REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 113 OF 2009

DAVID BUNDI MARARO……………….………………..APPELLANT

VERSUS

REPUBLIC………………………....…………………RESPONNDENT

J U D G E M E N T

David Bundi Mararo herein after referred to as the Appellant was charged before the Senior Resident Magistrate's court Baricho with the offence of **Rape contrary to Section 3(3) of the Sexual Offences Act No. 3 of 2006**. He was also faced with an alternative charge of indecent Act with an adult contrary to Section 11(6) of the Sexual Offences Act. Facts on both counts are as in the charge sheet and I need not repeat them for purposes of this judgment. He pleaded not guilty to the charges and the matter proceeded to full trial with the prosecution calling a total of six witnesses. On his part the Appellant made an unsworn statement of defence and called no witnesses. He was found guilty and convicted on the principal count and sentenced to serve 15 years imprisonment.

Being aggrieved by the said conviction and sentence, he filed this appeal. He relies on 9 home made grounds which he supported with written submissions which he tendered to the court on the hearing date. I have carefully read the said submissions along with the grounds proffered. Basically, his contention is that the conviction was against the weight of the evidence. He faults the charge sheet in his submissions saying that the same does not indicate the OB reference number. In his ground No. 2, he says that the OB No.11/15/5/08 indicated that he had been arrested for attempted rape. I will decide on that point at this early stage. The fact that a charge sheet does not bear an OB reference number does not render the charge defective. The only time the defect on a charge sheet would be found to be defective is if the alleged defect is in respect of the charge itself or on the particulars of the charge. The OB reference number does not go into the substance of the charge and cannot therefore call for the striking out of the charge. He also in his ground No. 8 alleges that he was taken to the court 4 days after his arrest and his constitutional rights were therefore violated. That is nonetheless an issue that he should have raised at the earliest opportunity in order to give the prosecution a chance to explain the delay. It is also observed that in his own statement of defence, he told the court that he was arrested on 28th may 2008 – yet the court record shows that he was taken to court for plea on 20.5.08. These dates are not reconcilable and it is not therefore possible for this court to make a finding to the effect that the appellant's constitutional rights were violated.

The other grounds challenge the sufficiency of the prosecution evidence to support a conviction and I will deal with that issue later.

This being a first appeal, it is incumbent upon me to revisit the evidence adduced before the trial court, re-evaluate the same and arrive at my own informed decision as to whether the conviction was safe or not. In doing so, I should however give an allowance to the fact that I did not have the advantage of seeing the witnesses testify **(see OKENO VS REPUBLIC).**

The evidence adduced before the trial court was very straight forward indeed. The complainant one Faith Wangui Kamunde had on the night in question gone to a neighbour's home to collect milk. On her way back about 8.00 p.m., she was grabbed by somebody from behind. She turned back and saw it was the appellant who she said she knew very well before – since he was born. She asked him what he wanted and the Appellant is said to have told her that he wanted to have sex with her. She protested saying that she was having her menses but the Appellant did not budge. He grabbed her by her mouth and neck and pulled her into a nearby farm, dropped her on the ground and poured soil into her mouth to stop her from calling for help. They struggled for sometime but the complainant was overpowered and the Appellant raped her. After the ordeal, the complainant went to PW2's shop and told her what had happened. She also went home and her daughters PW3 and PW4 enquired from her as to why her dress was soiled with blood and mud. She narrated the ordeal to them and they all decided to go to the Appellants house to seek an explanation from him. They said that they found the Appellant making a lot of noise and on seeing them he threatened to unleash violence on them.

They ran away. The complainant went to the police station the following day where she reported the matter. She was referred to Baricho Health Centre where she was examined by PW5 who also completed her P3 form. According to PW5, the complainant had neck pains and also had scratch marks on her face. She had no injuries on her genitalia and no spermatozoa could be detected as she was still in her menses. The Appellant was arrested later by a group of women who escorted him to the police station where he was charged with this offence.

In his unsworn statement of defence, the Appellant stated that he had a grudge with the complainant because he had separated with her daughter (PW4). He therefore denied having committed the offences he was charged with.

I have considered this evidence carefully and I have narrowed down the points or issues for determination to the following:-

1. **Did the complainant have an encounter with the Appellant on the night in question?**

2. **Did the Appellant have sexual intercourse with the complainant without her consent and if so, did that act amount to rape?**

3. **Was the evidence on record sufficient to found a conviction on the charge of rape?**

In considering and determining these issues, I will need to consider all the evidence adduced before the trial court as summarized above along with the Appellant's grounds of Appeal and the learned state counsel's submissions. The state counsel opposed the Appeal. He submitted that the evidence on record was explicit, vivid and uncontradicted.

He submitted therefore that the evidence was cogent and sufficient to support a conviction.

From the evidence and the submissions, I have no doubt in my mind that the Appellant stopped the complainant on the night in question and forcefully had carnal knowledge of her. I say so because, both parties agree that they know each other very well before. The complainant could not therefore have mistaken the Appellant for any other person. They were standing with zero distance between them; they talked and no doubt she must have recognized his voice too.

My first issue for determination is therefore answered in the affirmative. On the second issue, I believe that the Appellant did have sexual intercourse with the complainant without her consent. There was evidence from PW2, 3 & 4 that when the complainant went home, her clothes were soiled with blood and mud. The clinical officer confirmed that the complainant was in her menses and that would explain the blood on her clothes. She told the witnesses immediately what the Appellant had done to her, she had no time to concoct a story against the Appellant.

The P3 form also confirmed that the complainant had stiff neck and scratches on her face which was indicative of a struggle between them. She was therefore forced and subdued to have sex with the Appellant. The only other issue is whether this incident as supported by the evidence has met the legal ingredients for an offence of rape.

For an offence of rape to be proved under Section 3(1) of the Sexual offences Act, there has to be "penetration". This issue of 'penetration' in the Sexual Offences Act has actually raised the bar of burden of proof in sexual offences much higher than it was under the penal code. It is difficult for one to proof penetration especially where the victim has had sexual exposure before. Penetration can in my view be proved only with evidence of forced entry into the victim's genitalia. In this case, there was no sign of forced entry – maybe because the victim was a mother aged 45 years and there were no spermatozoa detected because she was bleeding and spermatozoa could not therefore be retained inside of her. This was an unfortunate situation but in my considered view, the legal parameters set by the sexual offences act were not met. The charge of rape was not therefore proved.

In its place however the charge of attempted rape was proved beyond any shadow of a doubt. The learned trial magistrate ought therefore to have convicted the Appellant on the charge of attempted rape under Section 4 of the Sexual offences Act instead of the offence of rape under Section 3(1) of the said Act. Both Section 179 and 184 of the Criminal Procedure Code gives him power to do that. Section 184 of the CPC provides as hereunder;-

> ***"where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual Offences Act, he may be convicted of that offence although he was not charged with it"***

I therefore invoke the above provision, set aside the conviction for rape and replace it with one for attempted rape contrary to Section 4 of the Sexual Offences Act. I also set aside the sentence of 15 years imprisonment and in its place thereof substitute the same with 10 years imprisonment. The Appellants Appeal therefore only partially succeeds to that extent.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 23rd day of September 2010.

In presence of:- The Appellant & Ms. Matiru for the State