REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 192 OF 2007

DANIEL MURIANKI ALIAS MUCHOKI ……..…1ST APPELLANT
JOSEPH MURITHI MAGIRI ALIAS JOSE…….2ND APPELLANT

VERSUS

REPUBLIC ……...…PROSECUTOR
LESIIT J

JUDGEMENT

The appellants in this case were as charged before the CMS' court at Meru with one count of gang rape contrary to S.10 of the Sexual Offences Act. The 2nd count of grievous harm S/C 234 of the Penal Code. It is alleged that the two appellants jointly with others not before the Court committed the two offences against one J.G. The two appellants were found guilty and convicted for both counts and were each sentenced to life imprisonment in both counts.

They have now appealed against both the conviction and the sentence. They have raised similar grounds of appeal in which they challenged their conviction on grounds their Constitutional rights under Section 72 Cap 73 of the Constitution were contravened; that their recognition by the prosecution witnesses was not free from mistakes; that the evidence of the complainant is support of the charge of rape was not supported by a doctor's evidence; that their defences were dismissed without consideration and finally that S. 169 (2) of the CPC were flaunted.

The state has opposed this appeal. Mr. Musau state counsel for the state submitted that the evidence against the appellants was overwhelming. Counsel urged that there were two pieces of evidence against the appellants the first being that they were found in a room where the complainant was found bleeding and that both of them had blood stained clothes. Secondly the run away from the scene to avoid arrest when they saw that the police officers had been summoned.

The facts of the prosecution case was that the complainant left Camp David where she was working at around 10.00a.m and went to river Side Bar. She says that a bar attendant at the River Side Bar bought her a drink between 10.30 and 4.00 pm. The Complainant said that she was taken to a bed to rest but she fell unconscious. Two PW3 found the complainant lying on a bed unconscious, bleeding profusely from her private parts and completely naked. The two witnesses found the two appellants in the same room in a compromising position and their clothes soaked in blood. PW2 and PW3 went to Subuiga Police Station where they reported the matter. The two were witnesses were accompanied to the scene by the OCS of the station and PC Maluki PW4. The appellants ran away when they saw the police approaching. The complaint was eventually taken to the hospital where she was treated and discharged. However when her

condition did not improve was taken back to the hospital and an operation was carried out and a soda bottle removed from her pelvis area. The doctor who produced the P3 Form, PW5 told the court that there was evidence of rape and damage the internal reproductive organ caused by insertion of a foreign body. He assessed the degree of injury caused to the complainant to be grievous harm.

The appellant were both put on their defence. The 1st appellant produced unsworn statement, denied the charge. He stated that the witnessed had lied against him because he was a casual labourer and they were all his enemies.

The second appellant gave a sworn statement in which he also denied the offence. The 2nd appellant alleged that the witnesses who testified against him disliked him because he became noisy whenever he drunk and also because they were jealous of his brother's bar.

I have carefully considered this appeal together with the submissions made by the appellants and the learned State Counsel. I have subjected the evidence adduced before the court to a fresh evaluation and analysis. In the **Okeno Vrs. Republic** 1972 EA 32 is relevant. It was stated in that case as follows:-

" An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter Vs Sunday Post (1958) E.A 424."

I will first deal with the issue raised by the appellant. They claim that they were held in the police cell for a period of 14 days before they were arraigned in court. That issue was not raised before the trail magistrate and therefore no evidence was adduced by the prosecution to explain the delay in bringing the appellant to court. I can say from the look of the proceedings that the appellants were arrested on 13th and the 16th of July 2007 respectively and arraigned in court on 30th July 2007 that is a period of 18 and 14 days respectively. That means that the first appellant was held for a period of 18 days inclusive of the date he was taken to court while the second appellant was held in police custody for a period of 14 days inclusive of the date he was taken to court. It is the first appellant who was held in police custody for 3 days in excess of the statutory 14 days under the old Constitution. Nothing turns on this point.

The second issue raised is that the evidence of the complainant in support of the charge of gang rape was not supported by doctor's evidence. The doctor who testified of the complaints' condition and treatment following the incident was PW5. In his evidence the doctor testified that there was evidence of both rape and damage to the complainant's internal reproductive organ. The latter injury he said was caused by insertion into pelvic abdominal area through the vagina of a soda bottle. The bottle was removed in the hospital where PW5 works and was produced in evidence and identified by all the necessary witnesses, including the doctor. The appellants' contention that the complainant's evidence did not receive a medical corroboration was therefore far from the truth. Nothing turns on that point.

The other issue raised was that the learned trial magistrate dismissed the appellants' defence without giving it due consideration. I have carefully considered the judgement of the learned trial magistrate. I found that the learned trial considered their defences and found that the two appellants' were alleging that the charge against them was actuated by hatred the witnesses felt towards them. The learned trial magistrate did not believe the appellants and he gave the reason for that. The trial magistrate found that the two key witnesses PW2 and 3 named the appellants on the spot and that the two appellants escaped subsequently. the appellants defences were duly considered, nothing turns on this point.

The appellants contend that the learned trial magistrate did not properly evaluate the evidence as mandated under section 169 of the CPC. I will consider this point as I consider whether the evidence was sufficient to sustain a conviction and whether the charges were proved.

The appellants were charged under section 10 of the Sexual Offences Act. The particulars of the charge alleged that the appellants jointly with others not before the court gang raped the complainant. The charge was impossible to prove as it is not humanly possible for two or more people to 'jointly with others gang rape' a person. Only one person can rape a person at a time. I believe it is the reason the statement of the offence under that section provides:

" Any person who commits the offence of rape or defilement under this Act in association with others is guilty of an offence termed gang rape…."

The Act talks of the offence being committed in association with not jointly with. Each of the appellants ought to have been charged separately with the offence of gang rape. The charge was in the circumstances incurably defective as it created an offence both unknown in law and impossible to proof. For that reason the conviction entered against the appellants in respect of this count is unsustainable. In the circumstances I quash the conviction and set aside the sentence entered against the two appellants in the first count.

Regard to the second count the evidence of the complainant was that she was first intoxicated by one Kaume, a barman at Riverside bar, which was a bar across the hotel where the complainant worked. Her evidence was that she not only became too drunk, but lost her consciousness, the moment she was escorted to Kaume's bed to lie down. The complainant was not in a position to say what happened to her. All she remembered was what happened to her. All she remembered was that there were six men in the bar when she was intoxicated, and that the two appellants were among them. The prosecution relied on circumstantial evidence that the appellants were found in the same room where the complainant was lying on a bed, nude without any form of clothing, bleeding and unconscious and that their clothes had blood.

In the case SAWE – V- REP (2003) KLR 354 the Court of Appeal held:

"1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. circumstantial evidence can be a basis of a conviction only if there is weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."

The onus lies on the prosecution to prove its case against the appellants beyond any reasonable doubt. The prosecution must establish the circumstances from which an inference of guilt is sought to be drawn, cogently and firmly. The appellants denied that PW2 and 3 found them inside the room where the complainant was. Apart from the learned trial magistrate finding that PW3 exaggerated that the 2nd appellant was on top of the complainant when he and PW2 went into the room, he found the rest of the evidence true and that PW2 providing corroboration.

I do not think that PW3 was inconsistent in his evidence regarding the position in which he saw the 2nd appellant when he walked into the room. The apparent inconsistency could easily be explained. PW2 and 3 were clear that PW3 was leading the way He must have entered the room before PW2. His evidence is that the moment the 2nd appellant saw him he came off the bed. That provides a reasonable explanation why PW2 did not see exactly what PW3 saw at that point.

The learned trial magistrate believed the evidence of PW2 and 3 that the appellants were found inside the room where the complainants was. The evidence adduced shows that the complainant was unconscious; bleeding from her private parts and by then had a foreign object inside her abdomen inserted through her private parts. The appellants had to explain what they were doing inside that room at that time under the circumstances in which they were found.

The appellants offered no explanation. In fact they denied being found anywhere near that room. That explanation was a mere denial which could not suffice as the prosecution evidence against them cogently and firmly established the said facts. The appellants were in the room with the complainant grievously hurt, naked without any piece of clothing, bleeding and unconscious complainant.

The evidence of PW2 and 3 received corroboration from the evidence of PW4, the scene visiting and investigating officer. The police officer testified that when PW2 and 3 led him and other officers to the scene, they found the complainant outside a room. He testified that the two witnesses identified a room where they said they had initially found the compliant. Inside that room he found and took possession of blood soaked bed sheets. These were adduced in evidence as exhibits. I find that the circumstances unerringly points towards the guilt of the appellants.

The appellants challenged the prosecution that it failed to produce the t- shirt alleged to have blood stains seen with the 2nd appellant. I do not find that point of any help to the appellants since it was shown that the appellants ran away from the scene soon after PW2 and 3 arrived with the police,, together with the blood soaked t – shirt. I however agree with them that no efforts were made to test the blood on the sheets and on the complainant. The failure to test the blood does not assist the appellants as there was other evidence against them.

That leads me to the other evidence against the appellants. The appellants were inside the room with the complainant when PW2 and 3 left for the police. By the time two went back with the police, the compliant had been removed from the room and had been clothed. The appellants were the last ones seen with the complainant was unconscious and it follows that she must have been dressed and moved by another or others. I find that the circumstances established in this case prove beyond any doubt that there appellants dressed the complainant and then moved her out of the room she had been. The only reason the appellants acted as they did can only be explained on the basis that they were the perpetrators of what had been inflicted upon the complainant. They were the cause of the complainant's injuries.

I find that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the appellants and none else.

After carefully considering the appellants appeal against the conviction, I find it has no merit and I dismiss it accordingly.

The appellants were sentenced to life imprisonment for this offence. The learned State Counsel urged the court to uphold the sentence. I agree that the offence the appellants committed was serious and aggravated. It was also inhuman and harsh. That notwithstanding, being first offenders I think that the sentence was a little on the higher side. In the circumstances, I will allow the appeal against the sentence by setting aside the sentence of life imprisonment imposed against each appellant and substituting it with a sentence of 15 years imprisonment each.

In the result, the appellants appeal against conviction is allowed. The appeal against the sentence is allowed to the extent indicated herein above.

Those are the orders of the court.

Dated Signed and delivered at Meru this 10th day of March, 2011.

LESIIT, J

JUDGE