REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO.204 OF 2010

(Consolidated with Criminal Appeal No.205 of 2010)

NICHOLAS MAKAU NZIOKA.. 1ST APPELLANT

JAMES KIOKO MWENDO ………………………………………………. 2ND APPELLANT

VERSUS

REPUBLIC ....PROSECUTOR

From original conviction and sentence in Criminal Case No. 384 OF 2008 at the Resident Magistrate's Court at Karaba by Hon. E.K. NYUTU – SRM on 2/12/2010

J U D G M E N T

NICHOLAS MAKAU NZIOKA & JAMES KIOKO MWENDO the 1st and 2nd Appellants respectively were charged with the following offences;

COUNT 1

GANG RAPE CONTRARY TO SECTION 10 OF SEXUAL OFFENCES ACT 2006

The particulars as stated in the charge were as follows;

> **NICHOLUS MAKAU NZIOKA**: **On the 14th day of November 2008 in Mbeere District within Eastern Province in association with others not before Court gang raped PWN.**

ALTERATIVE CHARGE

INDECENT ACTS WITH AN ADULT CONTRARY TO SECTION 11(A) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006

The particulars as stated in the charge were as follows;

> **NICHOLUS MAKAU NZIOKA**: **On the 14th day of November 2008 in Mbeere District within Eastern Province unlawfully and indecently assaulted PWN by touching her private parts.**

COUNT II

GANG RAPE CONTRARY TO SECTION 10 OF SEXUAL OFFENCES ACT 2006

The particulars as stated in the charge were as follows;

> **JAMES KIOKO MWENDO: On the 14th day of November 2008 at in Mbeere District within Eastern Province in association with others not before Court gang raped PWN.**

ALTERATIVE CHARGE

INDECENT ACTS WITH AN ADULT CONTRARY TO SECTION 11(A) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006

The particulars as stated in the charge were as follows;

> **JAMES KIOKO MWENDO: On the 14th day of November 2008 in Mbeere District within Eastern Province unlawfully and indecently assaulted PWN by touching her private parts.**

COUNT III

ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE

The particulars as stated in the charge were as follows;

> **JAMES KIOKO MWENDO: On the 14th day of November 2008 in Mbeere District within Eastern Province in association with others not before Court unlawfully assaulted SNM thereby occasioning him actual bodily harm.**

The matter proceeded to full hearing and the Appellants were convicted and sentenced to thirty (30) years imprisonment each for gang rape and five (5) years each for assault causing actual bodily harm. The order was for sentences to run concurrently. The Appellants were aggrieved by the Judgment and have appealed against both conviction and sentence, raising the following common grounds;

1. ***The learned trial Magistrate erred in law and fact in convicting despite the fact that the Prosecution failed to address the issue of light at the locus quo bearing in mind that the incident was allegedly committed at night, at a secluded mace and out of earshot of ordinary mwananchi.***
2. ***The learned Magistrate erred in law and facts in relying upon the medical report adduced by PW4 to the effect that the infection supposedly found with the Appellant/complainant as proof that there was sexual intercourse between them to be erroneous since such infections can be prevalent in an area and any commercial sex worker can infect her client with the same.***
3. ***The learned Magistrate erred in law and facts in concluding that the presence of spermatozoa proved an act of rape without considering that PW1 was married and the possibility of the same belonging to her husband could not be dispelled except through a D.N.A. test.***
4. ***That the trial Magistrate erred in law and facts in disregarding the fact that some suspects, to wit the one who allegedly led to the Appellants arrest were left to escape in dubious circumstances.***
5. ***That the trial Magistrate erred in law and facts in failing to find that the alleged demeanor at the scene was totally unbelievable as no same person intending to commit such an act would abduct a victim on the road, chase away her husband, take her to her own house and raped her for hours with the police post being less than 1 kilometer away.***
6. ***That she erred in law and facts in putting reliance upon inconstant and contradictory Prosecution evidence.***

The Prosecution case was that on 14/11/2008 at 9pm at Karaba market PW1 and her husband PW3 had escorted some two (2) guests from their house to the market. After parting ways with the guests they

were confronted by four young men whose names they gave as Niko, Kasee, Ayoo and Karu. The young men beat them and PW1 was dragged to her house from where they raped her in turns. PW3 was prevented from entering the house by being beaten and thrown stones at. When one finished raping PW1 he would go to the door to keep guard. PW5 (an officer and neighbour) came and arrested one Kaluu who he actually found raping PW1. The others ganged up against PW5 until Kaluu escaped. A report was made that night leading to the arrest of 1st and 2nd Appellant and Kaluu. It's alleged the said Kaluu escaped again.

PW1 was examined and it was confirmed that she had been raped (EXB3). 1st and 2nd Appellant were also examined and it was found that the urine analysis showed yeast cells similar to those found in PW1 (EXB6 & 7). Medical evidence by PW6 also confirmed that PW3 had been assaulted (EXB 8).

The 1st Appellant in his unsworn defence denied the offence saying he was arrested while in the 2nd Appellant's house where they had gone to sleep after doing some casual work upto 3am. They found PW3 and Kaluu handcuffed by police officers.

The 2nd Appellant sworn said he had met Cpl Kirui with whom he had issues and he ran away that night and went to the shamba. He worked well with the 1st Appellant at the shamba. Later they went to rest. At 2.30am they heard a commotion. They were arrested by police officers who had handcuffed Kaluu. Later Kaluu escaped. They were then taken to the Hospital for examination over allegations of raping a woman.

When the appeal came before me for hearing the Appellants presented the Court with written submissions expounding on their grounds. The State opposed the appeals saying they were well identified and both were shown to have had a common intention. She further submitted that the medical evidence confirmed that it was them who had raped the complainant. PW1 did not consent to their acts. And they had also assaulted PW3 who tried to rescue PW1.

This Court being a 1st appeal Court has the duty of re-evaluating and re-considering the evidence on record and make its own conclusions. I am alive to the fact that I did not see or hear the witnesses. The Court of Appeal in the case of ***CHARO –V- REPUBLIC [2007]1 E.A. 43*** held thus;

> ***"This being a first appeal, the Court had a duty to re-evaluate the evidence, draw its own conclusions, without of course ignoring the findings and conclusions of the trial Court".***

I have therefore considered the submissions by the Appellant and the State. I have also considered the grounds of appeal. I have equally re-evaluated the evidence on record.

PW1 and PW3 appear to have known their attackers well and whose names they gave as 1. NIKO, 2. KASEE, 3. AYOO ad 4. KARU. These appear to be nicknames. PW1 did not identify the Appellants by these nicknames. But PW3 identified 1st Appellant as NIKO and 2nd Appellant as KASEE. The rest of the evidence appears to flow so well i.e. common intention, penetration, unlawfulness of the act (lack of consent); association with others.

Ground No.1 of the appeal is quite disturbing. This is the ground again;

1. ***The learned trial Magistrate erred in law and fact in convicting despite the fact that the Prosecution failed to address the issue of light at the locus quo bearing in mind that the incident was allegedly committed at night, at a secluded place and out of earshot of ordinary mwananchi.***

This incident took place at 9pm or thereabouts. Throughout the evidence PW1 and PW3 have not mentioned anywhere what enabled them to identify the Appellants and others. PW3 explained one by one how the Appellants and others raped her. She does not say if there was any light in their house or not, or what enabled her to see who was doing what. The trial Court failed to make an inquiry into this very

important piece of evidence.

The Court of Appeal in the case of ***WANJOHI AND TWO (2) OTHERS –VS- REPUBLIC [1989] KLR 415*** stated thus;

1. ***Recognition is stronger than identification but an honest recognition may yet may be mistaken.***
2. ***The vital question upon which there is special need for caution is the correctness of identification.***

And in ***WAMUNGA –V- REPUBLIC [989] KLR 424*** it states as follows;

1. ***" Where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.***
2. ***Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made".***

In the case of ***KARANJA & ANOTHER [2004]2 KLR 140*** the court of appeal held thus;

1. ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.***
2. ***Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.***
3. ***Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made".***

To buttress the fact that light was lacking is the evidence of PW5 at page 48 lines 18 to page 49 lines 1-2;

> ***"I entered the house and found one man in the act of having sex with the wife of the complainant. I had a torch. I shone the torch on him and clearly saw him. I tried to arrest him and he struggled with me."***

PW5 would not have had to use his torch if there had been light in that house. And the person he says he found having sex with PW1 is Kaluu who is not one of the Appellants. That is the only person he identified with the torch light. The said Kaluu led them to the Appellants but he escaped. Inspite of the strong evidence that seems to be there I do find the identification of the Appellants to have been made in questionable circumstances. Having dealt with that ground and come to the above finding I see no need of dealing with the other grounds.

The result is that the appeal is allowed. The conviction on count 1, count 2 and count 3 are all quashed and the sentences set aside. Both Appellants to be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ingahizu for State

Both Appellants

Njue – C/c