



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 237 OF 2010

**W.I .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

The appellant, with another, who was however acquitted after trial, was charged two criminal offences. In the first count, he was charged with the offence of **rape** contrary to **Section 5(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the night of 8<sup>th</sup> and 9<sup>th</sup> March 2009 in Kakamega District, the appellant, jointly with others not before court, unlawfully inserted his genital organ namely penis to the genital organ of J.M namely vagina a woman aged 29 years old without her consent.

The appellant was further charged with the offence of **burglary** contrary to **Section 304(2)** and **stealing** contrary to **Section 279(b) of the Penal Code**. The particulars of the offence were that in the same night and in the same place, the appellant, jointly with others not before court, broke and entered into the house of J.M with the intent to steal and did steal one television set make Sanyo, solar panel 25 watts, torch, various farm produce and household goods as listed in the charge sheet all valued at KShs.36,050/=, the property of J.M. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the appellant was convicted on both counts. In respect of the first count the appellant was sentenced to serve ten (10) years imprisonment. In respect of the second count the appellant was sentenced to serve two (2) years imprisonment on each limb of the crime. Both sentences were ordered run concurrently.

The appellant was aggrieved by his conviction and sentence. He lodged an appeal to this court. In his petition of appeal, the appellant raised four (4) grounds of appeal challenging the decision of the trial magistrate to convict and sentence him. He was aggrieved that he had been convicted on the evidence of the prosecution that was wanting and contradictory. He took issue with the fact that he had been convicted after the trial magistrate had ignored his defence. He faulted the trial magistrate for not taking into consideration his mitigation before sentencing him. He was aggrieved that the sentence that was imposed on him was excessive in the circumstances. In the premises therefore, the appellant urged the court to allow his appeal, quash his conviction and set aside the sentence.

At the hearing of the appeal, this court heard oral submissions made by Mr. Elungata on behalf of the appellant and Mr. Orinda on behalf of the State. The thrust of Mr. Elungata's submission was that the victim of the crime had not properly identified the appellant. It was the appellant's case that the circumstances under which the crime took place were not conducive for positive identification. This is because the crime took place at night. The source of light that the victim is alleged to have used to identify the appellant was not sufficient to enable such an identification to be made. Mr. Elungata submitted that there was conflicting evidence of identification between the various witnesses who were

called by the prosecution. In particular, he took issue with the fact that the trial court had ignored the evidence that the appellant had adduced with his defence. He explained that the appellant was not examined to confirm whether or not he was HIV positive since the victim had claimed that she was HIV positive. Counsel submitted that taking into consideration the distance between the home of the appellant and that of the victim of the crime, it could not be possible that the appellant had committed the crime. He urged the court to take into consideration the totality of evidence adduced and reach a finding that the prosecution had failed to establish its case against the appellant to the required standard of proof.

On his part, Mr. Orinda for the State submitted that the prosecution had established its case against the appellant to the required standard of proof. He submitted that the victim of the crime had given evidence on how she had positively identified the appellant during the commission of the crime. She identified the appellant by name. The sexual assault took a long time. The victim was raped repeatedly. He submitted that the trial magistrate believed the victim of the crime was telling the truth when she testified before the court. He maintained that the fact that the appellant was not tested to determine his HIV status did not prejudice the prosecution's case. He urged the court not to disturb the finding made by the trial magistrate and proceed to uphold the same.

This is a first appeal. As the first appellate court, this court is aware of its duty. As was held by the Court of Appeal in **Njoroge vs. Republic [1987] KLR 19** at page 22:-

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (See **Pandya vs. R [1957] EA 336, Ruwala vs. R [1957] EA 570**).”*

In the present appeal, the issue for determination by this court is whether the prosecution established its case on the two counts that the appellant was charged with to the required standard of proof beyond any reasonable doubt.

What are the facts of this case? According to J.M (the complainant), on the nights of 8<sup>th</sup> and 9<sup>th</sup> March 2009, she was asleep in her house in Kakamega District. In the house, she was with her three (3) young children aged between 9 years and 1 year. At about 3.00 a.m., she was woken up by something knocking behind her house. She got out of her bed and went to investigate. She used a torch as a source of light. She checked on her cow and found that it was okay. She went back to her bedroom. When she entered the door to her bedroom she was shocked to find that two men had already entered the house. The two men were armed with a panga and had a torch. The complainant knew the two men by name. She identified them as Ibwaka (the appellant) and Jared Roy, a suspect who is still at large. The complainant testified that the two men ordered her to lie down. The appellant ordered her to remove her pants. The complainant told the applicant not to rape her because she was HIV positive. The appellant told the complainant that he would rape her even if she was HIV positive.

During this conversation, the appellant and his accomplice had put a panga on the neck of the complainant. The complainant explained that she was unable to scream to raise alarm because of this threat to her life. The complainant testified that the appellant and his accomplice raped her in turns for over forty five (45) minutes. During this period, the man not raping her was busy removing items from her house which included a Television set (Sanyo), a solar panel (25 watts), a Nokia 1200 mobile phone and various farm produce. The complainant was emphatic that she was able to positively identify the appellant by light of the torches that the appellant was using.

After the ordeal, and after the assailants had run away, the appellant screamed. Neighbours came to her rescue. They were able to recover cushions and radios which the assailants had thrown on the way. The complainant went to Kakamega General hospital where she was attended to by PW6 Francis Wasike, a clinical officer based at the said hospital. He confirmed that the complainant was indeed raped. He observed that there was spermatozoa in her vagina. PW6 observed that he had seen the complainant seven

hours after the rape incident. The P3 form and the post rape care form which was filled by PW6 were produced in evidence by the prosecution. The complainant reported the incident to the police at Kabras police station. PW5 PC Moses Mwangi was assigned to investigate the case. After concluding investigation, he arrested the appellant and charged him with the offences that he was convicted with.

When he was put on his defence, the appellant denied raping or stealing from the complainant. The appellant and his co-accused in the subordinate court called a total of nine (9) witnesses whose evidence basically related to the circumstances of the arrest of the appellant and his co-accused. The thrust of the appellant defence was that he could not have committed the offences because he lived some distance from the home of the complainant. However, when he introduced himself to the trial court when he was put on his defence, he told the court that he came from (*particulars withheld*) area.

Having carefully considered the rival submission made by counsel for appellant and learned counsel for the State, it was clear from the evidence that the case will turn on whether the complainant identified the appellant during the incident. The testimony of the complainant is that of a single identifying witness made in difficult circumstances. This court is aware that in such circumstances it must warn itself of the danger of relying on the evidence of a single witness without any other corroborating evidence. In **Maitanyi vs. Republic [1986] KLR 198** at page 200, the Court of Appeal held as follows:

*“Although the lower courts did not refer to the well known authorities **Abdulla Bin Wendo & Another vs. Reg (1953) 20 EACA 166** followed in **Roria vs. Rep (1967) EA 583**, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-*

*“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilty, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”*”

In the present appeal, although the appellant stated that the complainant could not have identified her during the sexual assault, having re-evaluated the evidence, and taking into account the period that the sexual assault occurred, this court finds the evidence of the complainant in regard to how she identified the appellant to be credible. The appellant was not a stranger to the complainant. In fact the complainant knew the appellant by name. They came from the same village. During the sexual assault the complainant was able to see the appellant by the light of the torch. The complainant spoke with the appellant. They even discussed the issue of whether or not it would be safe for the appellant to have sex with the complainant, the complainant having told the appellant that she was HIV positive. Although the evidence of the complainant is that of a single identifying witness, this court is of the view that the evidence of the complainant was that of recognition. The complainant recognized the appellant. During her testimony, she referred to the appellant by name. From the time of the sexual assault and the theft, the complainant's story has been consistent. The medical evidence adduced by the prosecution established that indeed the appellant raped the complainant. The evidence adduced by the appellant in his defence did not dent the otherwise strong culpatory evidence that was adduced by the prosecution witnesses.

The upshot of the above reasons is that the appeal filed by the appellant lacks merit and is hereby dismissed. The appellant was positively identified by the complainant as the person who raped her. Although the property which was stolen from the complainant was not recovered in the possession of the appellant, it was clear from the evidence adduced that it took three (3) months from the date of the incident before the appellant was arrested. During this period, the appellant may have disposed off the said property. This court finds no reason to interfere with the sentence that was imposed by the trial court. Both sentences that were imposed were legal. The conviction and the sentence of the trial magistrate is hereby confirmed.

It is so ordered.

**L. KIMARU**  
**JUDGE**

**DATED, DELIVERED and COUNTERSIGNED at KAKAMEGA this 23<sup>rd</sup> day of FEBRUARY 2012.**

**S. CHITEMBWE**  
**JUDGE**