



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 27 of 2011

PAUL NDUNG'U NJOROGE..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3970 of 2009 of the Chief Magistrate's Court at Makadara by T.N. Ngugi – Principal Magistrate)

J U D G M E N T

PAUL NDUNG'U NJOROGE, the appellant herein, was convicted on one count of **Gang Rape** contrary to **Section 10 of the Sexual Offences Act**. He was then sentenced to life imprisonment.

In his appeal to the High Court, the appellant has raised 3 issues, which can be summarised as follows;

- (1)The prosecution totally failed to prove the case beyond any reasonable doubt.***
- (2)The analysis of the blood stains obtained from the scene of crime exonerated the appellant.***
- (3)The trial court failed to give due consideration to the defence.***

As far as the appellant was concerned, the conviction was not based on sound evidence. If anything, the appellant believes that the evidence led by the prosecution left gaping holes in the case.

Secondly, the blood stains that were found on the complainant's clothing did not match the appellant's blood group. The complainant had blood group 'O', whilst the appellant had blood group "AB".

The analysis found blood groups 'O' and 'A'. He did not find any sample from blood group "AB" on the complainant's clothing.

The appellant contended that the said analysis effectively exonerated him from the offence.

Having been thus exonerated the appellant argued that the scientific evidence showed that the complainant was not a credible witness.

It was the appellant's further contention that the scientific evidence lent credence to his defence. His said defence was that the complainant had simply fabricated the story against him after he had divorced her.

In answer to the appeal, Ms Maina, learned state counsel, submitted that the evidence on record was sufficient to sustain conviction and sentence.

The respondent summarised the evidence, concluding that the complainant was an honest and truthful witness, who was firm during cross-examination.

The respondent also pointed out that the appellant did not raise with the complainant the allegations of fabrication of evidence by the complainant after she had been divorced.

Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions from the evidence. However, I have made an allowance for the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they testified.

PW 1 is the complainant. She testified that she heard a knock on her door, at about midnight. When she inquired who was at the door, the answer was “Paul or Baba Wairimu.”

PW 1 had known the said person, as he used to be her neighbour.

Paul wanted **PW 1** to help him take his wife to hospital. **PW 1** opened the door and found the appellant, Paul, outside.

At that time, the lights were on. In effect, it was not dark.

PW 1 talked with the appellant for a little while, and she then accompanied him to where the appellant said his wife was.

But when **PW 1** and the appellant got outside the gate, the appellant strangled **PW 1**. He then lifted up **PW 1** and placed her on his shoulders.

As the appellant was holding her neck, **PW 1** could not scream.

The appellant carried **PW 1** to the railway line nearby. It is there that he raped her.

The appellant's colleague, who had been standing guard, also raped **PW 1**. When the colleague was through, the appellant raped her again.

When **PW 1** tried to scream the appellant hit her on the mouth until her incisors became loose.

The appellant and the colleague abandoned **PW 1** at the scene. She could not move for awhile. But when she regained some strength, **PW 1** went back home.

The next day, she reported the incident at Githurai Kimbo Police Station. She was then treated at the Nairobi Women's Hospital.

Later, **PW 1** led the police to arrest the appellant.

When asked why she opened the door for the appellant, **PW 1** said that it was because she had known the appellant for 2 years. She also knew his wife well.

PW 2 was at the Githurai Kimbo Police Station when **PW 1** reported the incident. He is the police officer who recorded the report. He then referred **PW 1** to the Nairobi Women Hospital.

He was also the Investigating Officer. He recovered the appellant's underwear and the complainant's petti-coat and underwear. All 3 items were sent to the Government Chemist for analysis.

By the time when **PW 2** testified, the report from the Government Chemist was not yet

ready. However, **PW 2** was confident that the Government Analyst would confirm that the appellant committed the offence.

PW 3 is the Government Analyst. He analysed blood samples of the complainant (**PW 1**) and of the appellant. The complainant's blood was of group "O", whilst the appellant's blood was of group "AB".

PW 3 found seminal stains and few deteriorated spermatozoa on the complainant's underwear. But the seminal stains were insufficient for secretor grouping.

The blouse of **PW 1** was moderately stained with human blood of group "A".

It was the evidence of **PW 3** that the seminal stains and spermatozoa showed that **PW 1** had had sexual activity.

PW 4 was a medical doctor at the Nairobi Women Hospital. He did not personally examine the complainant. However, he produced the medical report on behalf of Dr. Muhombe, who used to be his colleague. Dr. Muhombe was unwell at the time when **PW 4** testified on her behalf.

The medical examination revealed that **PW 1** had bruises on her neck. Her upper and lower incisors were loose. Her left upper arm was tender and bruised. Her lower back was bruised and tender. She had supra-pubic tenderness.

The diagnosis was Sexual Assault/Physical Assault.

PW 5 is a medical doctor. He examined both the complainant and the appellant.

He found that **PW 1** had loose incisors in her central upper and lower jaws. She also complained of pain on the lower right lateral chest wall.

Both **PW 4** and **PW 5** found the external genitalia of **PW 1** to be normal. In other words, **PW 1** had no injuries to her genitalia.

When **PW 5** examined the appellant, he found that the appellant's genitalia was also normal. He had no injuries.

PW 6 was the arresting officer. He testified that the appellant had gone underground after committing the offence. The police looked for him night and day, and eventually arrested him after 3 days.

PW 6 confirmed that it was **PW 1** who led the police to arrest the appellant.

When the appellant was put to his defence, he gave an unsworn testimony. He said that he married **PW 1** in 2006.

However, when he learnt that she used to smoke bhang, the appellant left **PW 1**. He then married another lady.

According to the appellant, **PW 1** used to abuse his wife.

On the material night, the appellant was drinking at Mayu Bar in Githurai Phase 5, when **PW 1** arrived and drank his beer. Thereafter, **PW 1** is said to have quarreled and then fought with her partner. The 2 of them were thrown out of the club.

As far as the appellant was concerned, **PW 1** framed him when he failed to show them where Kariuki could be found. The said Kariuki is said to be the complainant's partner, whom she fought with on the material night.

In a nutshell, the appellant completely denied having committed the offence.

Having re-evaluated all the evidence on record, I find that the complainant was definitely assaulted. She had physical injuries which were consistent with her evidence of sexual assault.

She testified that she had known the appellant prior to the incident. She had also known the appellant's wife.

However, she did not say that she used to be the wife of the appellant. She said that they were neighbours.

In my considered opinion, if indeed **PW 1** had been the wife of the appellant at some point in time, the appellant would have put those suggestions to **PW 1**, during cross-examination. Instead, the appellant waited until he was put to his defence, to suggest that **PW 1** had been his wife, previously. That step by the appellant denied the complainant any opportunity to comment on the appellant's evidence. In effect, the said line of defence constituted an after-thought.

PW 1 testified that there was light which was on at the time she opened her door. She not only saw the appellant, but the 2 of them had a discussion concerning the appellant's wife. The complainant then walked from her door upto the gate, in the company of the appellant.

During that entire process, **PW 1** had ample opportunity to recognise the appellant. The circumstances prevailing were conducive for positive identification.

When they reached the gate, the appellant suddenly turned aggressive. He grabbed **PW 1** by her neck, and lifted her up.

The doctors who examined **PW 1** later, verified the injuries occasioned to her neck.

From the clothing of the complainant, there were clear pieces of evidence of a sexual activity. These are in the nature of seminal stains and spermatozoa. But the quantities of those stains were too small to be classified.

Meanwhile, when the blood stains on the clothing were analysed, it was found that the appellant's blood was not there.

So, if the appellant was positively identified by the complainant, how is it possible that his blood sample was not detected on the complainant's clothing. Did not the evidence of the Government analyst actually exonerate the appellant, as he submitted?

In my considered view, the evidence of the Government Analyst cannot be said to have exonerated the appellant.

It is true that the Government Analyst did not directly link the appellant to the offence. However, such an omission cannot, of itself, be construed to mean that the appellant was actually exonerated by that witness.

Nowhere was the Government Analyst asked whether or not his analysis exonerated the appellant. He therefore did not testify that the appellant was exonerated.

Dr. Kamau (**PW 5**) testified that the appellant had no injuries. That would explain why his blood stains were not found on the complainant's clothing.

The blood stains which were of blood group AB, possibly belonged to the appellant's accomplice. According to **PW 1**, the accomplice of the appellant was killed by a mob, in a robbery attempt. It was for that reason that the said accomplice was not arrested.

It is noteworthy that the appellant appeared to confirm that fact when he said;

“The other one died at the police station.”

It is equally noteworthy that the learned trial magistrate found the complainant to have been honest and truthful. I have found no reason, in fact or in law, to disagree with that assessment of the complainant. And there is no doubt from the record that the complainant did not contradict herself.

In the event I find that the evidence adduced by the prosecution was consistent, corroborative and sufficient to prove the offence with which the appellant was convicted.

As regards the sentence, I find that the same is lawful. Accordingly, I find no reason to interfere with it.

The appeal is dismissed. I uphold both the conviction and the sentence.

Dated, Signed and Delivered at Nairobi, this 25th day of February, 2013.

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FRED A. OCHIENG
JUDGE