REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 712 OF 2010

DANIEL NDUNG'U MWITHI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1769 of 2010 in the Chief Magistrate's Court at Thika – Mrs. L. Wachira (SRM)

JUDGMENT

1. **Joseph Gitau Gathoni,** the appellant herein was tried and convicted for the offence of rape contrary to **Section 3(1)(a)** as read with **sub section (3)** of the **Sexual Offences Act**.

2. The brief particulars were that, on the 28th April 2010 at Kiandutu slums in Thika District, the appellant in association with another not before court committed an act which caused penetration with J W K. In the alternative the appellant was charged with indecent act with an adult contrary to **section 11(6)** of the **Sexual Offences Act.**

3. Upon conclusion of the trial the learned trial magistrate sentenced the appellant to 17 years imprisonment on the main count. The appellant appealed against conviction and sentence on grounds that he was not identified at the scene, that the burden of proof was not discharged and that the charge sheet was defective.

4. Mr. Kadebe, the learned state counsel in answer to the grounds of appeal, stated that on identification there was enough evidence to place the appellant at the scene, and that he was caught in the act. On the burden of prove the learned state counsel contended that sufficient evidence was adduced to satisfy all requirements in a criminal trial and that the determination of guilt was proper. On the defect in the charge sheet, the learned state counsel urged the court to invoke **Section 382** of the **Criminal Procedure Code** and substitute the proper section of the law.

5. I have scrutinized and reassessed the evidence to make my own findings and draw my own conclusions. In doing so I gave allowance for the fact that I neither saw nor heard the witnesses as they testified.

6. On identification **PW1**, J W K stated that she saw two assailants, and that there was sufficient light from the moon to identify them. She recognised and identified them by their names as

Ndung'u and Kioko *alias* Kokoti. She also knew their homes and their parents. In her testimony she stated thus:

> **"When they came in I knew and recognized them.It was Ndung'u and another called Kioko alias Kokoti.I knew both of them well and they are both residents of Kiandutu. I know the parents of accused and even Kioko's**".

7. **PW2**, S K K a brother to the complainant corroborated the complainant's evidence stating that he heard the complainant's screams at 1.00 a.m. on 28th April 2010 and heard her door being banged. When he came out of his house he could see those who were dragging his sister away because there was moon light and light from Juja Consolidated Ltd. He rallied the other neighbours for help and they responded. They searched in the direction where **PW2** had seen the two men dragging the complainant and they came upon the appellant in the act of raping the complainant. **PW2** recognised the appellant as a person known to him as Daniel Ndung'u and who lived in Kiandutu.

8. The appellant fled from the scene but was chased and arrested by those who had come to the scene. The appellant was found in the act of raping the complainant and the issue of mistaken identity does not therefore arise.
9. The appellant has cited the English case of **Republic vs Turnbull [1976] 3 All ER 549**, in his bid to convince the court that the evidence of identification could not pass the litmus test. The guidelines in Turnbull included testing the evidence to establish.

> **"....how long the witness had the accused under observation?In what type of light?At what distance? etc...."**

10. I am mindful of the fact that recognition may be more reliable than identification of a stranger and that mistakes can sometimes occur even in recognition of close relatives and friends. In the case before me the evidence shows that the assailants dragged the complainant from her house to some bushes said by **PW2** to be notorious as a scene where victims are taken to be raped. The two assailants took time to argue before her as to who would rape her first and all this time they did not cover their faces nor hers.

11. She was made to lie down and during the act of raping her, their faces had to be in close proximity to her. I therefore find that the time for the observation was sufficient, the night was moonlit as stated by both **PW1** and **PW2** and the appellant was a person well known to her. The appellant contends that there was no light in the complainant's house hence the need for the torch, but the record shows that the sojourn in the house was only momentary as most of the time with the complainant was spent outside the house where there was light.

12. **PW6**, Dr. Marcy Igambo of Thika District Hospital confirmed to the court that there was evidence that the complainant had been raped.

13. I considered the appellant's evidence in light of the other evidence on record. His unsworn testimony was that he was accosted by two men as he was on the way to rescue his mother who was shouting for help. The two men beat him unconscious. He later woke up at Thika District Hospital. He denied the offence.

14. The story however, appears to be contrived and far fetched. It is difficult to believe that some passersby just descended on him and beat him unconscious for no reason. My conclusion is that the appellant sustained the beating in the circumstances described by the prosecution witnesses and not in the manner he has stated.

15. Lastly, on the issue of the charge sheet being defective, I find that the appellant was charged and convicted under **Section 3(1) (a)** as read with **sub-section (3)** of the **Sexual Offences Act**. The offence was however, described as **"gang rape"** and the particulars were those of committing the

act of penetration in association with another. The proceedings indicate that the appellant, at all times, knew the charge against him and the particulars thereof. In my view therefore, he was not prejudiced by the error in the section quoted.

16. This court can substitute the proper section being **Section 10** of the **Sexual Offences Act** without occasioning any prejudice to the appellant by virtue of the provisions of **Section 382** of the **Criminal Procedure Code**.

17. **Section 382** of the **Criminal Procedure Code** provides in part as follows:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

18. **Section 10** of the **Sexual Offences Act** provides for a sentence of not less than 15 years imprisonment upon conviction. The appellant herein having been sentenced to 17 years imprisonment is serving a sentence that is well within the provisions of **Section 10** of the **Sexual Offences Act**. I therefore find no reason to interfere with the sentence.

19. After a careful analysis of the evidence on record, I find that the evidence adduced by the prosecution was sufficient to prove the guilt of the appellant beyond reasonable doubt. The conviction was founded on a sound basis and the sentence imposed was lawful.

The appeal is therefore lacking in merit and is dismissed in its entirety.

SIGNED DATED and **DELIVERED** in open court this **13th day** of **June 2013.**

L. A. ACHODE

JUDGE