



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 431 OF 2007

(From Original Conviction and Sentence in Criminal Case NO. 1803 of 2007 of the Senior Principal Magistrate's Court at Kibera)

DANIEL NJOROGE WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Daniel Njoroge Wambui was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code.

He was tried and convicted and sentenced to 20 years imprisonment in count III and an alternative count II of handling stolen property contrary to Section 322 (2) of the penal Code and count III is rape contrary to Section 3 (1) as read with Section 3 (3) of Sexual Offences Act 3 of 2006. Alternative is indecent Act with an adult contrary to Section 11 (6) of the Sexual Offences Act. Count IV is failure to allow finger prints to be taken contrary to Section 21 (3) of the Police Act.

The Appellant pleaded not guilty to all 4 counts.

PW1 C Nwas sworn she gave evidence. On 24/12/06 she was at home, the wife of Appellant who used to be a neighbor said they were selling household goods. She asked if PW1 wanted to purchase anything. PW1 went to their house to see what was on sale. She purchased several items. PW1 paid on spot. For what she brought the accused moved home. On going back home S M told her the person who had sold to her PW1's goods was in her home removing a table. Appellant agreed to carry the item (table) back to PW1's house. On the way the Appellant trapped the PW1 and she fell and he raped her. Then he asserted they were married and they should collect the things in her house. He raped her again in his house, he had a knife and panga and he threatened to cut her up. There were no persons around.

PW1 had a husband. PW1 and her husband decided to go to police with Appellant. On the way to police station the Appellant resisted to go to the station. He wanted to go with PW1 by force. Her husband tried to

defend her but the Appellant with a panga cut him on the neck and he fell down. PW1 run and hid. At last they reported to police the following morning. Both PW1 and husband were taken to hospital. She informed police who came and found Appellant in a bar and arrested him.

PW2 CM W is the husband of PW1. On 23/2/07 he came home from work. PW1 was not at home. Later she came with Appellant. On inquiring from him he started quarrelling and PW2 decided to go to police to report. On the way Appellant got a piece of metal. He hit PW2 on the head. He fell unconscious to come to only at 3.00 a.m. at Police Station. PW1 reported the rape police sent her to hospital for treatment at Nairobi Women Hospital and also to Police Surgeon. PW2 was treated at Kiserian Hospital.

PW3 was Peter a friend of the complainant. He knew Appellant as Kamau. He saw the Appellant with a metal piece. PW4 was Dr. Ketra Muhombe working at Nairobi Women Hospital. She examined complainant on 24/2/07. There was finger nail scratch main entrance to vagina and made report as in exhibit No. 4. The doctor concluded that she was defiled.

PW5 was preparing supper the Appellant emerged from behind the plot. PW5 saw Kamau getting into complainant's house and took out a table. She is the one who informed C bout the table.

PW6 recorded the report in OB (1) assault on Kyalo (2) Rape of PW1 and (3) theft of her household goods. The Appellant when brought to police station was injured.

Doctor Z. Kamau Police Surgeon was called to examine PW1 in respect of rape of complainant. His report was filed in P3 and in respect of PW1 and PW2 both complainants. PW8 stationed at police station on 25/2/07 took the Appellant to Kenyatta National Hospital.

The Appellant was put to his defence he chose to make unsworn statement. Some time on that day he met a certain woman who said "**he is the one**". They hit him on head. He told them "**I am not Kamau.**"

They hit him on head and he fainted. He recovered at Kenyatta National Hospital. Later he was taken to his house by police officers and they found nothing. He was then charged in court.

The trial Magistrate acquitted him of burglary and stealing. Also alternative charge to count one. There is evidence he raped the complainant on 2 different occasions in the bush in his house. PW2 was injured in his wife's presence. The defence was not truthful.

On the day 25/2/07 a Sunday it would not have been possible to be seen and interact with so many prosecution witnesses in one day. He was sentenced to 20 years imprisonment on count III of rape.

On Count II of assault to serve 1 year in jail. The perusal of the record indicates that the Appellant took to

committing the offences on innocent people who had not done any harm to him. I find no reason to interfere with the decision of Trial Magistrate. It is clear that the case was proven beyond reasonable doubt. PW1, PW2, PW3 and PW4 were safe witnesses they are the complainants and they saw the activities of the Appellant. The evidence was direct. On the issue of the Doctor's opinion the complainant was a mature woman already married and used to sexual life and it is normal to have penetration.

Regarding Section 169 (1) Criminal Procedure Code no injustice was occasioned. The statement of unsworn defence was given consideration as the law requires what the Appellant said did not have an impact on the prosecution case.

It is in that circumstance that I say I shall not interfere with the decision of Trial Magistrate. The sentence is prescribed by law. I therefore dismiss the appeal.

Dated and delivered at Nairobi this 13th day of October 2010.

J. N. KHAMINWA

JUDGE