REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 152 of 2007 &30 of 2008

(From original conviction and in Criminal Case No. 120 of 2007 sentence of the Senior Magistrate's Court at Kilifi)

B.K.V & F. K. ELLANTSM……..…….APP

VERSUS

REPUBLIC ……..……..…… RESPONDENT

J U D G M E N T

B.K.V (the 1st appellant) F.K.M (2nd appellant) were convicted on a charge of rape contrary to section 3(1) (a) (b) of the Sexual offences Act and sentenced to serve 20 years imprisonment.

They were also convicted on charge of assault causing actual bodily harm contrary to section 251 of Penal Code and sentenced to serve two years imprisonment.

They were further convicted on a charge of stealing from the person contrary to section 279 (a) Penal code and sentenced to serve four years imprisonment.

The sentences were to run concurrently. The appeals were consolidated as they emanate from the same proceedings. The appellants denied the charges. It was the prosecution's case that on 13th January 2007 in Kilifi District, the appellants jointly with another not before court stole cash ksh. 3440/- from F.N.M, unlawfully assaulted her thereby occasioning her actual bodily harm and had carnal knowledge of her without her consent.

F.N (PW1) was at their neighour's house having a drink on 13-1-07 when she decided to go home. The two appellants who were with her offered to escort her to another place for more drinks. Thereafter they escorted her home at about 8.00pm, when 1st appellant whom she knew as Ndule, asked her to stop and they were joined by a third person. They held her hands and directed her to follow them. She called for help, but 1st appellant threatened her with a knife to keep quiet. She was taken to a farm, beaten and ordered to undress – she obliged. 1st appellant took away ksh. 3440/- from her and raped her, then 2nd appellant raped her, followed by the 3rd person. She pleaded with 2nd appellant whom she knew as Mazuri, as he had been visiting her. Instead, they raped her again in turns. 1st appellant then ordered her to kneel saying he wanted to sodomise her – which he did and she cried out in pain and collapsed. They threatened to kill her if she mentioned the incident to anyone. 1st appellant also took away her lesso and shoes. She managed to get to a neighbour's house and told them what had happened. It was her testimony that her attackers were people who worked with her at a quarry.

On cross-examination PW1 stated:

"I was beaten and raped. I found you at Mwololo's place… I didn't ask to be laid…"

B.M (PW3) confirmed that on 14-1-07, PW1 woke him up – she was injured and asked for water – but she did not tell him who had injured her. J.O (PW2) who went to see PW1 at her house said he found her in pain and she said she had been attacked and raped and she mentioned the names of the suspects which names PW2 recognised. PW4 Dr. Mutinda who examined the complainant found that she had a cut on the lower lip and there was presence of spermatozoa.

Both appellants gave unsworn testimony. 1st appellant's evidence was that he met the complainant at drinking den during the lunch break – both he and complainant worked out a quarry. At 5.00pm, he found the complainant still drinking – they had a drink and they all moved to another den to drink with the complainant. There was a scuffle between her and three other men who punched her on the face. She was injured and drunk. The next day, people accused him and 2nd appellant of assaulting the complainant.

The 2nd appellant denied that he knew the complainant and he was simply apprehended by a crowd of people alleging he had raped and robbed her.

In his judgment, the learned trial magistrate observed that the findings of the doctor confirmed that complainant had been assaulted and she sustained bodily injury, and that the presence of semen in her body confirmed that there had been sexual intercourse. He noted that complainant knew her attackers well as the two appellants worked with her at the quarry in M and were arrested the next morning. She also recognised the third person whom she named as Rasta who worked in a hotel where they used to eat.

It was the learned trial magistrate's finding that complainant had no grudge against the appellants and that her evidence was consistent even during cross-examination. However he found no medical evidence was made available regarding the unnatural offence.

It is against these findings that the appellants are aggrieved and challenge the same on amended grounds that are similar i.e:-

(1) They were held in police custody longer than the stipulated period recognised under section 72(3) (b) of the Constitution of Kenya.
(2) The particulars of the charge were framed contrary to section 137 of the Criminal Procedure Code as to two persons cannot, at the same time, insert their genital organs into that of a female and they should have been charged separately and not jointly, so the charge is defective.
(3) The plea of not guilty in respect of count 1, 2, 3 and 4 initially and after amendment of the charge were not signed, contrary to section 197 Criminal Procedure Code.
(4) The trial was conducted partly without a full coram.
(5) The trial was conducted contrary to section 33 of the Evidence Act.
(6) PW4 produced a P3 form with a different marking as one produced by PW1.
(7) The case was not investigated, as no investigation officer testified in court, so the case was not proved beyond reasonable doubt.
(8) The trial magistrate failed to follow the provisions of section 169(2) of the Criminal Procedure Code.
(9) Their defence was not considered alongside the prosecution case, and the sentence is harsh and excessive.

The appellants filed written submissions which are similar-
On allegations of violation of their constitutional rights, the appellants submitted that they were arrested on 14-1-07 and taken to court on 29-1-07 and that there was no explanation for this delay. They sought to rely on the decided case of **Albanus Mwasia Mutua V R Cr. Appeal No. 120 of 2004** where the Court of Appeal , sitting in Nairobi held that:

> ***"At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. 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."***

The Assistant Deputy Public Prosecutor, Mr. Ogoti who appeared on behalf of the State conceded that the appellants were held beyond the statutorarily recognised period, but argued that this would not entitle them to an automatic acquittal – rather they should find relief under the provisions of section 72(6) of the constitution which provides that in the event of such breach then they can seek compensation by way of damages against the State. I have considered the arguments raised in several decisions by the Court of Appeal – it is not for every constitutional violation that draws an automatic acquittal – there may be reasons as to the delay. However in the present instance no explanation was preffered by prosecution for the delay. Should this then entitle them to an acquittal? What about the constitutional right to life and to own property which the courts are equally required by the self same Constitution to protect? Shouldn't justice be a balancing of the scales – what message does the court send to a victim of crime when the person who has violated her equally constitutionally protected rights is set free? That it's alright to commit an offence, once you allege violation of your constitutional rights then freedom is yours for the asking? I don't think that is what the Constitution intended, and that is why the provision under section 72(6) of the Constitution exists. I

find as a fact that the appellants rights were violated by being held for over 24 hours and they are entitled to compensation by way of damages – which they should pursue.

The appellants also argue that the charges are defective in the manner of framing with regard to them being jointly charged with raping the complainant. They find support in the case of **Paul Mwangi Murunga V R Cr. Appeal No. 35 of 2005,** where the Court of Appeal sitting in Nakuru stated that:

> ***"We are unable to appreciate how two men can at the same time "jointly" enter or try to enter her genital organs. T he act is committed by each one of them alone, and if there be two or three of them, each must be charged on a separate count of rape."***

Another defect they point out is that the charge sheet failed to indicate the time that the offence took place again relying on the provisions of Section 137(f) of the Criminal Procedure Code which is to the effect that a charge should be framed so as to indicate with reasonable clearness the place, time, thing, matter act or omission referred to.

Mr. Ogoti's response is that with regard to the omission as to time, that is curable under section 382 Criminal Procedure Code and ought to have been raised at the earliest opportunity and appellants have not demonstrated how such failure has prejudiced them. I cannot fault that reasoning.

Section 382 Criminal Procedure Code provides as follows:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on accient of an error, omission or irregularity in the complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

Going by the evidence of both the complainant and the 1st appellant, the incident complained of took place at night – this came out clearly in the evidence and no prejudice or injustice was occasioned by the omission of time, in the particulars of the charge sheet.

However there is the question of being jointly charged with raping, the complainant and the sentiments expressed by the judges of Appeal in the **Muranga** case Mr. Ogoti's argument is that the two appellants acted in concert and had the necessary mens-rea.

My initial reaction when I read the Court of Appeal decision in Murunga's case was "How true, joint rape does not make practical sense no matter how much circumspection the attackers exercise it would have to be one individual committing the act followed by the other. Yet from a legal sense of the word "jointly" and drawing from other instances where persons are charged jointly, for instance in armed robbery otherwise referred to as "Robbery with violence" the individuals are deemed to be together in a gang, out of say a gang of six, may be only two are armed yet the entire group who will be acting in concert with their colleagues to achieve their intentions (although not sharing the firearm) will be deemed to be acting jointly (may be one was driving the get – away car, the other was keeping watch of intruders, another was simply barking orders, and yet another may have been collecting the loot, while the two armed ones would be the ones either firing or brandishing the weapons yet they will all be deemed to be acting in concert – reason? They had a joint mens-rea. Perhaps the Penal Code ought to have in its interpretation section, the meaning of the word jointly, because when I extrapolate then the situation I have allowed to could well be men taking turns at raping a woman instead of taking the loot all acting in concert, and with a criminal intention - since there is no such definition, and the Court of Appeal being supreme to this one, and based on the doctrine of precedence and there being nothing to help me distinguish what in my opinion appears to have been the intention of the draftsmen, I am guided by the Senior court's decision and find that the charge was defective and therefore the appellants were prejudiced and the conviction based on such charge as drawn was unsafe.

As regards the proceedings not being signed by the learned trial magistrate, it is the appellant's submission that after plea was taken and a plea of not guilty entered, the trial magistrate failed to append his signature after each record of "Not Guilty" and that even after the charge sheet was amended and the amended charges read out, no signature was appended by the trial magistrate.

They sought to rely on the provisions of Section 197 Criminal Procedure Code which provides that:

> ***"In trials by or before a magistrate the evidence of the witnesses shall be recorded in the following manner***

(a) the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court, by the magistrate… and shall be signed by the magistrate and shall form part of the record"

Would this render the proceedings a nullity and therefore warrant an acquittal?

Mr. Ogoti's response is that it would not be fatal as the record was made in the trial magistrate's own hand. I have perused the original record – while it is true that the learned trial magistrate did not sign against each entry of plea on each charge, yet at the end of the plea taking, he signed the record and to my mind no prejudice was occasioned by that – the sum total on the plea of Not guilty was duly signed by the trial magistrate.

When the charges were amended and read afresh to the appellants, a similar process was followed by the learned trial magistrate – after reading out all the charges and entering each plea at the end of that recording of plea, the learned trial magistrate appended his signature. There was no miscarriage of justice whatsoever in the manner the record was maintained by the trial magistrate

Appellants also challenged the coram saying on two occasions the court clerk was not recorded as being present – one occasion was on 12-2-07, then on 19-2-07 and on 21-2-07, as well as 7-3-07. I note that those were dates when the matter was in court only for routine mention and no evidence was adduced. The main role of the court clerk is to interpret whatever is being said in court, from the language being used by the prosecutor, witness or presiding officer, to a language which the accused person understands. In all the dates under reference, the matter was not heard and no adverse orders were made and so no prejudice was occasioned or any injustice suffered by appellants by failing to have the court clerk in attendance – this would not render the trial a nullity.

Appellants also complained about the production of the P3 form saying it is drawn as having been signed by Dr. Gachiri yet it was produced by Dr. Mutinda. They contend that this contravened the provisions of section 33 of the Evidence Act which provides that:

> ***"If the maker of the document is not available, the document can be produced only after another has been able to identify the maker's signature. And even then, it has to be shown to the satisfaction of the court, that the maker of the report was dead or could not be found or had become incapable of giving evidence or his attendance could not be procured without unreasonable delay or expenses."***

It is their argument that PW4 never alluded to being able to identify the maker's signature or handwriting.

Mr. Ogoti in response to this is that the P3 form was properly signed and produced and the appellants never objected, further that they were even given a chance to cross-examine the doctor and this ground is therefore an afterthought.

I have perused the P3 form, it is indeed signed by a Dr. Gachiri, who did not testify. Dr. Mutinda did not state that he is also known as Dr. Gachiri. There was no indication why the maker of the document was not called to testify or whether Dr. Mutinda was familiar with his signature or handwriting, or indeed whether he had ever worked with the said doctor. So where does this place that evidence – on which this case revolves?

Certainly this scenario does not fit in with any of the situation envisaged under the Evidence Act where statements contained in documents whose makers cannot be called are admissible and the question of whether the appellants did not protest when Dr. Mutinda testified does not sanitize the position as they were not even given an opportunity or informed as to why Dr. Gachiri could not come to court and the basis for Dr. Mutinda's producing a document made by him. I can do no better than referrer to section 33 of the Evidence Act on this aspect. The appellants were thus prejudiced as concerns count 1 and count 3 for which the p3 form relates.

The appellants further submit that since they were not subjected to medical examination then prosecution did not establish whose sperms were found in the complainant, and that meant that the medical evidence was inconclusive.

Mr. Ogoti in reply stated that the fact that spermatozoa was traced in the complainant and the evidence placed the appellants at the scene sufficiently pointed to them as the offenders and that the evidence was watertight.

The absence of spermatozoa per se in a female's reproductive system does not necessarily mean that there has been no sexual contact. Indeed the crucial issue to consider is whether there has been penetration. The paradox here now is that the very P3 - form which made reference to the presence of spermatozoa has been faulted as regard its production and that appellants were prejudiced by the procedure adopted by the trial court. Since again there is already an indication that two men cannot jointly rape and since here the evidence led was to the effect that

two men had sexual encounters with complainant (one of whom denies even being in the company) and spermatozoa having been detected, and the alleged individuals arrested, then it was necessary to carry out a semen/sperm analysis to determine whose sperms were found inside the complainant under the circumstances. Due to these technical loopholes, the upshot then is that the conviction in this matter was unsafe and I quash it. The sentence is set aside on count 1 and count 3.

With regard to the second count of stealing from a person, the learned trial magistrate did not address it in his judgment apart from posing the question as to whether the money was proved to have been stolen? In fact there was no reason given as to how he came to convict appellants on this count. What proof as there that she had the money? The finding on count 2 totally went against the provisions of section 169 Criminal Procedure Code. Consequently that conviction too was unsafe and it is quashed and sentence likewise set aside.

The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **26th** day of **May 2009** at Malindi.

H. A. Omondi
JUDGE