REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 164 of 2007

CHARLES WANJOHI MURAGE……..…….APPELLANT

Versus

REPUBLIC…..….....…….RESPONDENT

(Appeal from the original conviction and sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No.80 of 2007 by L.W. GITARI - SPM)

J U D G M E N T

The appellant Charles Wanjohi Murage, was charged with robbery with violence contrary to *Section 296 (2)* of the penal code. He was also charged with rape contrary to section 3(1) & (3) of the Sexual Offences Act. Finally he was charged with indecent act contrary to *section 11(1)* of the Sexual Offences Act. The particulars of the charges are well set out in the charge sheet.

The appellant denied the charges and he was subsequently tried by L.W. Gitari, the then Chief Magistrate, Nyeri Law Courts. The facts of the case were that H.R.M (PW1) had gone to Dominion Chapel on 31st December, 2006 at N village for overnight prayers. Whilst there she decided to go for a call of nature in a toilet behind the church. As she was doing her thing she received a call on her mobile phone. Whilst talking on phone a person suddenly snatched the same and ran away. She ran after the said person screaming but never managed to get him. As she was coming back to the church she met the appellant. The appellant then held her by the neck, squeezed it and led her to the nearby shamba. He demanded money from her and she parted with Ksh.150. The appellant then placed a knife on her neck and stabbed her as he forced her to remove her clothes. Thereafter he forcibly penetrated her. She screamed as the appellant continued to rape her. Some people heard the screams and went to her assistance. One of them Stephen Nderitu Kambugu (PW2) chased the appellant and arrested him. The appellant was taken to Nyeri police station where the matter was reported to Japheth Nyamunge (PW3). PW1 was later referred to Nyeri Provincial Hospital where she was treated and her P3 form filled by Dr. Gatungi which showed that she had suffered a blood clot around the left eye and left side of the neck. She also had bruises on her private parts. The P3 form was tendered in evidence by Ajeri Austin (PW5) on behalf of Dr. Gatungi. The appellant was later charged with this offence.

The appellant gave a sworn state of defence and told the court that he was arrested by some people numbering about twenty as he was on his way home. He said he did not know anything about the offences preferred.

The learned magistrate having considered all the evidence adduced both by the prosecution and the defence found for the prosecution on the 2nd count. She however acquitted the appellant on the 1st count. She made no finding on the 3rd count as she felt and correctly so in my view that the said count ought to have been an alternative to count 2. Upon conviction as aforesaid, the learned magistrate

handed down a sentence of 14 years imprisonment on the appellant.

The appellant was aggrieved by the conviction and sentence aforesaid and instantly preferred this appeal. He faulted his conviction and sentence on the grounds that he was held in custody for a period in excess of 24 hours permitted by the constitution, that he could have been a victim of mistaken identity, the evidence led against him was inconsistent and contradictory and finally that his defence was not given due consideration.

When the appeal came up for hearing, the appellant offered to canvass the same by way of written of submissions. I have carefully read and considered the same.

Mr. Makura, learned Senior State Counsel opposed the appeal. He submitted that there was overwhelming evidence to support the charge of rape. The complainant identified the appellant in the act. She never consented to sex with the appellant. The appellant was chased and arrested by PW2. The evidence of the medical officer showed that the complainant had bruises on her private parts. The prosecution evidence was corroborated, consistent and proved beyond reasonable doubt that the complainant was raped by the appellant. The defence by the appellant dwelt on the circumstances of his arrest and did not cast any doubts on the prosecution case. Accordingly the conviction was safe. On sentence, the learned Senior State Counsel felt that the appellant being a first offender, ought to have been given the minimum sentence and not 14 years.

As a first appellate court, it is my duty to submit the evidence tendered during the trial to fresh and exhaustive evaluation so as to reach my own decision as to the guilt or otherwise of the appellant but giving due consideration to the observations of the trial court on issues of demeanour of witnesses. See Okeno V Republic (1972) EA.32.

However the determination of this appeal will turn on a narrow and technical aspect as to how the learned magistrate treated the witnesses who turned up before her to testify. It is a mandatory requirement in criminal proceedings and indeed all court proceedings that witnesses be sworn and or affirmed. In very rare circumstances is a witness allowed to testify without being sworn and or affirmed for instance in the case of evidence by a child of tender years. However, such evidence will only be admissible if the child has been subjected to voire dire examination by the trial court. From the record herein it does appear that all the witnesses who testified were never sworn. All witnesses are recorded thus “PW1 HRM, F/A XTIAN STATES IN KIKUYU, PW2 – STEPHEN NDERITU KIAMBUGU MALE XTIAN STATES IN KISWAHILI, PW3 – NO.82132 PC – JAPHETH NYAMUNGO STATES IN ENGLISH, PW4 – LILIAN MUTHONI NJOGU FEMALE XTIAN STATES IN KISWAHILI, PW5 AJEVI AUSTIN MALE XTIAN STATES IN ENGLISH. Nowhere is it indicated that those witnesses were sworn. It is very unlikely that a Senior Magistrate as the trial magistrate herein would have allowed witnesses to testify without being sworn. However we are a court of record. We go by the same. That being the record, it is apparent therefore that all the witnesses testified without being sworn. Though I entertain some doubts on this score, I will still resolve the doubt in favour of the appellant. Unsworn evidence is of very little or no value at all. It cannot therefore be said that the appellant was not prejudiced when he was convicted on unsworn evidence. I have looked at the original record of the trial court. It is in conformity with the typed record.

I am not oblivious of the fact that this issue was not raised and canvassed by any party to this appeal. However it is a matter of law. This court cannot simply ignore it on the basis that it was not raised by any of the parties.

Ordinarily this is a case which should have called for a retrial. However a retrial should not be ordered if it will accord the prosecution and indeed the court opportunity to mend its ways. In the circumstances of this case if a retrial is ordered, that is exactly what will happen. A retrial in the circumstances will not be appropriate.

In the result, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be released from prison custody forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE