REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

CRIMINAL APPEAL 609 OF 2006

PETER MUNENE .....…..……..... APPELLANT

- AND -

REPUBLIC …….....…….....…..……RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Mrs. *Usui* dated 3rd August, 2006 in Criminal Case No. 14494 of 2006 at Makadara Law Courts)

JUDGEMENT

In a first count, the appellant was charged with rape contrary to s. 140 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant, on 4th July, 2004 at , Nairobi, had carnal knowledge of ***M M M*** without her consent.

In a second count, it was charged that the appellant, on the said date and at the said place, stole a cellphone, Motorola by make, a wrist-watch and cash all valued at Kshs.13,600/= the property of ***M MM.***

To the first count there was the alternative charge of indecent assault on a female contrary to s. 144 (1) of the Penal Code; and the particulars were that the appellant, on the material date and at the said place, indecently assaulted ***M M M*** by touching her private parts.

M M M (Pw1), a fruit-hawker residing at T in Embakasi, testified that on 4th July, 2004 she alighted from a Mombasa-Nairobi bus and, at 11.00 pm she was taking her merchandise to her storage-place. She boarded a mini-bus, and alighted at the Tassia stage, which was 3 - 4 km to her house. PW1 then had the sensation of the appellant herein coming from behind, going past her, and blocking her way in the front. The houses in the neighbourhood were illuminated with security lights; and PW1 clearly saw the appellant herein. The appellant inquired of the witness where she was coming from; and she responded that she was coming from a place of business. The appellant then held PW1's hand, took her handbag, and removed from it her Rolex wrist-watch. In the said handbag the complainant had kept Kshs.5,000/=, as well as her Motorola cellphone; and the appellant grabbed these items, while threatening to stab the complainant with a knife which he had. It was PW1's testimony that the appellant took her handbag, and ordered her to sit down. The appellant thereafter stripped off the complainant's underwear; in PW1's own words:

"He removed my underpant when I was sitting. He told me I should not scream as he would kill me and drink my blood. He put the underpant on the ground. I was naked. The accused parted my legs. He removed his clothes and entered into my body. The accused removed his private parts (penis) and

inserted into my private parts (vagina). The accused person then penetrated my vagina with his penis. I never allowed the accused to have sex with me as I never knew him. I never consented to the act. The accused had placed the knife on the ground near me. The accused had sex with me many times. He would stop, rest, and start again. He did that about four times. It took a while. He then threw me into an area of garbage. The accused ejaculated inside me four times ... After every round, the accused threatened me with the knife."

It was PW1's testimony that Police officers found her in a dark garbage area at 4.00 am of the material night, and took her to Nairobi Women's Hospital; and she made a report at the Police Station thereafter.

PW1 testified that she did give a description of the appellant herein to the Police Officers; and she accompanied these officers in a search for the appellant. PW1 and the Police officers found the appellant at a butchery. How was PW1 able to *recognize* her molester? In her own words:

"***I had seen the accused very well when he stopped me on the road. I recognized him immediately. He had not even [had a change of clothing]. He has the same clothes today in Court – a mid-jacket, brown trousers, and a grayish-black T-shirt under the jacket. He had white shoes which he is not wearing today."***

On cross-examination, PW1 said that the appellant had both a knife and a pistol, which he used to intimidate her, on the material night. She said she had clearly recognised the appellant's face on the material night, as the place was illuminated with bright lights from the neighbouring buildings. PW1 said the footpath along which the assault on her took place had garbage on one side, and bushes on the other, and the assault had taken place in the bushes.

Dr. Zephania Kamau (PW2) of the Police Surgery testified that he examined the complainant on 12th July, 2004 – about a week since the material night. The general examination was normal; the complainant had no physical injuries; and she had no vaginal discharge. PW2 examined the appellant herein on the same day; he had no physical injuries, and his private parts were normal; no exhibits were recovered from him. In the case of the complainant, several items of clothing were recovered from her, for the purpose of a chemical assessment – but such an assessment was not carried out, as no exhibit was placed before the Court.

Police Constable Martin Nzuki (PW3) of Embakasi Police Station was on duty on 8th July, 2004 at about 8.00 pm, when he was requested to accompany the complainant to Tassia, for the purpose of arresting the appellant herein. PW3 found the appellant at a butchery and the appellant was identified by the complainant. PW3 arrested the appellant and took him to the Police Station, and charged him with the offence of rape, and with theft from the person. The stolen items were not recovered.

The appellant in an unsworn defence, could not remember whether on the material night he was at his home. But he said that on the night he was arrested, on 8th July, 2004 he had gone to a butchery to take soup, and while he was at the butchery, two Police officers accompanied by a live-in friend of two years, that is the complainant, came in and called him out of the butchery; they took him to his house where his wife opened up, and they conducted a search, for something unknown to the appellant. The Police officers thereafter took the appellant to the Police station and he was charged with the offences of rape and theft.

In her analysis of the evidence, the learned Magistrate recorded as follows:

"**The Court will determine if the accused person had carnal knowledge of the complainant without her consent and if the accused stole from the complainant. I have considered both the prosecution and defence evidence carefully. I find the complainant's evidence very consistent and vivid [on] the manner in which she was attacked. She testified that she was waylaid along a footpath [which was illuminated by] security lights. She gave details of how the accused threatened her with a knife and a pistol as he had carnal knowledge of her. The complainant testified that she had seen the accused person very well, as there were security lights nearby. She also testified that she was with the**

accused for about two-and-a-half [hours] before he finally released her. She also testified that she noted the accused's clothes on the material [night], and that the accused [was wearing] the same clothes on the date of arrest. I therefore find that [in] the circumstances, the complainant could very easily identify her attackers. The complainant identified the accused person about four days after the attack. Her memory was still fresh."

The learned Magistrate deprecated the failure by the Police to produce as exhibits items of clothing which were said to have been linked to the material incident. Of the finding by PW2 that there was no clinical evidence of a sexual assault on the complainant, the trial Court noted that the doctor's report was prepared eight days after the date of the alleged offence.

Finally on the merits of the case, the learned Magistrate thus recorded her findings:

"**Despite the fact that I have the direct evidence of the complainant alone, I was satisfied [with] her descriptions of the attack, and with her demeanour, as she was a witness of truth .... Having armed himself with a knife and a pistol, I find that the accused had the intention of having sexual intercourse with the complainant without her consent: *Republic v. Oyia [1985] KLR 353* "where a woman yields through fear of death or through duress it amounts to rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will"). It is clear in this case that the complainant never consented to ... sexual intercourse. She was threatened with death. I did not believe the accused when he alleged that he was arrested for an offence he did not commit.**

"**I find this case proved as by law required. I have no doubt in my mind that the accused person attacked the complainant, had sexual intercourse with her against her will, and stole from her as alleged."**

The trial Court found the appellant herein guilty of rape, contrary to s. 140 of the Penal Code. The appellant was also found guilty on the second count, of theft from the person contrary to s. 279 of the Penal Code. The appellant was convicted on both main counts; the Court took into account the fact that he was a first offender, considered his mitigation statement, and sentenced him to eight years' imprisonment on the first count, and to three years' imprisonment on the second count – the two sentences to run concurrently.

The appellant contended in his grounds of appeal that: the conviction was based on the testimony of a single witness, in circumstances calling for positive evidence; that the trial Court failed to consider the existence of a grudge-element in the mounting of the prosecution case; that the trial Court had relied on unsubstantiated evidence; that the defence case was not given due consideration; that the sentence handed down was "cruel and excessive".

On the occasion of hearing the appeal, the appellant urged that no exhibits had been produced to demonstrate that he had raped and stolen from the complainant, on the material night; and he based this argument in particular on the doctor's (PW2's) findings that neither the complainant's nor the appellant's genital areas showed any manifestations of a rape incident.

Learned State Counsel, ***Mr. Mulati*** contested the appeal, noting that conditions of visibility had been good at the material time, and the complainant had identified the appellant as he, while armed with a knife and a gun, committed rape and theft on her. Counsel contested the grudge - thesis raised in the grounds of appeal, as the Court proceedings disclosed the existence of no such grudge.

After considering all the evidence, certain aspects of it have become quite clear to me. It is not to be disputed that the complainant was, on the material night, violently accosted and detained by a lone man who subjected her to a rape assault for a prolonged period of several hours. This incident took place alongside a footpath which was illuminated by security lights from neighbouring residences. The complainant was forced out of the footpath itself, and taken into neighbouring bushes; and she was later thrown into a nearby area of dirt and garbage, where Police officers found her in the small hours of the

morning. The direct witness of these scenarios is the complainant herself, whose *demeanour* the trial Court assessed, and held to be candid, and her evidence to be truthful. This Court will accept that to be the correct position, on the basis of established judicial practice.

The complainant clearly saw the appellant, and took detailed note of his *mode of dressing*, at the time of the attack. She remembered the appellant's appearance, and was able to identify him four days later, for arrest by the Police.

The appellant had no answer to the prosecution case, and his claim about a grudge between himself and the complainant, had no foundation, in my opinion.

Did the appellant also *steal* personal items and money from the complainant? Without necessarily doubting the single-witness evidence on the charge of theft, it is to be noted that the proof placed before the Court had focused on the first count of the charge, while little had been shown to *prove* the theft charge. No attempts were made to convince the Court that the items allegedly stolen had existed, or were in the complainant's custody on the material night. The mode of proof, in his regard, conveys *doubts* which, by the standard practice in criminal law, will have to be resolved in favour of the appellant.

In the result, I hereby uphold the conviction in respect of the *first count* of the charge; affirm sentence in respect of the *first count;* allow the appeal in respect of the *second count*; and set aside the sentence in respect of the *second count.*

Orders accordingly.

DATED and DELIVERED at Nairobi this 29th day of January, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Respondent: Mr. Mulati

Appellant in person