**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.180 OF 2012**

**BETWEEN**

**RIOBA BOKE NYAMBURI …..... APPELLANT**

**AND**

**REPUBLIC …..... RESPONDENT**

*(Being an appeal from original conviction and sentence in Criminal case No.534 of 2011 in the SRM's court at Kehancha dated and delivered on 12th July 2012* - T.A. SITATI, RM)

**JUDGMENT**

1. The appellant herein Rioba Boke Nyamburi was the accused in the SRM's Court at Kehancha in Criminal Case No.534 of 2011. In count 1 he was charged with the offence of robbery contrary to **Section 296 (1)** of the **Penal Code**. The particulars of the charge were that on 2nd November 2011 in Kuria East District he robbed SB of Kshs.300/= and one mobile phone make Nokia 1200 and at or immediately before or immediately after the time of such robbery threatened to use violence on the said SB.

2. In the 2nd count he was charged with the offence of rape contrary to **Section 3 (1) (a)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the offence were that on 2nd November 2011 in Kuria East District, he intentionally and unlawfully caused his penis to penetrate the vagina of SB without her consent.

3. In the alternative count, he was charged with committing an indecent Act with an adult contrary to **Section 11 (4)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on 2nd November 2011 in Kuria East District, he intentionally touched the vagina of SB with his penis against her will.

4. The appellant pleaded not guilty to all the counts and the trial ensued. The prosecution called 5 witnesses.

5. PW1 was SBN (the complainant). Her testimony was that on 2nd November 2011 at about 7.00 p.m., she was walking home from Ntimaru Market. Because it was drizzling, she had covered her head with her brown jacket. Near Mzee Mairo's home, which was next to the appellant's home, someone suddenly grabbed her at her waist in a tight embrace. When she turned to see who it was, she recognized the appellant whom she knew as Boke Nyamburi. She asked the appellant what he wanted with her and he

told her that she was going to find out soon what it was. The appellant then tripped her and as she fell on the ground, he sat on her belly.

6. The complainant tried to scream but he tried to strangle her. He also produced a panga and silenced her with it. He then put his knees on her hands respectively. He then dropped the panga which he had put on her neck, and forcefully removed her underpants.A struggle ensued, but the appellant overpowered the complainant. The appellant smelt of alcohol. He then forced his penis into her vagina and had sexual intercourse with her by force. The complainant again tried to scream, but each time the appellant gogged her mouth using her brown jacket. The appellant also tore her clothes in the process of forceful removal.

7. After the appellant satisfied his sexual desire, he released his grip on the complainant who in turn managed to get up and to escape. She ran into Ntimaru police station, with the appellant in hot pursuit. The complainant ran away from the scene while dressed only in her petticoat and an inner top.

8. The complainant reported the matter to Ntimaru police station as the appellant disappeared into the night. The report to the police was received by No.89368 Police Constable Dunstone Wangila who, in the company of Ojera (PW3) and Cpl Ndirangu accompanied the complainant to the appellant's home where they found the appellant in his house preparing supper. The complainant positively identified the appellant to both PW2 and PW3 and also identified some of her clothing which the appellant had seemingly taken to his house. The recovered items were produced in evidence.

9. PC Wangila and his colleagues were also led to the scene of the alleged crime from where they recovered the complainant's brown jacket and red T-shirt, and also recovered the panga from the nearby maize plantation. On the following morning PC Wangila escorted both the complainant and the appellant to Ntimaru District Hospital for medical examination and treatment.

10. According to PC Wangila, the recovered items from the appellant's house and from the scene of the alleged crime were:-

From the House

- *Red inner wear;*
- *Khaki biker;*
- *White sandal; and*
- *Black T-Shirt.*

From the scene

- *Red T-Shirt;*
- *Skirt brown;*
- *Panga.*

11. PW3, Number 66409 Police Constable Jacktone Ojera corroborated the testimony of PC Wangila concerning the visit to the appellant's home and the scene of the alleged crime and the recoveries made therefrom. PC Ojera also confirmed, as had been confirmed by PC Wangila, that the complainant told them she knew her attacker by name and also knew his home and led them there.

12. At Ntimaru District Hospital, the complainant was examined by Ragira Wycliffe, PW5, a clinical officer at the said hospital. According to his testimony, the complainant was taken to the hospital under police escort. On examination, PW5 established that the complainant's hymen was absent as she was a mother of 2 children. Laboratory examination was also carried out. All the results on Veneral Disease

Examination, Urinalysis, HIV test, pregnancy were negative. The treatment notes together with the laboratory tests results were produced as exhibits during the hearing.

13. PW4, Lawrence Maruti, a clinical officer at Kisii Level 5 Hospital filed the P3 form issued to the complainant by PC Wangila. The examination was carried out on the complainant on 4th November 2011. The findings were:-

- *Complainant was aged 20 years.*
- *She had a soiled vest and skirt.*
- *Hymen was missing.*
- *There were no tears or lacerations.*
- *Whitish discharge was visible (normal) in the vagina.*
- *No vaginal blading.*

Upon laboratory examination, the following were the findings:-

- *P.ITC – HIV test – negative.*
- *VDRL – sexually transmitted infections – negative.*
- *Urinalysis – pus cells – sexually transmitted infection.*
- *High vaginal swab – No male spermatozoa was noted.*
- *Negative pregnancy test.*

14. In his further evidence, PW5 stated that his findings were based on the laboratory request forms dated 3rd November 2011 prepared at Kuria District Hospital.

15. When called upon to defend himself, the appellant gave a brief unsworn statement in which he recalled being arrested on 2nd November 2011 and taken to Ntimaru police station and booked in for one night. The next day, he was escorted to Kehancha police station. The appellant testified that all the charges against him were fabrications arising out of a long-standing grudge between his family and that of the complainant. That the grudge was over suit land that was sold; that the complainant's family was determined to see him jailed, so that his mother, whose only son he was, could become destitute. He denied any knowledge of the allegations that were leveled against him.

16. After carefully evaluating all the evidence that was placed before it, the trial court reached the conclusion that the prosecution had not proved the charge of robbery to the required standard and accordingly acquitted the appellant of the same under **Section 215** of the **Criminal Procedure Code**.

17. With regard to Count II, the trial court reached the conclusion that though both PW4 and PW5 did not confirm penetration, the court was satisfied that the surrounding circumstances left no doubt in its mind that there was no explanation other than that the appellant raped the complainant under threat of violence as he was armed with a panga.

18. Upon conviction, the appellant was sentenced to 20 years' imprisonment.

19. Being aggrieved by both conviction and sentence, the appellant is now before this honourable court seeking a fresh evaluation of the evidence that was placed before the trial court on the following homemade grounds:-

1. *He pleaded not guilty to the charge of rape.*
2. *The trial magistrate erred in both law and facts since it came out clearly that the complainant was grabbed from behind and eventually raped by unknown criminal suspect.*
3. *The trial magistrate erred in both law and facts in that the appellant was apprehended in his house and hence compelled by the police officers to address the rape subject which indeed was beyond appellant's understanding and knowledge.*
4. *The trial magistrate erred in both law and facts in that in the face of overwhelming discrepancy of statements adduced before the court by a medical officer, the subject proceeded mercilessly and*

*gave the appellant a harsh sentence of 20 years.*

5. The appellant prays for the court to intervene and quash the sentence since it was based on a figment of imagination.

20. The appellant also filed his written submissions dated and filed on 6th May 2014. In his submissions he has advanced grounds *inter alia* that:-

1. *The prosecution failed to establish a prima facie case against him.*
2. *The evidence of the complainant that she was raped did not match that of the clinical officer as penetration was not proved.*
3. *The complainant did not explain the source of light she used to see her attacker as the attack took place at night.*

21. When the matter came up before me on 6th May 2014, Mr. Ochieng, learned counsel for the State warned the complainant that he (Mr. Ochieng) would be asking for enhancement of sentence to life imprisonment by virtue of **Section 3 (3)** of the **Sexual Offences Act** should the appellant still pursue the appeal.

22. The appellant was warned accordingly before he proceeded to argue the appeal.

23. During oral submissions, the appellant told the court that the evidence adduced in the lower court was false; specifically the evidence that he was found in his brother's house as the prosecution never called his brother to prove this allegation.

24. The appeal was opposed by the State. Mr. Ochieng, Learned Prosecution Counsel submitted that the evidence fully supported the charge of rape against the appellant. That the evidence of recognition remained unchallenged and further that the complainant's clothing was recovered from the appellant's brother's house, a house that was also the appellant's place of abode. Regarding sentence, counsel submitted that the sentence meted out by the trial court was well within the provisions of **Section 3 (3)** of the **Sexual Offences Act**.

25. This being a first appeal, my duty as the first appellate court is to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter, remembering only that this court does not have the privilege of seeing and hearing the witnesses who testified during the trial. This court is only dealing with the records and must therefore exercise caution as it reconsiders and evaluates the evidence afresh. See generally **Pandya -vs- Republic [1957] EA 336**; **Okeno -vs- Republic [1972] EA 32** and **Selle & another -vs- Associated Motor Boat Co. Ltd. & others [1970] EA 123**.

26. I have now fully analyzed and evaluated the evidence adduced before the trial court. I have also carefully considered and weighed the judgment of the learned trial magistrate with a view to determining whether the conclusions reached by the trial court should be supported. The issue that arises for determination is whether the charge of rape was proved, and whether it was the appellant who committed it.

27. According to **Section 3** of the **Sexual Offences Act No.3 of 2006** rape is defined in the following terms:-

> "3 (1) 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;**
>
> **c. the consent is obtained by force or by means of threats of intimidation of any kind.**

**(2) In this section the term "intentionally" and "unlawfully" has the meaning assigned to it in Section 43 of this Act.**

**(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than 10 years but which may be enhanced to imprisonment for life."**

28. Therefore, for the offence of rape to be completed two ingredients have to be proved **(1)** there has to be lack of consent by the victim **(2)** there has to be an act of penetration in the genital organs of the victim.

29. In the instant case PW1 the complainant narrated to the trial court how the attack took place. She described how she was raped by the appellant as follows:-

> **".... When I got near Mzee Maina's home next to the suspect's home, suddenly someone grabbed at my waist in a light embrace I turned to look who it was. I knew the person. His name was Boke Nyamburi ….. He tripped me to the ground and sat on my belly.**
>
> **When I tried to scream, he strangled me and then produced a panga to silence me with it. His knees were on my both arms. The right knee was on my left pressing it to the ground and same for the right hand. The panga was briefly placed in my neck before he dropped it and removed my underpants. I struggled with him but he overpowered me. He smelt of alcohol. He put his penis into my private parts and had sexual intercourse with me by force whenever I tried to scream he would muffle my mouth with my jacket. He tore my clothes in the process. Eventually after he satisfied himself sexually, he lost grip of me. I threw him off myself and started to run away."**

30. PW4 Lawrence Maruti the clinical officer who filled PW1's P3 form stated:-

> **"I did examine her. She had a vest that was soiled as was her skirt. She is aged 20 years. Hymen missing. No tears or lacerations. Whitish discharge was visible – normal in ladies in the vagina. No vaginal bleeding. We referred her to laboratory examinations. The results were as follows:-**
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> **PIJC – HIV test negative**
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> **VDRL – Sexual transmitted infections - negative**
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> **Urinalysis – Pus cells – Sexually transmitted infection**
>
> **High vaginal swab – No male spermatozoa was noted**
>
> **Negative pregnancy test."**

31. On cross examination by appellant both revealed:-

> **"Her urine showed pus which indicated a sexually transmitted disease. No sperms were noted in the analysis."**

32. On the other hand PW5 Ragira Wycliffe the clinical officer who wrote PW1's initial treatment notes and produced the laboratory technician's report as exhibits stated.

> **"On further investigations the hymen was not there. She had already given birth to 2 children before as per her information. I sent her for laboratory examination."**

33. On cross examination by appellant, PW5 stated:-

> **"Pus cells are normal in urine for women. All tests returned negative."**

34. It is also worthy of note that though the complainant was not taken to hospital immediately after the attack she was advised by police not to take a bath for evidence purposes and report to hospital early in the morning.

35. From the evidence highlighted above, is it clear that the complainant was indeed raped? Does the evidence of PW4 and PW5 corroborate the complainant's allegation?

36. In **Mwangi -vs- Republic [1984] KLR 595 at page 603** the Court rendered itself as follows:-

> **"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape, which doctor's evidence did not establish or corroborate."**

37. How then does one prove penetration? Must there be an injury on the genitalia for the court to connote beyond any doubt that penetration occurred?

38. Justice Asike Makhandia (as he was then) in the case of **Kanini Muli -vs- Republic [2012] e KLR** stated the following:-

> **"A round of rape or sexual intercourse, connotes perhaps climaxing in ejaculation leading to release of spermatozoa if indeed there was a round of rape, it would be spermatozoa in the vagina of the complainant. Whereas PW6 sought to explain why the absence of injuries or tear on PW1's genitalia, he was silent on the absence of spermatozoa."**
>
> In the instant case, the trial magistrate in his judgment noted:
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> > **"Although the medical reports by both PW4 and Pw5 did not establish the evidence of penetration, I am satisfied that the surrounding circumstances of the episode leave no doubt that there was no other explanation other than that the suspect did insert his penis into the vagina after removing her clothes and tearing off her underwear under threat of violence; he was armed with a panga."**

39. From the evidence I have analyzed above and taking into account the case law, it is my humble view that it was not established beyond reasonable doubt that PW1 was raped. Furthermore, the trial magistrate was not convinced of the same as I have quoted him and despite the doubt, he nevertheless went ahead to convict the appellant of rape. I say that there was no evidence to corroborate PW1's evidence on rape because:-

1. *PW1 was not a child (minor) or a virgin. The fact that she had given birth to two children meant that the issue of her not having a hymen was immaterial.*
2. *There were no lacerations or injuries in her vagina to suggest that there had been use of force. Usually it is assumed that when one rapes a person they are not gentle but use a lot of force as the intimacy is not consensual.*
3. *No spermatozoa was found in PW1's genitalia even after conducting a high vaginal swab, although as stated in the* **Mwangi case** *(supra) absence of spermatozoa did not mean there had been no sexual intercourse..*
4. *The presence of a sexually transmitted disease in PW1's urine in my humble view does not indicate that it was the appellant who transmitted it to her as no results were produced confirming that indeed the appellant had a sexually transmitted disease and the fact that PW1 was already sexually active means that she may have contracted the sexually transmitted disease from else where.*

40. After evaluating all the above evidence, I have reached the conclusion that the rape charge against the appellant cannot stand. However, from the evidence adduced by PW1, PW2 and PW3, it is clear that the complainant and appellant were together that night. PW1's testimony was unshaken on the fact that she recognized the appellant as the person who was her attacker. The complainant categorically stated the appellant was her neighbour and even gave his full names. She also said it was not yet dark when the appellant grabbed her at the waist. She turned and looked at him and recognized him. This piece of evidence was not controverted by the appellant.

41. Secondly, after the scuffle between the appellant and complainant, complainant managed to escape albeit half dressed. She reported the matter to the police station and PW2 and PW3 gave her escort. On the same night, they proceeded to appellant's compound in the company of PW2 and PW3 only to find appellant at his brother's house and also found her clothes at a corner in the same house. Among the clothes discovered at a corner of appellant's brother's house were her red inner wear, cream biker, cream brassier and white sandals. The question then this court must answer is: what were PW1's personal items doing in the house of appellant's brother moments after PW1 alleged to have been attacked and sexually assaulted?

42. Furthermore, PW1 proceeded with her escorts and the appellant to the scene where the alleged attack had taken place. At the scene, a panga which appellant had used to threaten the complainant was found, her red T-Shirt and Brown Skirt. All these items recovered both at the scene and at appellant's brother's house undoubtedly point at the fact that PW1 and appellant were in an intimate encounter on the material night.

43. Since it has been proved beyond all reasonable doubt that the appellant was in possession of complainant's inner wears, I am convinced beyond all reasonable doubt that the complainant did not freely give those items to the appellant. I am satisfied that the appellant's action of removing the complainant's brassier, inner wear and biker all indicate he must have indecently touched the complainant's breast, vagina and thighs in order to have possession of the said items.

44**. Section 1A** of the **Sexual Offences Act** states:-

> **"Any person who commits an indecent act to an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

45. In the premises, I allow the appeal on both conviction and sentence on the charge of rape. The conviction is quashed and the sentence of 20 years imprisonment is set aside. However, being satisfied that the alternative count of committing an indecent act with an adult has been proved beyond any reasonable doubt, I find the appellant guilty of the same and convict him accordingly. A conviction under this charge calls for a maximum sentence of five years imprisonment or to a fine not exceeding Fifty Thousand shillings or to both.

46. In the circumstances of this case, I sentence the appellant to five (5) years imprisonment. The sentence shall run from 12th July 2012 when the appellant was sentenced by the trial court.

47.The appellant still has a right of appeal to the Court of Appeal within 14 days from the date of his judgment.

48. Orders accordingly.

**Dated and delivered at Kisii this 23rd day of October, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:-

Present in person for Appellant

Mr. Majale for Respondent

Mr. Bibu - Court Assistant