REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 104 of 2008

DAVID GARAMA …….....……..…..…….....……APPELLANT

VERSUS

REPUBLIC ……..…….……RESPONDENT

JUDGMENT

David Garama (the appellant) was convicted on a charge of rape contrary to section 3(1) of the Sexual Offences Act No. 3 of 2006, and sentenced to serve ten (10) years imprisonment.

The prosecution's case was that on 19th June 2007 in Malindi District, appellant intentionally and unlawfully committed an act which caused penetration of his genital organs with the genital organs of D.S.

Appellant had denied the charge and prosecution called a total of five witnesses to prove its case. D who testified as PW1 told the trial court that on 19-06-07 at around 8.30pm, she was inside her house, cooking, with her neighbours Z. Later, appellant (who is a relative to her husband) came and sat on a chair – they all had supper and thereafter appellant announced that he was going to sleep in PW1's house. He grabbed her, dragged her out and after some struggle took her to the maize plantation where he knocked her down, then begun raping her. She later ran back to her house but appellant followed her – she threatened to cut him with a panga.

She reported the matter to police the next day. She also went to the hospital for treatment.

On cross-examination she stated that Z witnessed what happened, and although she (PW1) screamed, no one went to her aid, as people's homes are far from the scene. She also stated that appellant had been her husband's friend for two years, and she was not aware of an existing grudge between the two men.

Z (PW2) confirmed that she was in PW1's house cooking and that they cooked supper which they ate together with appellant whom she described as her brother. She then went to bed and while sleeping, she heard some commotion and woke up to see PW1 fighting with the appellant who was demanding his pouch. Soon thereafter PW1 took a panga and threaten d to cut the appellant. PW2 rushed home to inform her mother but when they returned to complainant's house, appellant had run away.

On cross-examination she stated:

> ***"I woke up and saw you fighting with PW1. I never saw you raping PW1"***

(PW3) K.K.K, a village elder who knew both PW1 and appellant, received a report from PW1 on 19-6-07 aDt 9.30pm, that appellant had raped and assaulted her on the same night within her farm.

Pc Gladyce Akinyi (PW4) received the report about the incident and when appellant was brought to the station by members of the public, she received him and later charged him. Dr. Ali Hussein (PW5) who examined the complainant on 25-7-07 found that she had a slight swelling on the posterior neck and the left lumbar region was swollen and tender. From the genitalia, there was a bloody discharge, and sperms were seen. On cross-examination the doctor stated:

> ***"I don't know if the sperms were yours, I only found spermatozoa"***

On being put to his defense, the appellant elected to remain silent and did not call any witness.

In her judgment, the trial magistrate found that the prosecution witnesses were truthful and corroborative and that the evidence of PW1 and PW2, demonstrated that indeed there was a commotion between PW1 and appellant and latter appellant ran away, and medical examination confirmed that PW1 had been sexually assaulted and she even had other physical injuries and she held that:

"medical evidence corroborates eye witness accounts"

In the amended grounds appellant challenges the findings saying that:

(1) PW1's evidence was flawed and the trial magistrate failed to consider what PW2 had stated – that what she witnessed was a fight NOT rape.
   (a) Further that the allegation of rape was not proved because the P3 form showed that PW1 went to hospital three days after the incident, yet she was a married woman.
   (b) The doctor who treated her was not called to testify.

Appellant had supplementary grounds of Appeal to the effect that the trial magistrate erred in convicting him in the case yet the same had no complainant because the prosecution withdrew their case against him on 28th February 2008 and brought new charges yet the complainant was not called to give evidence in support of the fresh charges and all she had done, was to testify in support of the old charge sheet.

Secondly, that even the eye witness who had testified to being with the complainant did not testify in support of the substituted charge sheet.

Further that section 200(2) Criminal Procedure Code was not adhered to by the trial magistrate taking over the matter from D. Ochenja to D. Nyambu.

Appellant filed written submissions in which he stated that on 28th February 2008, the prosecutor applied to be allowed to withdraw the charge under section 87(a) Criminal Procedure Code and substitute it with another – this request was allowed and appellant was discharged – he then took a fresh plea, where he maintained a plea of not guilty.

It is his argument that from then, the evidence which had been taken earlier became invalid, and for the court to have relied on it to reach a conviction was irregular. He also pointed out that Hon. D. Ochenja ceased hearing the case on 17th March and Hon. D. Nyambu took over and heard the evidence of PW5 on 30th June 2008 and even wrote the judgment.

However, the records do not show that the court complied with the provisions of section 200(3) Criminal Procedure Code and it is the appellant's contention that he was greatly prejudiced.

He also urges the court to consider the fact that PW1 went to hospital three days after the incident, and taking into consideration that she was a married woman, and appellant was not examined medically, then the trial magistrate erred in holding that he was the culprit. I think the insinuation is that what was found by the doctor may as well have been as a result of indulging in sex with her husband.

He also pointed out that the doctor who testified in court was not the one who had treated PW1, and no explanation was given, and he was prejudiced and that this violated section 34 of the Evidence Act.

Miss Waigera on behalf of the State, concedes the appeal on grounds that the provisions of Section 200(3) Criminal Procedure Code was not complied with because the magistrate who took over the matter did not explain the provisions to the appellant. However she requests for a retrial saying the offence is very serious and appellant will not be prejudiced because he was only sentenced in 2009 to serve ten years imprisonment.

Appellant pleads with this court not to order retrial, pointing out that he has been in custody since 2007 and has suffered in prison. He argues that the trial magistrate is well versed in law and if there was a procedural error he should not pay for it, and he will be really prejudiced by a retrial.

I confirm from the record that Hon. D. Ochenja heard the evidence of the first four witnesses, then Hon. D. Nyambu took over and heard the evidence of PW5 and wrote judgment. Section 200(3) Criminal Procedure Code provides as follows:

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his precedessor, the accused may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

Obviously the duty lies with the trial court, and in the present case, that provision was not observed – hence appellant was prejudiced and the State properly concedes the appeal.

Is a retrial the way to go? There are issues which the appellant raised in his grounds of appeal which I must examine to establish whether a retrial would not be prejudicial to appellant as it would perhaps give prosecution a chance to reseal certain loopholes.

The evidence by PW2 that when she woke up to the ongoing common appellant was demanding for his pouch from PW. There was no other evidence to support PW1's claim that they had gone out of the house, had sex, then ran back into the house for further struggle and the trial magistrate failed to reconcile this with the scenario PW1 advanced.

Under the circumstances then, given these loopholes, I think that ordering for a retrial would be prejudicial to the appellant and I decline to do so.

Consequently the appeal succeeds in toto and the conviction is quashed and sentence set aside.

Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **6th July 2010** at Malindi.