REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 5 of 2009

JOHN KATANA CHARO …….…….....…….…APPELLANT

VERSUS

REPUBLIC …….....…..……RESPONDENT

JUDGMENT

John Katana Charo (the appellant) was convicted on a charge of rape under the Sexual Offences Act No. 3 of 2006. He was sentenced to serve 20 years imprisonment. The prosecution case was that on the night of 28th August 2006 at about 7.30pm in Kilifi District, appellant intentionally and unlawfully had carnal knowledge of a person he knew or had reason to belief was mentally retarded.

K (PW2) told the trial court that she was at K when she was attacked by a man from J. It was her evidence that it was evening, the man was naked (having removed his trouser and shirt), and he announced that he loved her and wanted her to go with him. She managed to run home and was taken to make report to the police.

On cross-examination she stated that she was from V and it was dark, but she was able to see the person who held her hand, undressed and stripped her and inserted his penis into her private parts – she was certain it was the appellant. During the incident she called for help, and people arrived and found the appellant and apprehended him. A curious part of her answer on cross-examination is this ***"He did not force me***". It was her evidence that she knew the appellant but not his name. When she was taken to hospital, she was examined by Patrick

Bashishi, a clinical officer who informed the trial court that the victim was mentally retarded, and upon examination of her private parts, he found evidence of penetration.

On cross-examination he stated there was no discharge or pus cells or spermatozoa and opined that she may have bathed. Salim Kaingu (PW4), a resident of K, was on his way to the shops on 28th August 2006, when he heard a lady screaming, crying *"niache, niache"*. He saw a lady being pulled by a man into the bushes and he waited to see if he could get help. No one appeared, so he decided to go into the bushes and there he found the appellant having sex with PW1. He approached cautiously, and the appellant got up, panting. PW4 asked appellant what he was doing – the appellant got up and started running away. PW4 realized the victim was a lady known to him as someone of unsound mind. So PW1 called for help and with others, managed to apprehend the appellant and take him to the police station. It was PW4's evidence that appellant

> ***"is my neighbour and a distant relative. There was moonlight I could see him. We gave chase without losing sight of him."***

On cross-examination PW4 stated that appellant had lowered his trousers down to his ankles.

M.C (PW5) brother to complainant, was at home sleeping when he heard people shout for help, saying that K had been raped by K. He got out and found appellant being beaten. He helped apprehend appellant and take him to the police station. He told the trial court that PW1 had been of unsound mind since childhood. When he observed his sister, PW5 noticed that she had grass on her body and her clothes were stained with soil.

Appellant's sworn testimony was that he had gone to relieve himself just near his home when he heard shouts of *"thief thief"*, then people appeared and beat him claiming that he had defiled the lady, yet he had not seen the lady at he scene. He was not examined in respect of the rape.

On cross-examination he maintained that he was relieving himself by the road when people just descended on him and beat him.

The trial magistrate in her judgment stated that it was a matter of judicial knowledge that those of unsound mind do have lucid intervals, and when the complainant testified in camera, she was able to listen to questions and answer them coherently. However, she held that it could not be medically confirmed that complainant was of unsound mind. As regards the sexual assault, she found that appellant was actually caught in the act by Salim, and this was confirmed by PW1 who was able to point out the appellant in court, as the person who attacked her. Further, that there was moonlight which enabled Salim to see and recognize appellant and PW1, (both of whom were known to him)

Since there was no medical evidence to confirm PW1's mental status, the trial magistrate relied on the provisions of section 3(2) of the Second schedule of the Sexual Offences Act, to convict the appellant on a charge of Rape contrary to section 3(1) of the Sexual Offences Act.

The appellant challenged the findings of the trial court, stating that:

(1) He was not medically examined

(2) The medical evidence was not conclusive

(3) Prosecution case had glaring contradictions.

(4) The prosecution case was not proved beyond reasonable doubt.

(5) He was held longer than 24 hours before being taken to court thus violating his rights under section 72 (3) (b) of the Constitution of Kenya.

(6) The sentence was harsh and excessive

The appeal was opposed.

The appellant relied on written submission which he had filed stating that he was not facing a capital charge, yet he was held in police custody for more days than is allowed.

He also challenged the admissibility of the p3 form saying the details contained therein did not support the offence charged, saying that although there was evidence of penetration, even the doctor could not tell what caused the penetration and that the medical evidence proved his innocence. It was also his contention that the plaintiff's evidence in chief differed from her evidence on cross-examination and so she could not be regarded as a credible witness.

It is the appellant's contention that the mode of identification was unsatisfactory and that although PW4 referred to moonlight – he did not describe its light intensity.

I have had to try and glean through the meaning of the appellant's submissions, a lot of which is a ramble of words which do not convey much.

The appeal is opposed, Miss Waigera who appeared for the State submitted that PW1 had clearly narrated to the trial court her ordeal at the hands of the appellant and this was corroborated by PW4 who saw the appellant performing the sexual act with PW1. She pointed out that PW4 was able to see and recognize the appellant (who was a neighbour and a relative) because there was moonlight.

Further that the findings of the clinical officer confirmed what PW1 and PW4 had told the court about a sexual encounter.

She argued that appellant's defence was considered and found to be a mere denial.

As for his rights being violated, Miss Waigera submits that appellant was represented by an advocate who should have raised the issue at the earliest opportunity and to wait or raise it on appeal is simply an afterthought.

She urges the court to dismiss the appeal saying the sentence was merited.

Certainly there was no medical evidence or examination carried out to determine and confirm PW1's mental status, although from the evidence of those who knew her and even the clinical officer's cursory observation, was that she was mentally challenged. The trial magistrate cannot be faulted with regard to the manner she then proceeded to make her finding in relation to PW1.

The dividing line between forced sex and negotiated sex is the element of consent.

From the medical evidence i.e evidence of PW2 and PW1, the complainant had engaged in penetrative sex. That PW1 had not consented to the act, is confirmed by the evidence of PW4 who heard her protestations of *"niache, niache"* as she screamed.

PW4 found appellant in the act with all the tell tale signs including panting and trousers lowered to the ankles. He was able to see and identify appellant with the aid of moonlight and on cross-examination he confirmed that he was just ten feet away – both appellant and complainant were known to him –that was identification by recognition.

It is also significant that as appellant fled and PW4 gave chase with other members of the public who had responded, they never lost sight of the appellant.

The trial magistrate properly analysed the circumstances, the opportunity for identification and reached merited conclusion.

Appellant's defence that he had merely gone to relieve himself when he was mistaken for a thief had no foot on which to stand, as;

(a) no one made claims of having their property stolen

(b) appellant never raised the issue during cross-examination and it emerged as an afterthought.

Under section 3(1) of the Sexual Offences Act provides for a sentence of not less than ten years imprisonment. Appellant was described as a first offender – the sentence was legal and I find no reason to interfere with it. The appeal fails and is dismissed.

The conviction is upheld and sentence confirmed.

Delivered and dated this **29th June 2010** at Malindi.

H. A. Omondi
JUDGE