IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 133 OF 2009

(From original conviction and sentence in Criminal Case No. 1038 of 2007 of the Chief Magistrate's court

at Nakuru – J. KINGORI, SRM)

DUNCAN NJUGUNA NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

DUNCAN NJUGUNA NGUGI, the appellant herein, was charged with the offence of rape contrary to **Section 3(1)** and (3) of the **Sexual Offences Act (SOA**). In the alternative, he was charged with the offence of indecent act with an adult contrary to **Section 11(1)** of the **SOA**. He was convicted of the alternative charge and sentenced to 10 years imprisonment. The appellant is aggrieved by the conviction and sentence and preferred this appeal on grounds that the magistrate erred by basing the conviction on evidence of a single identifying witness that lacked corroboration; that the court failed to consider the fact that the complainant, PW2, was his former wife; that the court did not consider the evidence of PW1 and his defence. In addition to the above, the appellant filed written submissions. Mr. Omwenga, of the State Law Office opposed the appeal. He submitted that the complainant explained in detail how the offence was committed, it was in broad daylight at 5.30 p.m. and the appellant was known to the complainant. He also submitted that the offence took place in the appellant's house and after a complaint was lodged, the complainant's clothes were recovered in the appellant's house. He also urged that the complainant's evidence was supported by the doctor's evidence that there was penetration without the complainant's consent and therefore the offence of rape was proved. Counsel urged that the sentence is lawful being the minimum sentence allowed under the law and the appeal lacks any merit and should be dismissed.

After carefully going through the record of appeal, I note that there is an obvious contradiction in the prosecution evidence as to when the alleged rape took place. The magistrate never addressed this glaring discrepancy in the dates nor did the state counsel notice it when opposing the appeal. The particulars of

the charge state that the offence was committed on 18/5/07 at Mangu Village. The alternative charge states that it was committed on 18/5/2007. The complainant in her evidence testified that the offence was committed on 18/5/2007. However, PW1, Dr. Philip Wainaina Kamau testified that he examined the complainant on 11/5/2007, for an offence of rape, which had allegedly been committed on 8/5/2007. The doctor's evidence tallies with that of PW3, PC Charles Njiru who testified that the complainant reported to him about the rape on 8/5/2007. In cross examination, PW3 maintained that the report was made to the police on 8/5/2007. The question then is when was the offence committed, if at all, was it on 8/5/07 or 18/5/07? The court record shows that the plea in this case was taken on 14/5/2007. The offence could not have been committed on 18/5/07 when the appellant had already been charged with the same. I note from the typed proceedings (court record) that the plea was taken on 14/5/2009 but the next mention is recorded as 31/5/2007. The date of '14/5/09' is an error as it does not tally with the handwritten record. The correct date of plea is 14/5/07. That being the case, it means that the charge was for an offence committed in future which was totally irregular. At the time the plea was taken, the charges to which the appellant purportedly pleaded to had not yet been committed and were non-existent. It is of concern that the trial magistrate did not realize that as of 14/5/07, the charge to which the appellant pleaded had not been committed because 18/5/07 had not yet reached. In my view, the appellant was tried for an offence yet to be committed and that amounts to a mistrial. In her judgment, the trial court found the appellant guilty of the offence committed on 16/18/5/2007. It was a mistrial. Since the complainant testified that she was raped on 18/5/07 and PW1 and 3 testified that the incident they were referring to occurred on 8/5/2007, then the prosecution evidence was totally at variance with the charge. It is likely that the witnesses were not talking about the same incident.

However, from my earlier findings, the appellant was tried and convicted for an offence allegedly committed after his arrest and that amounts to a mistrial and the court declares it as such. The court will not consider the merits of the appeal but order that the conviction be quashed and sentence set aside. The file is remitted back to the lower court for the appellant to be tried for the proper offence complained of before a different magistrate. Since this is an old matter, the matter be placed before the Chief Magistrate on 26/1/2011 for allocation forthwith and the hearing be given priority.

DATED and DELIVERED this 25th day of January, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:
Appellant present – in person.
Mr. Nyakundi for the state.
Kennedy – Court Clerk.