REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 176 of 2006 & 446 of 2006 (Consolidated)

PETER KAMANDE ITUI .....1ST APPELLANT

JOSEPH MUNGAI ROSE ……2ND APPELLANT

- AND -

REPUBLIC ……..……...……RESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. M.W. Murage dated 31st July, 2006 in Criminal Case No. 1233 of 2004 at Kikuyu Law Courts)

JUDGMENT

The appellants herein were charged with rape contrary to s. 140 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the two, on 7th October, 2001 at Kiambu District of Central Province, had carnal knowledge in turns, of ***F K K***, without her consent. The appellants faced a second count, of indecent assault on a female contrary to s. 144(1) of the Penal Code; and the particulars were that on the said date and at the said place, they indecently assaulted ***LM*** by touching her breasts and private parts.

The prosecution case was that the complainants, PW2 and PW3, left their house to buy candles, and on the way they met the appellants herein who declared PW2 and PW3 to be under arrest for loitering; the appellants said they would take PW2 and PW3 to Thogoto Police Post. As the appellants coerced PW2 and PW3 along, 2nd appellant was left with PW2, while 1st appellant held on to PW3; and the two men then directed PW2 and PW3 into the forest. When they got into the forest, 2nd appellant forced PW2 to removed her clothes; he forced her to lie down, and raped her. The 2nd appellant then left PW2 and went to PW3 – whom he held on the legs, and touched her private parts; and 2nd appellant then assisted another man to rape PW3. On the following day, PW2 and PW3 reported the incident to the Police, and were given the P3 medical-reporting forms which were filled in by ***Dr. Kungu*** (PW1) after he examined the complaints. Subsequently the appellants herein were arrested and charged.

In the testimonies, PW2 said she knew 2nd appellant, who was in the business of cleaning cars, close to her residence. PW2 had given 2nd appellant's name to the Police at the time of reporting; and subsequently when 2nd appellant found the complaints together, he sought forgiveness. The 2nd accused admitted knowing both complainants, and having met them on the material day.

The Government Analyst (PW4) found on the underwear of PW2 the semen strains of a Group "O" secretor, as well as a few degenerated spermatozoa. PW4 found the blood samples of both appellants also belonged to a Group "O" secretor. PW4 concluded that PW2 had been involved in sexual activity with a Group "O" secretor – and that could have been 1st or 2nd appellant or both.

The learned Magistrate found that 2nd appellant had not challenged the evidence, and his defence was mere denial. So the trial Court found 2nd appellant guilty as charged.

It was PW3's testimony that 2nd appellant held her and touched her private parts as *another man* raped her. As this evidence was not challenged, the learned Magistrate entered a conviction against 2nd appellant, on the charge of indecent assault.

The 1st appellant in his grounds of appeal, contended that the trial Court was in error, in entering a conviction, because the complainant had not made a first report implicating him, and so the allegation against him was a mere afterthought; because consideration was not given to the fact that 1st appellant had served a two-year term of imprisonment before trial began de novo; because he had an alibi defence which was not considered.

The 2nd appellant had no grounds of merit, which would raise the question whether his appeal is against conviction and sentence, or just sentence. He contends as follows: the trial Court had not taken into account the fact that his trial was a re-trial; the trial Court did not take into account the period he had already served in jail; the retrial was occasioned by prosecution error; he deserves mercy.

Just as the record is unclear about the 1st appellant's complicity in the material incident, so is his appeal, which he chose to conduct in writing and not orally. In his written statement, he is preoccupied with matters that shed little light on the merits; matter such as why the case went for re-trial; such as his being regarded as a first offender; such as his being a law-abiding citizen; matters such as his remaining in prison custody for long.

The position of 1st appellant has remained unclear, partly because of the line of submissions taken by learned counsel for the respondent, ***Mr. Murithi***; he urged: "First appellant has now stated he is only appealing against sentence"; and he proceeded on that basis to urge that the appeals by the two appellant be dismissed.

The 2nd appellant, in respect of whom the incriminating evidence is quite unambiguous, in his submissions said:

"There was a retrial. So, for long, I have been in jail. I ask for pardon."

The proof of a criminal case against an accused person is squarely the responsibility of the prosecution; and all the evidence adduced are required to be methodically analysed so as to show clearly that the burden of proof has been discharged. Analysis of the evidence is a judicial task which is required to be responsibly conducted, as the basis for reaching any verdict. That analysis is to feature clearly in the text of the judgment, so that an appellant Court such as this one can appreciate the permutations in the evidence coming to justify a conviction. The basic principle is clear from the terms of s. 169(1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya), which thus provides:

"Every judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

The record does not show how the proof against 1st appellant was conducted, and it would give the impression that 1st appellant was required to dispose a case against himself. That would be contrary to

well established principles of the criminal law.

As for 2nd appellant, there is the clear evidence of the complainants, quite well corroborated, showing his involvement in the crimes charged.

I hereby acquit 1st appellant, and order that he shall be forthwith released, unless otherwise lawfully held. I dismiss the 2nd appellant's appeal in respect of both counts of the charge. I uphold conviction and affirm sentence as imposed upon the 2nd appellant by the trial Court.

Orders accordingly.

DATED and *DELIVERED* at Nairobi this 22nd day of January, 2009.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Murithi

Appellants in person