REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 329 OF 2010

ISAAC ONGERI…….…….....APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(An Appeal from original conviction and sentence in Naivasha S.P.M.CR.C.NO.827 of 2010 by Hon T. W. C. Wamae, Senior Principal Magistrate, dated 27th October, 2010)

JUDGMENT

The appellant was charged in the court below with:

i) **rape** contrary to **Section 3(1)(a)** of the **Sexual Offences Act No.3 of 2006;**

ii) **grievous harm** contrary to **Section 234** of the **Penal Code.**

According to the particulars of the offences, the appellant is alleged to have committed the offences on 7th day of April, 2010 at Lisirwa Sub-location, Kiambogo Division, Naivasha District within Rift Valley Province when it is said that he unlawfully had carnal knowledge of the complainant without her consent.

The complainant told the trial court (R.W.C. Wamae, SPM) that she knew the appellant and that she used to see him at Kongasis Trading Centre; that she had seen him at the trading Centre for 5 years but she did not know his name. She told the court that on 7th April, 2010 at 9.30a.m., the appellant stormed into her house and slapped her before raping her for about 15 minutes. She told the court that she screamed once and that the appellant strangled her to prevent her from screaming. She also told the court that she was injured on the back, right leg, on the hip and that she felt pain while going for a short call.

After the ordeal and as she came out, the appellant's mother attacked her with stones and threatened to kill her if she did not leave that area. Her screams attracted P.W.2, Charity Muthoni Mwangi (Muthoni) who came to her assistance. She reported the matter to Kiambogo police post after which she was treated at Gilgil Hospital by P.W. 3, Dr. Brenda Onkunya. Later she also reported the matter at Gilgil Police Station where she recorded her statement.

In her evidence, Muthoni said that she saw the appellant and his mother retreating from the complainant's home. The complainant informed her that she had been attacked and raped by the appellant.

According to the doctor, the complainant complained of pain on the head, back, private parts, hip and could not hold urine. The doctor approximated the age of the injuries to be 3 days. The doctor, however,

noted that the complainant had no injury on the outer genitalia but she had lacerations on the lower part of her vagina. Laboratory test confirmed presence of spermatozoa.

Three days after the alleged offence, the appellant was arrested and charged.

In his unsworn evidence the appellant denied committing the offence for which he was tried arguing that the complainant framed him up because of a land dispute between his mother and the complainant which dispute had been resolved in the mother's favour by the elders and the chief. The complainant was not satisfied and warned the appellant that she would teach him a lesson. Indeed on 11th April, 2010 he was arrested and charged.

The appellant's witness, D.W.2 Kenneth Toroitich, the chairman of Community Policing confirmed that there was a land dispute between the two families; that the complainant was not pleased with the chief's decision but declined to go to the District Officer (D.O.) for the determination of the dispute.

The learned trial magistrate considered the foregoing evidence and found that it proved beyond reasonable doubt the offence of **rape** contrary to **Section 3(1)(a)** of the **Sexual Offences Act No.3 of 2006** and upon conviction, sentenced the appellant to ten (10) years imprisonment. The charges of assault were dismissed.

The conviction and sentence aggrieved the appellant who, through counsel, has brought this appeal on the following condensed grounds:

i) the case was not proved;

ii) the learned magistrate ignored the appellant's defence;

iii) the complainant's evidence was not corroborated;

iv) medical evidence was inconsistent.

Counsel for the respondent conceded the appeal arguing that had the learned trial magistrate evaluated the evidence, she would have found that there was bad blood between the appellant and the complainant arising from a serious land dispute.

This court is obliged to consider the evidence on record afresh, bearing in mind the fact that it is only the court below that had the opportunity to observe the demeanor of the witnesses. There is no dispute that the appellant and the complainant knew each other; that as a matter of fact there had been between them a long-running land dispute.

The only question that fell for determination before the trial court and also in this appeal is whether the appellant unlawfully had carnal knowledge of the complainant without her consent. The complainant alleged that the appellant broke into her one-roomed house as she prepared a meal, forced her on the bed and raped her. This took about 15 minutes. She screamed once and the appellant strangled her preventing her from screaming more.

The doctor found that she had suffered multiple injuries, which in her view were 3 days old. She also noted that although the complainant did not suffer any injuries on the outer genitalia, there were lacerations on the lower part of her vagina. Presence of spermatozoa was also noted. Can the injuries and the presence of spermatozoa be attributed to sexual act by the appellant?

While I am persuaded that due to the difference between the appellant and the complainant the former in the company his mother went to the complainant's home where they assaulted her, it is however inconceivable and incredible that the appellant would have raped the complainant for 15 minutes with his mother waiting outside. P.W.2 who heard the complainant screaming only heard her crying out that she was being *"killed."* It is also not clear why the complainant went to three police stations (Kiambogo,

Elementaita and Gilgil) to report the incident. Her claim that she made the first report at Kiambogo Police Station was rejected by APC Samson Njoki. Even though the complainant knew the appellant's home it took her three days to take the police to arrest him.

In her evidence, the complainant said she only used to see the appellant at the trading centre and did not know his name, suggesting she did not know him well. She also denied that she had a land dispute with the appellant's mother maintaining that she did not know why the appellant attacked her. In her cross-examination, however, she conceded that she had previously made a report that the appellant's mother had assaulted her with a hoe on 3rd March, 2010, a month earlier.

The complainant claimed that after being raped, she bathed and washed her clothes before going to the police station and to the hospital. She told the trial court that she reported to the police at 3p.m., several hours after the alleged rape (at 9.30a.m.). The questions are why if she was raped, did she take a bath and wash her clothes – why did it take her that long to report to the police.

Regarding laceration to her genitalia, the doctor who examined her the following day after the alleged rape estimated the injuries to be three days old. As the appellant insisted, the complainant was a married lady, the laceration and the presence of spermatozoa may be attributed to the husband. The presence of spermatozoa *per se*, as has been stated in decided cases is not evidence of rape or penetration. See **Mwangi** V. **Republic** [1984] KLR Pg.595

Bearing in mind all these factors and in view of the bad blood, I find that the learned trial magistrate erred in failing to evaluate the evidence presented before her. I am convinced that due to the bad blood, the complainant exaggerated the attack on her. The learned trial magistrate ought to have given the appellant the benefit of doubt.

In the result this appeal is allowed. The conviction is quashed and sentence set aside. The appellant shall be set at liberty unless lawfully held.

Dated, Signed and Delivered at Nakuru this 17th day of July, 2012.

W. OUKO
JUDGE