REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 181 of 2008

PATRICK MACHARIA MAINA…….....…..……..……..APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(Appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Kangema in Criminal Case No.164 'B' of 2007 dated 27th May 2008 by S. N. Mbungi, Senior Resident Magistrate)

JUDGMENT

The appellant herein, **PATRICK MACHARIA MAINA**, faced a charge of rape contrary to *Section 3 (1), (2) (a)* of the Sexual Offences Act No. 3 of 2006. He also faced an alternative charge of indecent assault contrary to *Section 11 (1)* of the Sexual Offences Act No. 3 of 2006. After undergoing trial, the Appellant was convicted and sentenced to ten (10) years imprisonment.

The Appellant being aggrieved, filed this appeal to challenge both the conviction and sentence. He has put forward the following grounds in his Petition:

1. ***That the learned trial magistrate erred in both points of law and fact in finding credence upon the prosecution case while the prosecution evidence lacked compatible facts connecting me to the offence.***

2. ***That the learned trial magistrate erred in both points of law/fact in failing to observe that the prosecution did not prove it's case beyond all shred of doubts.***

3. ***That the learned trial magistrate erred in accepting the evidence adduced by the prosecution was adequate to find a conviction but ignored the fact that my examination was the reasonable corroboration required to prove the charge of rape.***

The prosecution's case before the trial court was supported by evidence of five witnesses. The particulars

of the main count are to the effect that on the 21st day of June 2007 in Murang'a District within Central Province, intentionally and unlawfully raped V. N.K. N. N.K (P. W. 2) told the trial court that on 21st June, 2009 at 9.30 a.m. she left home to visit a neighbour. When she came back, P. W. 2 claimed, she was informed by J.W (P. W. 3) that V.N.K, (Complainant) her mentally challenged daughter, had been raped by the Appellant. P. W. 2 said that P. W. 3 told her that she heard the Complainant crying but when she went to check she found her alone. P. W. 3 told P. W.2 that the Appellant had been seen shortly before she screamed in company of the complainant. P. W. 2 said she reported the incident to the Police who gave her a P3 form to be filled by the doctor. J.W.M (P. W. 3) said she saw the Appellant walking together with the Complainant along a nearby road at about 9.30 a.m. After ten minutes she said she went to fetch water in a nearby river and that is when she heard screams. She found the Complainant crying while holding her pants by her hands. P. W. 3 took the Complainant home where she informed P. W. 2 what she had witnessed. P. W. 3 did not find the Appellant at the scene. Danson Maina (P. W. 1) produced the P3 form filled by one Ruto, a clinical officer attached to Kangema Health Centre. I have examined the P3 form and it is obvious that there was no finding that the Complainant was raped.

The Appellant on his part gave an unsworn statement in which he denied committing the offence. He blamed John Mwangi for framing him up.

This being the first appellate court, the Appellant is entitled to a re-evaluation of the evidence. Mr. Makura was of the view that there was sufficient evidence which could sustain a conviction. The prosecution's case heavily relied on circumstantial evidence. It is the evidence of P. W. 3 that she had seen the Appellant and the Complainant walk together about ten minutes along a nearby road. Shortly she heard screams. When P. W. 3 reached the scene, she only found the Complainant crying while holding her underpants with her hands. The Appellant was nowhere. The P3 form produced by P. W. 1 did not show any evidence of rape on the Complainant. There is evidence that the Complainant's vagina had mild lacerations. It is possible the Complainant being mentally challenged could have injured herself. It is also possible that the scene being a public road, the Complainant was sexually assaulted by someone else other than the Appellant. I agree with the submissions of the Appellant, that in the circumstances of this case the prosecution did not prove its case beyond reasonable doubt. What is apparent is that there is strong suspicion that the Appellant committed the offence but unfortunately suspicion alone, however strong, will not substitute evidential proof.

I hereby allow the appeal. The conviction is quashed and the sentence set aside. The Appellant is set free forthwith.

Dated and delivered at Nyeri this 12th day of February 2010.

J. K. SERGON

JUDGE

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