REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 182 of 2011

(From original conviction and sentence in Criminal Case No.91 of the Principal Magistrate's Court at Nyahururu – A.B. MONGARE, SRM)

MWANGI MACHARIA ALIAS GATHEE…..……..APPELLANT

VERSUS

REPUBLIC……..…..RESPONDENT

JUDGMENT

This is an appeal from the decision of the Senior Resident Magistrate, Nyahururu Court, A. B. Mongare, in Cr. Case 91/2011, where the appellant, Kelvin Mwangi Macharia alias Gathee, was convicted for the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006** and sentenced to 30 years imprisonment. He had also been charged with the offence of robbery with violence of which he was acquitted. Being aggrieved by the said conviction and sentence, the appellant preferred this appeal for reason that the prosecution did not prove the case to the required standard, beyond any reasonable doubt because he was not positively identified, the evidence was contradictory and that the evidence was insufficient to found a conviction.

The appeal was opposed and Ms Idagwa, Learned Counsel for the State submitted that the appellant was known to the complainant; that the scene of crime was lit by lights from an adjacent building; the Doctor found that the complainant was injured on her private parts and that the sentence was fair considering that the appellant had a similar previous conviction.

The appeal is predicated on supplementary grounds of appeal and written submissions filed by the appellant. The grounds can be summarized as follows:-

1. **That the appellant was not positively identified;**

2. **That the prosecution evidence was contradictory;**

3. The medical evidence did not link the appellant to the offence;

4. The trial court did not consider the appellant's defence.

The appellant therefore prays that the appeal be allowed, the conviction quashed and sentence set aside.

Briefly stated, the case before the lower court was that A. N. M. (PW1) was coming from her sister's place at {*particulars withheld*} in Nyahururu on 9/1/2010 at about 10.00 p.m. When she reached Double M Building, she met Gathee, the appellant, whom she knew before. He came running, went ahead of her, tripped her and she fell. She screamed but he held her by the neck and strangled her, covered her mount and threatened to kill her if she screamed. He bit her check, put his hand in her pocket and took Kshs. 2,200/-, a mobile phone 1200. He pulled down her trouser, biker and pants and raped her. He took her to a field covered her face with her sweeter where a 2nd person came and raped her too. They left and warned her not to get up till they were gone. She went home, changed clothes and reported at {*particulars withheld*}. She went to the scene with police (PW7) recovered her shoes, trouser, biker and 15/-. She was treated the next day, and reported to the Police Station where she was issued with a P3 form. The next day, the appellant was arrested by some boys. The appellant named his accomplice as Paul and the 2nd accused were arrested. PW1 said that she 1 who was 2nd accused in lower court.

PW1 said she knew the appellant well, she had seen him earlier in the day. He used to carry her on the motor cycle and even described how he was dressed to the police. PW2, G. W., PW1's sister confirmed that PW1 had been in her house on the night of 9/1/2011 and she came back after 30 minutes with a swollen face, only wore a T-shirt, was carrying her trouser in her hands and she was taken to hospital. PW6, Dr. Waiti produced a P3 form prepared by Dr. Imera which confirmed that PW1 had injuries on the face, neck, cheek, a tear of the labia majora and pregnancy test was positive and the Doctor was of the view that there had been penetration.

In his defence the appellant only made reference to 11/1/2011 when he was arrested and claimed to have been framed.

Like most sexual offences, PW1 was the only witness to the incident which took place at night in a secluded place. The court therefore based its conviction on the evidence of a single identifying witness under unfavourable conditions. Although the trial court ultimately agreed with PW1's testimony, the court did not warn itself of the dangers of relying on the evidence of a single identifying witness under unfavourable circumstances. The case of **R. v Turnbull & Others [1973] ALL ER 549** considered some of the factors that the court should take into account when the only evidence turns on identification by a single witness. 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."

Although the complainant was raped at about 10.000 p.m., she told the court that there were security lights at Double M building where she was accosted. The appellant was in close proximity with PW1 and she was able to see the assailant well. The appellant did not disguise himself during the ordeal. She said she had seen the appellant earlier in the day. She knew him as a motor cycle rider and he used to carry her. She even described the manner in which he was dressed that he spotted dreadlocks and when she went to report at police station on the same night, she named **'Gathee'** – the accused as the assailant. PW7, Corporal Lawrence Kimathi of Mairo-inya Police Station who received the first report from PW1 said that on the same night, 9/1/2011, about 11.21p.m., the complainant reported to him that **'Gathee'** had raped her and robbed her. I am satisfied that even though the conditions were unfavourable to identification, the complainant was in a position to identify the appellant and she did identify him and that is why he was arrested the next day.

During the cross examination of the witnesses, the appellant alleged that the case was a frame up because of the grudge they had with him. However, the appellant never bothered to explain the nature of the grudge or the frame up. His defence was a mere denial. PW1, PW2

and PW3 all denied having had any dispute with the appellant before and I am satisfied that no dispute existed between the complainant's family and the appellant as none was alluded to. The appellant was charged with the offence of defilement in Criminal Case 1285/2011 (CRA 161/11) but so far there is no evidence that that case is related to this one at all.

The appellant complains that relevant and material witnesses were not called. Under **Section 143** of the **Evidence Act,** there is no specific number of witnesses required to prove a fact. It means that even one witness can be sufficient to prove a fact. The appellant contended that PW1 testified that some boys arrested him but the said boys were never called as witnesses and therefore the court should draw an adverse inference that had the boys been called, their evidence would have been adverse to the prosecution case. In **Ahmed Ramson v Rep [1955] EA,** the court said:-

"It is the burden of the prosecution to avail all the material evidence to the court to enable the court arrive at a fair and impartial decision. The prosecution must summon all the material witnesses and avail or furnish the court with all facts even those whose evidence may have been unfavourable for it."

See the case of **Patrick Kamwara v Rep.** 305/2010.
See also **Bukenya & Others v Uganda** [1972] EA 549.

PW1 told the court that the appellant was arrested by some boys and was taken to her home on 11/1/2011. PW4, PC Yator who re-arrested the appellant on 11/1/2011, said that members of public arrested the appellant. PW4's evidence corroborates that of PW1 as to how the appellant was arrested. The members of public merely arrested the appellant and they would not have adduced any useful evidence in regard to how the offence was committed. The only witness to the offence is the victim (PW1). Calling the members of public would not add any value to the prosecution evidence.

No doubt the complainant was raped. Soon after the ordeal, she went back to PW2's house who saw that she was injured on the face and had her trouser in her hand. PW7 also corroborated her evidence that after PW1 made the report, he went with her to the scene where they recovered her shoes, some money, pants and one earring. PW1's evidence was further corroborated by the Doctor's evidence who confirmed that she had injuries on the face, neck, injuries to her private parts and the pregnancy test was positive. The Doctor confirmed that there was penetration. The violence meted on the complainant supports the fact that the offence was committed on her.

The medical evidence could not directly link the appellant to the offence because this was a gang rape. No specimens were taken to the Government Analyst for further examination. Despite that, there was sufficient evidence on which a court could found a conviction. The appellant had been charged with an offence of robbery with violence for which he was acquitted. Although the trial court believed that the appellant was identified by PW1, it is surprising that she made a finding that the appellant did not rob the complainant. However, since the prosecution did not warn the appellant that this court could consider the charge of robbery with violence, I will not consider that charge.

After carefully analyzing the evidence on record, I come to the conclusion that it is the appellant with another not before the court, who raped the complainant and the trial magistrate did arrive at the correct finding. I find that the conviction is safe and I hereby confirm it. Under **Section 10** of the **Sexual Offences Act**, a person convicted thereunder is liable to imprisonment for not less than 15 years which can be enhanced to life imprisonment. In this case, the trial court considered the fact that the appellant had been convicted of a similar offence and enhanced the sentence. I confirm the sentence.

DATED and DELIVERED this 23rd day of January, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Appellant in person

Ms Idagwa for the State