doubt and convicted him accordingly. The appellant was sentenced to life imprisonment and being dissatisfied, he brought this appeal against both conviction and sentence.
7. In the said appeal the appellant asserted that the charge was defective; that the case was not proved beyond reasonable doubt; that the evidence was circumstantial and not corroborated; that it was inconsistent, contradictory and inconclusive and that the trial court failed to comply with **Section 150** and **169(1)** both of the **Criminal Procedure Code**.
8. In his written submission the appellant contended with regard to the first ground, that the words "**intentionally and unlawfully**" having been omitted from the charge sheet, the offence stated was not one of rape and this was fatal to the prosecution case. In rebuttal Miss Nyauncho, learned counsel for the state submitted that the said omission did not make the charge sheet defective and was infact, curable under **Section 382 Criminal Procedure Code** as it was not fatal.

9. The Court of Appeal had occasion to consider this question in the case of **JMA vs Republic [2009] KLR pg 671**, in which the Superior Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge, for reasons that the charge was fatally defective for bearing the above omission. The Court of Appeal held inter alia that:

> **"This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor."**

The test is whether the failure occasioned a miscarriage of justice in the trial.

10. I observe that the finding of the Court of Appeal was based on a case of defilement, but it is my considered opinion that if the appellant in the instant case understood the statement of the offence and the particulars thereof the evidence proves that the appellant did intentionally cause his penis to penetrate **PW1**'s vagina and that this was without her consent, the omission of the words **"intentionally and unlawfully"** in the charge sheet is not fatal to the prosecution's case. It is curable under **Section 382** of the **Criminal Procedure Code**.

11. In the second, third and fourth grounds, the appellant argued first, that the case was poorly investigated since he was not taken to a doctor to be examined, second, that since there was testimony that he was related to **PW1**, he should have been charged with incest under **Section 20(1)** of the **Sexual Offences Act** and the provisions of **Section 11(2)** of the **Sexual Offences Act** which provides the punishment would not therefore apply. His third and fourth assertions were that the age of **PW1** was not proved to warrant such a harsh sentence and that there was contradiction in the prosecution's evidence as to whether or not there was blood and semen on the appellant's underpants and also how long **PW1** had stayed in the appellant's house.

12. In response Miss Nyauncho argued that the case had been proved beyond reasonable doubt by the prosecution. Further that the evidence was corroborated, especially by the medical report in which it was concluded that **PW1** was sexually assaulted, and **PW2** a neighbor who heard noises from the appellant's house at the pertinent time.

13. The second, third and fourth grounds of appeal essentially attacked the weight of the evidence upon which the appellant was convicted. From the record there is no dispute that **PW1** had engaged in a sexual act in the hours leading to her examination in hospital on 7th August 2009. **PW4** William a medical officer at Kiambu District Hospital filled a P3 form on her behalf on 10th August 2009. The findings in the P3 form were that her hymen was lacerated and there was virginal discharge. It was also noted that she had scratch marks on the inner thigh and knee and tenderness on her right hip joint. A spermiosis test revealed the presence of spermatozoa in the vaginal swab taken from her.

14. **PW4** told the court that he relied on the initial clinical notes to fill the P3 form and that therein it

had been indicated that **PW1** presented at the hospital with a complaint of having been raped by a person known to her and that the state of her clothing included torn pants and torn underpants. **PW4** also testified that the doctor who attended to **PW1** when she was first brought to hospital was known to him.

15. **PW3**, Cpl Giathe of Ndumberi Chief's offices told the court that on 7th August 2009 at 4 p.m. he accompanied the chief to Karunga village to rescue a girl who was reported to be in need of help. At the scene they found the girl in the compound lying on the dusty ground. The gate was locked from the outside and they had to break the padlock to gain entry. They found that the girl could not walk due to the injuries she had sustained and her voice was hoarse. He also noted the state of her sweater, trouser and under pants. He helped take her to hospital and also traced and arrested the appellant at a church when **PW1** said she was raped by the person with whom she resided. **PW6**, PC Naibei was at the scene too. He assisted in taking **PW1** to hospital and he too noted her torn clothes and that she was found locked in and lying outside in the compound.

16. The evidence of **PW3**, **PW4** and **PW5** therefore lent credence to the testimony of **PW1**, that she was raped and that she sustained injuries and was left lying helpless outside the house because she could not walk. Further that the house door and the gate were locked from the outside. From these facts the inference to be drawn is that the sexual encounter was not consensual.

17. The appellant seemed to imply that if there was sexual intercourse it was between **PW1** and **PW2** and that they fabricated this charge against him for interfering with their relationship. I note from evidence of **PW2** that he did hear a scream and some commotion at the material time coming from the compound where the appellant and **PW1** lived. He went out to investigate and did not press the matter because the relationship between the appellant and **PW1** was of father and daughter and in his opinion it was not his place to interfere if a father was chastising his daughter. In the compound where **PW1** and the appellant lived there were other houses but they were unoccupied. The appellant was the property's caretaker.

18. This evidence ties in with that of **PW1** who said that when she screamed someone came to their gate and the appellant went out and conferred with him. When the appellant returned he hit her in the hip region with a piece of timber for having screamed. **PW4** did testify to the presence of tenderness in her right hip region when she was examined at the hospital. I find therefore that the evidence of the prosecution interlocks well and flows properly from one witness to the next.

19. I assessed the evidence on record afresh in light of the grounds of appeal and submissions on record. In the first ground the appellant urged that he was convicted on a defective charge sheet and that he was wrongfully charged for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, instead of the offence of incest by a male person, contrary to **Section 20 (1)** of the same **Act**, being a relative to **PW1**. Miss Nyauncho responded that the charge sheet was not defective as the proper sections were cited and the particulars were very clear.

20. The Sections referred to above provide as follows:

Section 20(1)

"Any person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years".

Section 3(1) of the Sexual Offences Act provides that:

A person commits the offence termed rape if-

a. **he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**

b. **the other person does not consent to the penetration; or**
c. **the consent is obtained by force or by means of threats or intimidation of any kind."**

21. From the evidence on record, it is not in doubt that the appellant is a relative of **PW1**. He is a cousin to her mother and therefore an uncle to **PW1**. From the reading of the two sections above it is evident that whereas the appellant could have been charged under **Section 20 (1)** of the **Sexual Offences Act**, which specifically deals with sexual assault by male persons, in incestuous relationships, there was nothing to preclude him from being charged under **Section 3(1)** of the **Sexual Offences Act** as he was.

22. The ingredients in both offences are similar save that in the offence of incest, the victim is a relative of the suspect. Therefore, the fact that the appellant was charged with rape and not incest did not render the trial defective, neither did it prejudice him or occasion any failure of justice, as both offences provide a punishment of not less than ten years imprisonment upon conviction.
23. On the ground that the evidence was fabricated, I note that the appellant subjected both **PW1** and **PW2** to lengthy and detailed cross-examination. **PW1** gave a detailed chronology of events that would have been difficult to maintain it if was made up. She also steadfastly denied any involvement with **PW2** whom she called an old man and said he only responded to her scream because he was the closest neighbor to them. The appellant did not put the question of the existence of a romantic relationship between **PW1** and **PW2** to **PW2** when he cross-examined him. Coming this late in the proceedings it appears to be an afterthought meant only to exonerate him. From an assessment of the record in its entirety therefore it is evident that the narrative of what transpired on the ill-fated night is as was presented by the prosecution witnesses and not the appellant.

24. On the fifth and sixth grounds the appellant contended that his rights were infringed under **Section 150** of the **Criminal Procedure Code** because some witnesses were not availed, and that the trial court did not also comply with **Section 169** of the **Criminal Procedure Code**. Lastly the appellant complained that the trial court did not give due consideration to his unsworn alibi defence. In a short response Miss Nyauncho asserted that the trial court had complied with the law in assessing the evidence.

25. In his submissions the appellant contended that the area chief, IP Omondi of Ndumberi AP Post and the girls who found **PW1** should have been availed to testify. **Section 150** of **Criminal Procedure Code** empowers the court to summon a witness or examine any witness at any stage. As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. See - **High Court Criminal Appeal Number 54 of 2011 Martin Ochieng Opiyo vs Republic** (unreported). In my view those witnesses called were able to establish the prosecution case. **Section 169** of **Criminal Procedure Code** on the other hand, is with regard to the manner of writing judgments. I have perused the judgment of the lower court and I do not believe that this ground has any merit.

26. This being the first appeal, I considered and re-evaluated the evidence adduced by witnesses as pertains to each of the grounds advanced by the appellant to arrive at my own independent decision, whether or not to uphold the conviction of the appellant. In drawing my own conclusion I was cognisant of the fact that I neither saw nor heard the witnesses as they testified and gave due allowance therefor. - ***see Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR***.

27. On the basis of the foregoing I find that the evidence adduced against the appellant was sufficient and that the trial court evaluated it properly. On the sentence however the appellant was charged and convicted under **Section 3(1)** of the **Penal Code**. As stated elsewhere in this judgment **Section 3(3)** which provides for the punishment states that a person found guilty of an offence under this section is liable upon conviction to imprisonment to term which shall not be less than

ten years and which may be enhanced to life. The court's reason for enhancing his sentence to life was that he showed no remorse. While that may be so, the court should have also noted his mitigation and that he was being treated as a first offender.

28. For those reasons these appeal on conviction is found to have no merit and is dismissed but it succeeds on the sentence only. The appellant's sentence is reduced to ten years imprisonment.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **24th** day of **September 2014**.

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L. A. ACHODE

JUDGE