REPUBLIC OF KENYA

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

HCCR APP NO. 123 OF 2007 & 121 OF 2007

JAMES KAMAU GAKUO ………………………….1ST APPELLANT

PATRICK MWANGI MAINA………..…………...2ND APPELLANT

BENSON MUTHAMI MUNGAI ……….…………3RD APPELLANT

-AND-

REPUBLIC ……………………………………………RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate L.W. Gicheha dated 30th November, 2006 in Criminal Case No. 10416 of 2003 at Thika 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 1st appellant jointly with another person not before the Court, on *27th September, 2003* at Thika district, within Central Province, had carnal knowledge of ***LNB*** in turns, without her consent. This charge had the alternative count, that the same persons named in the foregoing particulars, on the said date and at the said place, unlawfully and indecently assaulted ***LNB*** by touching her private parts.

In count 3, it was charged that 2nd and 3rd appellants herein, on *27th September, 2007* at Githurai Progressive Village in Thika District, within Central Province, jointly with another not before the Court, had carnal knowledge of ***H G B*** in turns, without her consent.

The prosecution called five witnesses. PW1 and PW2, who are sisters, were coming from Kenyatta University's cultural week, walking to a nearby petrol station, for the purpose of finding a taxi to take them home. Suddenly, there was noise all around, coming from several men, and one of these men grabbed PW1 by the shoulders. The man dragged PW1 to the ground and, at that moment, she saw herself surrounded by some ten men who searched her and grabbed her shoes and ear-rings; and thereafter they dragged her into the bush at the side of the road, and she was raped by a gang of some seven men.

PW1 testified that she identified 1st appellant herein, as the rape of her was taking place; she said there were motor vehicles passing along the road – and their lights enabled her to see 1st appellant herein. The men left, after the rape assault; but one of them then returned, offering to assist her: and he escorted her to the supermarket where she lived. It is from the supermarket, that PW1 went up to the Police station and reported the incident. PW1 had realized that her sister was missing; and after she got to the supermarket she saw her sister being escorted by a small boy.

The caretaker had called Police officers who came to the supermarket; and PW2 then took them to the house where she on her part, had been raped a short while earlier; and at that house, the *2nd and 3rd appellants* were arrested.

PW1 later gave information to the Police which led to the arrest of *1st appellant* herein. PW1 and a Police officer (PW3) visited the scene where she had been sexually assaulted, and recovered her underpant, and also found used condoms.

PW2 testified that on the material night, when PW1 had been dragged away and then sexually assaulted, there were some eight men surrounding PW2; and these men took her jacket, even as *three of them* grabbed her and led her away from the crowd. The three men took PW2 into *a house* which was still under construction; they knocked on the door, and someone inside opened. The men took PW2 to a room in the house, where they raped her. PW2 talked to the third man, who said he could not release her until the next day; and in the morning he gave her a pair of shoes and Kshs. 20/= for bus fare. PW2 upon getting out of the house, took the decision not to take a bus, but to go on foot: she wanted to get a *clear view of the location of the house* into which she had been commandeered in the night and then sexually assaulted. After clearly seeing the geographical set-up of the *locus in quo*, PW2 went home, and found her sister (PW1) waiting for her.

PW2 was able to identify 3rd appellant herein when she left the *locus in quo* at 5.30am. When the Police officers came after she arrived home, PW2 led them to the *locus in quo*; and there, 3rd appellant was found sleeping. He was arrested, and he took the Police team to the home of 2nd appellant herein.

At the time PW2 had been forced into the *locus in quo*, she had heard one of the assailants being referred to by the nickname "***Pato***"; and this was the name given to a small boy who was asked by the Police team to call 2nd appellant. Both 2nd and 3rd appellant were then arrested and held by the Police.

Later on, PW1 saw a man she recognised as one of her assailants, and she asked PW2 to call the Police; but in the meantime, the suspect disappeared. At that stage, PW3 led the complainants through the area's bus stage, and there, one suspect not before the Court was arrested; and subsequently, 1st appellant herein was arrested.

PW4, a brother to 3rd appellant, said he was in his house on the material date, at 4.30am, when his brother (*3rd appellant*) and two of his friends (one being *2nd appellant*) came into the house with a lady. PW4 who opened for those night arrivals, did not know where they had come from, and did not hear what they were saying to one another; these are PW4's words:

"I can't remember what they were saying; then they returned to my brother's room one by one. I saw one of them was a girl. There were three men and one girl. They came and sat on my bed, and they went to my brother's room one by one. I then heard them escort each other …. My brother's bedroom door opens into my room. My brother then came back alone and he told me he had taken my shoes. He said he was going to give the girl because the girl had lost one shoe. When we were talking it was 6.00a.m. He gave her my shoes and they left. They passed through my room so I knew when they left. My brother then returned at 6.00a.m. After sometime I woke up and went to my parents' for breakfast. At around 6.10a.m. I saw Police come. They asked me questions, then the girl came and said that I was one of the people who had raped her. I said it was not me she had come with; it was my brother. I showed her my brother, and she identified him. At that time she was still wearing my shoes. We then took [the Police] to ***Patrick's*** house …. later, my brother and ***Patrick*** were charged."

A doctor (PW5) examined the complainants, and found that the two had probably been raped, even though there was no sign of spermatozoa in their genitalia.

The appellants herein when put to their defence, all denied the charges.

The learned Magistrate thus defined the questions for determination in the trial:

(a) whether PW1 and PW2 were raped on the material night;

(b) whether the accused persons were part of the gang of men which raped PW1 and PW2.

She noted certain striking elements in the evidence: PW1 and PW2 had given evidence that they were raped, and they led the Police to the *locus in quo* where, in the case of PW1, her underpant was recovered, as well as used condoms; and in the case of PW2, condoms were recovered; the P3 medical-reporting form indicated that the two were probably raped, even though spermatozoa had not been found in their genitalia – a fact which may be related to the use of condoms. The learned Magistrate concluded that rape-assaults had taken place upon both complainants.

As to causation, the learned Magistrate noted that the rape offences had occurred at night; some seven men had dragged PW1 into the bush, raped her, and taken off; PW1 said she was able to identify 1st appellant herein, with the aid of lights from motor vehicles moving along the neighbouring road; she said she saw the men's faces as they sexually assaulted her; she said 1st appellant herein *was* the man who had dragged her into the bush, the *locus in quo*; PW1 is the one who led the Police to arrest 1st appellant herein; PW1's testimony was that 1st appellant was one of the touts plying the road that passes by the *locus in quo*, and was generally seen in that area.

The learned Magistrate gave focused attention to the issue of *identification*, in respect of 1st appellant; she remarked:

"**I agree identification at night with the help of moving motor vehicles may not be easy as the light is not fixed. However, in a case [where] a person's face directly faces you, and it is a person you have seen before, it is not difficult to recognize the person. She also [saw] the 1st appellant as he dragged her off the road. These are people she had seen at the stage. What [grips] the Court's attention is her indication [that] she could identify the people who raped her, and [she] even led to their arrest."**

The position with regard to the second complainant was more stark still; the learned Magistrate thus observed:

"**As for PW2, she was able to lead the investigating officer to the house where she was raped and found [3rd appellant] …. Still lying on the bed [on which] she had been raped. Her evidence is corroborated by the evidence of [PW4] who confirms that a girl was brought by [2nd appellant] and [3rd appellant] that night, and he saw them go into the room where she was, one by one. [PW4] also [says] he spoke to [2nd appellant] that night, which [confirms] beyond doubt that [2nd appellant] was one of the people in that house that night. PW2 was even given shoes by [3rd appellant] and these shoes turned out to be PW4's shoes – which again corroborates her story."**

The learned Magistrate was clear that PW2 had been sexually assaulted, and that there could be no element of consent in the act; she thus stated the point:

"There is no way …. she would have willingly gone [into] that house to sleep with three men. It is therefore true that she [was] forced into that house and raped."

The learned Magistrate came to her conclusion as follows:

"**I have considered the accused [persons'] defences, and I find [that] they raise no reasonable [doubts]. The complainants had never dealt with the accused persons before, and there was no grudge between [them]. They only got to know [one another] when the accused persons mercilessly dragged the two girls and raped them in turns with their friends …. I …. find that the prosecution**

have proved their case beyond [any] reasonable doubt, and the accused are accordingly, convicted.”

The learned Magistrate recorded the appellants’ statements in mitigation, and treated them as first offenders; and on that basis sentenced each to a 15-year term of imprisonment.

Learned counsel ***Mr. Kangahi*** formulated an amended petition of appeal, stating the grounds as follows: that the doctor’s medical report was negative, and so there was no basis for the convictions; that the convictions were arrived at against the weight of the evidence; that the ingredients of rape-offence were not established; that the appellants had not been properly identified as suspects; that the learned Magistrate arrived at wrong conclusions, and had been moved by her own conjectures rather than by the evidence.

The foregoing points were urged by ***Mr. Kangahi***, who maintained that the doctor’s (PW5) evidence showed no evidence of penetration, nor of spermatozoa, and that this showed that the complainants had not been raped – let alone by the appellants herein. ***Mr. Kangahi*** contended that PW5 had found only scratch-marks and pain in the pubic zones of the complainants’ genitalia – and that such, disproved the rape hypothesis; counsel urged that neither complainant had been subject to any penetrative intercourse, and so, neither had been raped.

Of 2nd appellant, counsel submitted that some evidence showed he did not “manage to rape [2nd complainant]”, and so he should be acquitted.

A check on the record shows, however, that ***HGB*** (PW2) responded to 2nd appellant’s cross-examination on 23rd November, 2004 as follows:

“You raped me. You found me and [PW1] at Kenyatta University. You were one of three I was left with …. It was 4.30a.m …. I had never seen you before. We had no agreement …. I don’t know why you took me to your house and raped me …. You raped me. You were holding my hand. There were people in the plot. I was scared of screaming; I did not know what you could do to me, so I did not scream. I was given shoes even though you had raped [me].”

PW2, on cross-examination by 3rd appellant testified:

“I knew you that day in the morning; it is not true that I had a relationship with [2nd appellant]. You took us to ***Patrick’s*** house. I was held by my hand. I had not agreed to sleep with [2nd appellant] …. I first slept with 1st accused [not before the Court], then [2nd appellant], then [3rd appellant].”

Learned counsel had contended that 2nd appellant could not have committed rape; in his words: “The [2nd appellant] is the one who gave [PW2] a pair of shoes which she used to get home ….; this wasn’t the [conduct] of a person who had committed such a serious offence – rape.”

Learned counsel ***Mr. Makura*** contested the appeal, and supported both conviction and sentence. He urged that the complainants had adduced overwhelming evidence showing they had been raped on the material night by the appellants herein. PW2 had been quite clear about one of the rape-assailants, who was referred to by his associates as “***Pato***”, and it was 2nd appellant herein. PW1 had seen the appellants working as touts along the road close to the *locus in quo*, and she identified 1st appellant as one of the men who raped her along the road, on the material night.

Mr. Makura submitted that the examination of the complainants by the doctor took place a significant length of time after the rape-incident; and that his failure to find signs of spermatozoa in the complainants’ genitalia, did not mean rape had not taken place; and moreover, there was evidence that the rape-assailants had used condoms during the sexual assault.

I have considered and set out all the evidence, set out the learned Magistrate’s line of analysis,

considered the grounds of appeal, and heard the respective submissions of counsel.

In my opinion the trial Court took all due care in analyzing the evidence relating to the 1st complainant, noting that the primary source of lighting at the *locus in quo* was the vehicular headlamps moving along the adjacent road. That basis of identification, I agree with the learned Magistrate, was strengthened by the fact that the first complainant was able to see the man who grabbed her and pinned her down in the roadside bush, to be sexually assaulted by men in numbers. There is no doubt at all that PW1 was raped: her underpant was later recovered at the *locus in quo*, and evidence of sex, at that point, was glaring, in the shape of used condoms. PW1 is to be believed, that the sex act brought the culprits to face her directly, and she saw their faces, and identified 1st appellant as one of her attackers. Evidence of such a delicate and personalized nature, I will take judicial notice, does not offer plenty of opportunities for distortion. Like the learned Magistrate, I find that PW1 was sexually assaulted by 1st appellant herein.

As for the 2nd complainant, the evidence, just as the trial Court found it, is all so clear. The testimonies of PW2 (the complainant) and PW4 (brother to 3rd appellant) interlocks to prove that 2nd and 3rd appellant whisked PW2 into a certain house, where they and another, repeatedly raped her, before releasing her in the morning. PW2 had taken care to identify the house in which the rape took place: and this was the starting point in identifying the two culprits.

Upon considering the sentence meted out by the learned Magistrate, I find the same fair and well measured.

The appeals are, each and all, dismissed. Conviction is upheld in each case. Sentence is affirmed in each case.

Orders accordingly.

DATED and **DELIVERED** this 19th day of March, 2009.

J.B. OJWANG

JUDGE.

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Kangahi

For the Respondent: Mr. Makura