

and raped her severally in turns. That the appellant and his co- appellant who passed on were the complainant's neighbors. That the complainant reported the matter to her father and that the accused persons were subsequently arrested and charged. The learned magistrate convicted the appellant in the backdrop of the above evidence. That the Dr established that there was forceful penetration. That sand was put in the complainant's mouth to ensure that she does not scream.

In his evidence the accused person stated that he was apprehended at a scene where boda-boda riders were being arrested. He denied any involvement in the commission of the offence.

Was failure to arraign him in court on time raised at the submission stage in his appeal render the conviction invalid? Did the trial magistrate error in law and facts when he failed to consider that the medical report, failed to note the contradiction and inconsistency of evidence, failing to observe the fact that accused person was not examined by the Doctor and there being no exhibit that was produced. To be considered are the issues as to whether the conviction was safe given the evidence that was available particular so with regard to recognition.

The complainant who was the key and only eye witness given the peculiar nature of the offence, stated that the appellant and another accosted her as she walked from the place where she had fetched water. That she was accosted by the two assailants whom she identifies as the appellant and the other who passed on. Going through her examination in chief and cross- examination as recorded by the learned trial magistrate, her account of the events remained the consistent.

The charge was amended after the trial had commenced and the first witness was yet to be cross- examined. The accused persons then were asked to plead to the new charge. Therefore no undue disadvantage was occasioned on the accused person.

The accused person was arrested on the 17th of January and in this particular file was arraigned in court on the 29th of January 2011. This is a human right issue and may be raised at any stage during the pendency of the case. Raising it at the appeal level at the submission stage is late in the day as it does not form the grounds of appeal and those who arrested him and arraigned him late on whom the constitution places the onus of offering an explanation for the delay have no opportunity to explain. This therefore can not be determined by this court and in this forum not all is lost, as the appellant has the forum of seeking for damages for wrongful confinement.

With regard to the medical report the trial magistrate did consider it on page 3 of his judgment, the 2nd paragraph. The learned magistrate stated that;

“The medical evidence by p.w3 supports the evidence of the complainant that she has sexual contact and penetration which I find to be a vital element to the charge of gang rape contrary to section 10 of the sexual offences act”

The medical report was therefore considered and a finding made over the same. The said finding was not frivolous as it was made on the basis of sound evidence that established that there was penetration.

In this case there were no inconsistencies that went to the core of the case to warrant rendering the conviction baseless.

Failure to examine the suspect by the Doctor given the fact that the arrest was not made immediately the incident occurs, is not fatal to the case. The account as given by P.W1 and her father indicate how they went to the police to report and at one point they were told to go and bring the remaining suspect by themselves. The arrest was therefore not done under the most optimal of the situations.

It would have been desirable to produce any exhibits if they were available but this did not render the evidence insufficient in any material way.

There was evidence of recognition in this case. The distinction between the evidence of identification and recognition is as set out in the case of **Siro Ole Giteya vs. Republic (unreported in KAVETA AND OTHERS V REPUBLIC C.A. NUMBER 65 OF 1986 (UNREPORTED))**, the court of appeal held:

“ Where evidence is based on identification the court should closely examine the

circumstances in which the identification by each witness came to be made. ”

the circumstances as described by the the witness P.W1 were well detailed and indicated that she was clearly able to identify her assailants. The same is free from the possibility of any error. It was on the basis of the foregoing that the court finds the convict safe. This is because there was sufficient evidence and the learned magistrate addressed all issues raised. This court therefore will uphold the conviction.

The sentence too is reasonable given the way the offence was committed and there is no justification in interfering with the same.

READ, DATED & SIGNED IN THE OPEN COURT THIS 11TH DAY OF NOVEMBER 2011

S.M. MUKETI
JUDGE