REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 75 of 2007

STEPHEN MUGO MAINA.....APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

(An appeal from original conviction and sentence in Nakuru Criminal case No. 1051 of 2006 by W. Kagendo SRM dated 18th April, 2007).

JUDGMENT

The appellant, Stephen Mugo Maina, was charged that on 23rd day of April, 2006 at Free Area in Nakuru District within Rift Valley Province he unlawfully had canal knowledge of C W W contrary to **Section 140** of the **Penal Code.**

The case before the lower court was to the effect that on 23rd April, 2006 at around 6.45 pm P.W.1, C W W, met the appellant, whom she knew on her way to her friend's home. The appellant offered to escort her to her friend's home. On their way back, the appellant asked her to accompany him to his friend's house but the complainant declined because it was getting late. The appellant insisted that she had to go with him and pulled her to a plot near the Full Gospel Church where after forcefully removing her clothes he raped her for 5 minutes before he was interrupted by John Muiruri Kariuki (P.W.3) and Stephen Opiyo Okuyo (P.W.4) who came calling the appellant's name. P.W.3 and P.W.4 told the court that they heard screams from their house and that upon gaining access into the house they found the appellant on top of the complainant and that both of them were naked. After the complainant was rescued by the two witnesses, she went to the road where she met P.W.5 (her father) who picked her in his car. When they got home, P.W.5 noted that his daughter's clothes were muddy and that she had facial injuries. When he asked what had happened the complainant told him that she had been assaulted by the appellant. She also told P.W.6 (her mother) that the appellant had raped and assaulted her. P.W.5 and P.W.6 reported the incident at Mwariki Police Station and later took the complainant to the Provincial General Hospital Nakuru for treatment.

Two days after the alleged offence, P.W.2 Dr. Philip Wamuele Kamau, examined the complainant and noted a 2cm laceration in her labia minora; blood discharge from her vagina; swellings on the face and the neck. He formed the opinion that the injuries were caused by assault and rape. P.W.7, PC Jackson Longosiek, investigated the offence and charged the appellant with the offence herein.

In his defence the appellant admitted having been with the complainant at the scene of crime but denied having committed the offence. His witnesses gave evidence to the effect that the appellant and the complainant were lovers.

Just before the close of the prosecution case the trial magistrate ordered the prosecution to amend the charge sheet and include the offence of assault which it felt the prosecution had failed to charge the appellant with. Consequently, the charge was amended, the appellant called upon to plead to the amended charge and the witnesses recalled for cross-examination by the appellant's advocate.

Upon considering the evidence presented before her the trial magistrate found the charges proved beyond reasonable doubt and upon convicting the appellant sentenced him to serve ten years in respect of the main count and two years in respect of the other count.

Aggrieved by both the conviction and sentence the appellant has brought this appeal challenging the conviction and sentence on five (5) grounds, that can be summarized as follows:-

1) that the conviction was against the weight of the evidence;

2) that the trial was unfair as essential prosecution witnesses were not recalled for cross-examination.

3) that the learned trial magistrate was biased; and

4) that the learned trial magistrate took into account extraneous matters.

Before me, counsel for the appellant submitted that the trial magistrate was biased as that she cancelled the appellant's bond for no apparent reason; and that she refused to disqualify herself even after allegations of bias were leveled against her.

Counsel for the respondent conceded that conviction was not safe because of bias. He submitted that if a tribunal shows bias, that goes to the root of the trial. In his view the trial magistrate had convicted the appellant before close of prosecution case.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence adduced at trial in order to come to its own independent conclusion bearing in mind it neither saw nor heard the witnesses.

From the record before me I find as a fact that the trial court, on its own motion ordered the amendment of the charge sheet to include the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. It also, of its own motion, ordered the cancellation of the appellant's bond and declined to reinstate the same after several attempts by the appellant to have the same reinstated. That conduct of the trial court is the subject of this appeal with both the counsel for appellant and respondent agreed that the trial magistrate was biased against the appellant.

Under **Section 214** of the **Criminal Procedure Code**, Chapter 75 Laws of Kenya a court is empowered to order for amendment or substitution or addition of a new charge, as it deems necessary to meet the circumstances of the case. But where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge and the accused may demand that the witnesses or any of them be recalled to give their evidence afresh or be further cross-examined.

In the instant case, in compliance with the above requirement of the law the trial magistrate upon amendment of the charge called the appellant to plead afresh to the amended charge. She also ensured that key prosecution witnesses, notably the complainant, her father and the doctor were recalled for cross-examination by the appellant's advocate. P.W.3 and P.W.4 who were eye-witnesses to the offence were also booked to attend court for cross-examination but failed to attend.

The court upon consideration of the evidence adduced before her, nevertheless, found the offences proved beyond reasonable doubt and convicted the appellant.

The record before me shows that the trial court ordered for amendment of the offence after the

evidence adduced revealed that the evidence adduced pointed to commission of not only the offence of rape but also the offence of assault causing actual bodily harm. As noted above the court has power to order for amendment of a charge where there is variance between the evidence adduced and the charge. There was, therefore nothing wrong with what the court did, even though the court was not moved by the prosecution. The court's duty was to ensure that the legal safeguards were followed.

It was also submitted that in canceling the appellant's bond and refusing to reinstate it on what it termed overwhelming evidence, the trial magistrate demonstrated open bias against the appellant; and that there was no evidence whatsoever that the appellant would have absconded if his bond had been reinstated.

That issue was the subject of court's determination in Nakuru High Court Criminal Application No. 104 of 2006, **Stephen Mugo Maina** V. **Republic** in which the appellant had asked the High Court to overturn the trial court's refusal to reinstate his bond. While declining to issue the orders sought Kimaru J. held:

".....A trial Magistrate has the discretion to order cancellation or reinstatement of bond granted to an accused person.....The trial magistrate correctly observed that it would be too risky to release the applicant on bond considering the nature of the evidence that had been already adduced against him by the prosecution witnesses."

No evidence whatsoever has been led to prove that the trial magistrate was motivated by spite or ill-will in ordering the cancellation of the bond.

Turning to the evidence adduced at the trial, it is common ground that the appellant was with the complainant at the time of the alleged offence; that the two knew each other prior to the day in question. The complainant gave evidence to the effect that the appellant caused his genital organ (penis) to penetrate her genital organ (vagina) without her consent. She also gave evidence to the effect that the appellant assaulted her as he raped her. Her evidence was corroborated by that of P.W.2 who examined her two days after the offence was committed. Further corroboration of the complainant's evidence was provided by P.W.3 and P.W.4 both of whom caught the appellant in the act. Their testimony to the effect that they heard screams coming from the house and the fact the complainant was physically assaulted further strengthened the prosecution's case against the appellant.

Under **Section 139** of the **Penal Code**, Chapter 63 Laws of Kenya:

"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm....is guilty of the felony termed rape."

It has been held in numerous authorities that lack of consent is an essential element of the crime of rape and that to prove the mental element required in rape, the prosecution has to prove that the complainant resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will. See **Republic** V. **Oyier** (1985) KLR 353.

In the instant case there was evidence that the appellant had carnal knowledge of the appellant and that he used force before, during and after the ordeal. Even though P.W.3 and P.W.4 did not attend court for cross-examination after the charge was amended I find and hold that the court would have arrived at the same decision even if it had disregarded their evidence, as the complainant's evidence was adequately corroborated by that of P.W.2.

Regarding the sentence imposed by the trial magistrate, I note that the appellant was sentenced to ten years imprisonment for an offence whose maximum sentence is life imprisonment.

As a general rule an appellate court will not interfere with the discretion of a trial court in sentencing unless it is satisfied that the court acted upon some wrong principle or overlooked some material factors. See **Macharia** V. **Republic** (2003) KLR 115.

Even though the learned trial magistrate made unwarranted comment about the appellant's business, she passed a sentence that was neither unlawful nor excessive.

For the foregoing reasons this appeal has no merit and is dismissed.

Dated and Signed at Nakuru this 18th day of January, 2013.

W. OUKO
JUDGE

Dated, Signed and Delivered at Nakuru this 29th day of January, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE