



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 113 of 2009**

**GEORGE NDUNGU MIGATHOAPPELLANT
VERSUS
REPUBLICRESPONDENT
JUDGMENT**

George Ndungu Migatho, the appellant herein was tried on a charge of two counts. In the first count he faced a charge of rape contrary to section 3(1) (a) of the Sexual Offences Act No. 3 of 2006 with an alternative count of indecent assault on a female contrary to section 6(c) of the Sexual Offences Act No. 3 of 2006. In the second count the appellant was accused of assault causing actual bodily harm contrary to section 252 of the Penal Code. At the end of his trial the appellant was convicted on the two principal counts. He was sentenced to serve 10 and 2 years imprisonment in counts 1 and 11 respectively. The appellant being dissatisfied preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition of appeal christened "Amended Grounds of Appeal":

1. *That the learned trial magistrate erred in points of law and facts in convicting upon reliance of a defective charge sheet which cannot sustain a conviction.*
2. *That she erred in law and facts in disregarding the fact that my constitutional rights were violated in that I was kept in custody for more than twenty four hours.*
3. *That she erred in law and facts in convicting without observing that the trial was full of contradictions and inconsistencies*
4. *That she erred in law and facts in convicting on reliance of a defective parade.*
5. *That she erred in law and facts in convicting without pausing to find that my arrest had no nexus to the alleged crimes in that whoever led to my arrest was never availed to tell the court how he/she knew the perpetrators of the crimes when the complaint didn't*

When the appeal came up for hearing, the appellant successfully applied to file and rely on written submissions.

Before dealing with the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The particulars in the first count are that on the 31st day of January 2008 at K village in Laikipia District, within the Rift Valley Province the appellant unlawfully and intentionally committed an act which causes penetration with his male genital organ in the female genital organ of RMW without her consent. The particulars in respect of count II are similar to those in count I in respect of the place and date when the offence was committed save that the offence in count II is that of assault. According to the evidence of R M W, the complainant herein, she was asleep in her house on 31st January 2008 when she was woken up by the movements of her goats. She went out of the house to check on what was happening. After bringing back the goats into their pen, the complainant headed back to her house. Shortly she saw someone whom she did not recognize with the assistance of moonlight. That person followed to her house held her by the neck. A struggle ensued between the stranger and the complainant. In the end the complainant was raped by the intruder. The complainant claimed she managed to bite the stranger's finger and caused a farm implement to cut his waist. The complainant's assailant fled the scene after the ordeal. The complainant

was taken to Nyeri Provincial General Hospital for treatment where she was admitted for four days. The complainant claimed she told the police that she could identify her assailant by the injuries inflicted on his fingers due to her bites. The complainant claimed she managed to identify the appellant in an identification parade using the finger bites he had. She later discovered that the appellant was actually her neighbour. She claimed that during the ordeal, the appellant spoke to her and hence she was able to recognize his voice as that of her neighbour. Bernard Kariuki (D.W.2) told the trial court that she visited the complainant on 1st February 2008 whereupon he discovered she had a swollen face. P.W.2 claimed the complainant told him she had been attacked by the appellant. P.C. Octarius Waweru (P.W.4) told the trial court that he recorded the complainant's report on 9th February 2008. He said the complainant told him that she would be able to identify her assailant since she recognized him with the assistance of moonlight. P.W.4 revealed that another suspect had been arrested and released before the appellant was arrested.

When placed on his defence, the appellant denied committing the offence. He said the complainant was unable to identify him in the first two rounds of the identification parades save for the third round. He claimed the first suspect who was arrested prior to his arrest was released when he paid the police a bribe of Kshs. 8000/= but he was taken to court when he failed to raise the amount. One of the grounds argued on appeal is that the appellant was convicted on evidence which were inconsistent contradictory and unreliable. I have carefully considered the evidence and I am convicted that the appellant was convicted on contradictory evidence. At the initial stage the complainant clearly stated that she was raped by someone she did not know. In fact she said she can only be able to identify him if she was shown the injuries the assailant sustained on his fingers as assault of her bites, B K (P.W.2) claimed the complainant told him that her assailant was the appellant. That information contradicted what the complainant told the police and the trial court. If indeed the complainant identified the appellant by the injuries on his fingers, then it was incumbent upon the prosecution to tender medical evidence to establish the nature of those injuries. They failed to discharge that burden. In her evidence in cross-examination, the complainant claimed that the appellant spoke to her while committing the offence. She averred that she identified his voice as that of his neighbour. If that was true then what became so difficult for her to divulge that information to the police. With respect, I agree with the appellant's submissions that there was no credible evidence to sustain a conviction.

In ground 2 of the amended grounds of appeal, the appellant urged this court to find that the trial magistrate erred when she disregarded the fact that his constitutional rights were breached before he was arraigned before a court of law. It is the appellant's submission that he was arrested and kept in police custody for more than 24 hours before being taken to court in breach of S. 72(3) of the then constitution. Mr. Makura, learned Senior State Counsel did not file any replying affidavit to counter the aforesaid averments despite having been given leave to do so. The charge sheet indicates that the accused (appellant) was arrested on 14th February 2008 and was arraigned in court on 20th February 2008. He was held in police custody for five days before being taken to court yet the constitution allowed the police to hold such a suspect for only 24 hours before taking him to court. The prosecution was bound to explain what impeded them from taking the accused to court within the period set by the constitution. In the case of Albanus Mwasia Mutua vs= Republic Cr. Appeal No. 1200 of 2004 (unreported), at page 7 the court of Appeal stated in part as follows:

“The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”

It is plain from this appeal that the prosecution have not proffered any explanation to enable this court determine whether or not it can countenance the delay. In the absence of such an explanation, this court has no option but to pronounce that the appellant's constitutional rights were breached hence the criminal case should have been dismissed and the appellant acquitted of the charges without recourse to the merits of the case.

In the end I will not belabour myself to reconsider the merits of the case that was before the trial court nor the appeal. Consequently the appeal is allowed. The conviction and sentence are quashed and set aside respectively. The appellant is ordered set free forthwith unless lawfully held.

Dated and delivered this 17th day September 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kingori h/b Gori for appellant and Mr. Makura for the State

J.K. SERGON

JUDGE