



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 117 OF 2009

JOHN MAINA KARIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL CASE NO. 131 OF 2009

JACKSON KAREGWA MAGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being Appeals from the original conviction and sentence by T.W. Murigi, Senior Resident Magistrate, in the Senior Principal Magistrate's Criminal Case No.532 of 2007 delivered on 29th May 2009 at Muranga)

JUDGMENT

Jackson Karegwa Magu and **John Maina Karira**, hereinafter referred to as the 1st and 2nd appellants, were tried on a charge of rape contrary to *Section 3(1)* as read with *Section 3* of the Sexual Offences Act No. 3 of 2006. They also faced an alternative count of indecent acts contrary to *Section 11(6)* of the same Act. After undergoing a full trial, Hon. T. W. Murigi, learned Senior Resident Magistrate, convicted both appellants for the offence of gang rape contrary to *Section 10* of the Sexual Offences Act No. 3 of 2006. The Appellants were each sentenced to serve 20 years imprisonment. The Appellants were dissatisfied hence they each preferred to appeal. The 1st Appellant filed **NYERI H.C.CR.A. NO. 131 of 2009** while the 2nd Appellant filed **NYERI H.C.CR.APPEAL NO. 117 OF 2009**. Those appeals were ordered consolidated since they arose from the same proceedings.

For ease of reference it is important to reproduce the grounds set out by each appellant. The 1st Appellant i.e. Jackson Karegwa Magu put forward the following grounds on appeal:

1. *That the trial magistrate erred in both point of law and fact in finding credence upon the police charge without the need to observe that incarceration experienced of the 1st appellant was a contradiction of section 72(3) and (b) and 77 (1) of Constitution thus the trial did not comment*

- being lawful.*
- 2. That the trial magistrate erred in both point of law and fact in perceiving the prosecution's case as proved but failed not observing the silent of the complainant refused any recognition at the scene and subsequent mention of any name remains an after thought.*
 - 3. That the trial magistrate erred in both point of law and fact in finding a conviction before resolving the conflicting doubt upon the part of the 1st appellant.*
 - 4. That the learned trial magistrate erred in both point of law and fact in shifting the burden of proof.*

The 2nd Appellant i.e. John Maina Karira relied on the following grounds on appeal:

- 1. That the learned magistrate entered a twenty year imprisonment disregarding the fact that the prosecution case started with violation of the highest law in the republic of Kenya in being detained in police cells for more than 5 (five) clear days thus violating section 72 (3) and (b) and 77 (1) of Constitution.*
- 2. That the learned trial magistrate erred in fact in finding credence upon the testimonial of PW 1 where else the 1st report of the complainant hardly mentioned any names thus the evidence of recognition lacked merit.*
- 3. That the learned trial magistrate erred in both point of law and fact in finding a conviction before resolving the prevailing doubt was resolved on the part and the appellant.*
- 4. That the learned trial magistrate erred in the administration of justice in holding the scale partially upon the prosecution and thus becomes forced to reject my defence which remains true and trustworthy.*

Before considering the aforesaid grounds, let me set out in brief the case that was before the trial court. The prosecution's case is supported by the evidence of four (4) witnesses. The Complainant herein, **Rosalind Muthoni Maina** (P.W.1) told the trial court that on 3rd March 2009 at about 8.00 p.m. she was walking towards her home in Kabui Village when she met two men who demanded for her to identify herself. One of them took from her Ksh.500 and a mobile phone. A commotion ensued. P.W.1 said John Maina Karira (2nd appellant) forcefully removed her panty tore it and went ahead to remove her skirt after which he raped her. P.W.1 further alleged that Jackson Karegwa Magu (1st appellant) joined the 2nd Appellant in raping her in turns. P.W. 1 claimed she was beaten when she attempted to scream. She was rescued by the 2nd Appellant's father who took her to their neighbour's home. She reported the incident to Kaweru Police Patrol base after which she went for treatment at Murang'a district Hospital where she was issued with a P3 form. P.W.1 said that the night was bright and that she knew the two Appellants as people who came from Mwerua Village. P.W. 1 said she did not tell the Police the names of the Appellants despite the fact that she claimed she recognized them by their voices. **Malikzedek Njuguna Kamau** (P.W. 2), told the trial court that P.W. 1 told him that she had been raped by the Appellants. P.W.2 further told the trial magistrate that the Appellants were brought to Kaweru Police Patrol base by members of the public whereupon he re-arrested them. **Caroline Kipkului** (P.W.3) stated that on 4th March 2007 she escorted P.W.1 to Muranga District Hospital for examination and treatment. **Patrick Mwangi** (P.W.4) was the clinical officer who filled the P3 form. He came to the conclusion that there was penetration since P.W.1's hymen was freshly torn and that there was presence of spermatozoa.

The 1st Appellant on his part told the trial magistrate that he spent at home the whole of 4th March 2007 and that on 5th March 2007 at 2.00 a.m. he was arrested by a group of 10 men. He said he did not know the Complainant until the time he met her in court. He denied ever going to Mugeka centre on 3rd March 2007. He also denied having been in company of the 2nd Appellant. On the other hand, John Maina Karira (2nd Appellant) told the trial court that he spent the whole day of 4th March 2007 repairing

his brother's house. He claimed he was arrested at 1.00 a.m. by a group of people who claimed they were Police officers. He said those people said they were looking for stolen goods. They took him to the Police station where he was charged.

Having set out in brief the history behind this appeal, let me now consider the merits of the appeal. It is the submission of Mr. Karweru, learned advocate for the Appellants, that the conditions for their identification were not conducive for a positive identification free from error. It is pointed out that the Complainant said that she could not recognize the 2nd Appellant because he had covered his face. The complainant is said to have described the Appellants as one short and the other tall. The Appellants are said to have been identified by their voices. Mr. Makura was of the view that there was proper identification of the Appellants. He claimed there was a bright moonlight which enabled P.W.1 to recognize John Maina (2nd appellant) physically and by voice. It is said the 2nd Appellant hailed from the same village with P.W.1. I have carefully considered the rival submissions plus the recorded evidence. The question which must be determined is whether or not the Appellants were positively identified and placed at the scene of crime. It is not in dispute that the offence was committed at night. It is the evidence of the Complainant that she recognized the Appellants by their voices. She also claimed that one was tall and the other was short. The Complainant claimed that she physically and by voice, recognized the 2nd Appellant. On cross-examination, P.W.1 said she did not recognize the face of the 2nd Appellant because he had covered his face. P.W. 1 claimed she told the men from her village the names of the Appellants. She did not tell the Police nor the person who rescued her, the names of her assailants. She merely described them as one was short and the other was tall. A critical examination of the Complainant's evidence will reveal that some doubt has been created as to whether she really recognized the Appellants. If it was true that she recognized the Appellants then why didn't she mention their names to the Police? The medical report shows that the clinical officer recorded that the patient was raped by unknown people. There was no clear evidence as to how the Complainant managed to physically recognize the Appellants yet it was alleged that one of them had covered his face. I have come to the conclusion that the identification of the Appellants was not free from error. There is doubt whether the Complainant actually recognized the Appellants. I will give the Appellants the benefit of doubt.

The second ground argued on appeal is that the Appellants were held in Police custody for more than 24 hours. They were actually held for 4 days before being arraigned in Court. Mr. Makura conceded the appeal on this ground but stated that the only remedy available was for the Appellants to claim damages. I agree that the Constitution provided for one to claim damages, but that did not prevent this Court from making a declaration that the charges had become void upon the breach of the Appellants' constitutional rights. The prosecution were enjoined to give an explanation for the delay but they chose to offer none. I find that the Appellants' constitutional rights were breached hence the charge should have been declared as having been brought against the Appellants in contravention of the Constitution hence the same became null and void and no conviction could have been sustained.

The third ground argued is that there was no nexus between the offence and the Appellants. Mr. Karweru pointed out that there was no D.N.A. profiling to connect the Appellants to the offence. Mr. Makura did not address this Court on the above submission. There is no doubt that the Complainant was examined and found to have been penetrated. There was some trace of spermatozoa in her genitalia. The Appellants were not medically examined to profile their D.N.A. There is therefore doubt whether or not the sperms belonged to the Appellants. Again, I will give the benefit of doubt to the Appellants.

In the end, I allow the appeal. The conviction is quashed and the sentence set aside. The Appellants are hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 11th day of March 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Mr. Karweru for Appellant and Mr. Makura for the State.