REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 230 of 2008

STANLEY NJOGU MUCHIRI …….…….....……APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.1081 of 2007 by T.W. MURUGI (SRM)

J U D G M EN T

The appellant, **Stanely Njogu Muchiri** was arraigned before the Senior Principal Magistrate's Court, Murang'a to answer to the charge of rape contrary to *section 3 (1)* as read with *section 3 (3)* of the Sexual Offences Act No.3 of 2006. Particulars given were that on the 4th day of May, 2007 at G[particulars withheld] village in Murang'a District of the Central Province, he intentionally and unlawfully had carnal knowledge of **PMM**without her consent. The appellant also faced an alternative charge of indecent acts contrary to *section 11 (6)* of the Sexual Offences Act No.3 of 2006. Particulars whereof were that on 4th day of May, 2007 at G[particulars withheld] village in Murang'a District of the Central Province, intentionally and unlawfully did indecent acts to **P M M** by touching her private parts. The appellant pleaded not guilty to the charges and he was tried.

The case for the prosecution was that the **complainant PMM** comes from G[particulars withheld] and knew the appellant as he was her step son. On 4th May, 2007 at about 9p.m. she was in her house when the appellant knocked her door and told her that he was with her grandson, one M and police officers from Kangema. She opened the door and immediately this appellant held her by her cheeks and dragged her to her bed, removed her skirt and since she was old woman wore no panties, the appellant proceeded to her three times. Though she had not put on the light she was nonetheless able to recognize the appellant by his voice which she was familiar with. The following morning she went and reported the incident at G[particulars withheld] police station.

WP2 P.C. cosmos Kivita received the report of the complainant on 5th may, 2007. He booked the same, issued her with the P3 form and escorted her to hospital. At the hospital she was examined by PW3 **Samuel Wangai Kahando**, a clinical officer based at Muriranjas hospital. He later filled the P3 form in respect to the complainant on 7th May, 2007. When he examined her, he noted that inner wear and petticoat were wet with blood, bruises on the labia and they were blocked on the vaginal wall and clitoris. That she had active vaginal bleeding and a high vaginal swap indicated the presence of spermatozoa. He concluded that she had been sexually assaulted.

The appellant was thereafter put on his defence. In his unsworn evidence he testified that the complainant was his stepmother and denied committing the offence. It was his evidence that the complainant had a grudge with him due to a land dispute and thus implicated him.

Having carefully evaluated and re-appraised the evidence led by the prosecution as well as the defence, the learned magistrate was convinced that the prosecution had proved their case beyond reasonable doubt. Accordingly she proceed to convict the appellant on the first count. She correctly made no finding in respect of the alternative count. Upon conviction, the learned magistrate sentenced the appellant to 20 years imprisonment.

The appellant was aggrieved by the conviction and sentence. He thus preferred this appeal in which he complains that he was convicted on the evidence of a single identifying witness, that his rights under *section 72 (3) and (b)* were violated, that voice identification was not free from possibility or error and finally that his defence was rejected without any reasons being advanced.

When the appeal came up for hearing, the appellant submitted that he wanted the court to re-evaluate the evidence as he did not commit the

offence. That the complainant had a grudge against him over land. Finally he maintained that his constitutional rights were violated when eh was held in police custody in excess of 24 hours.

Mr. Makura, learned senior state counsel opposed the appeal. He submitted that the evidence against the appellant was overwhelming. The complainant recognized the appellant by voice. Her evidence was corroborated by PW2. PW3 confirmed that the complainant had been sexually assaulted. On sentence, **Mr. Makura** submitted that the appellant was sentenced to 20 years imprisonment. Under *section 3 (1)* of the Sexual Offences Act, minimum sentence is 10 years imprisonment but can be enhanced to life. The appellant is aged 72 years. 20 years imprisonment was thus harsh and excessive. Otherwise he left the issue of sentence in the hands of the court.

This is a first appeal. I am therefore enjoined to revisit the evidence afresh, analyse it, evaluate it and come to my own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing witnesses and giving allowance for that. See the case of **Okeno V Republic (1972) E.A.32.**

However, I do not think that exercise will be necessary in the circumstances of this case and in view of the position taken by the appellant that his constitutional rights were violated during the trial. In his petition of appeal the appellant captured the issue in this terms;

"…..That the learned magistrate erred in both points of law in accepting to commence with the prosecution charge (sic) while else (sic) there was existence of 6 weeks of my legal rights bestowed by *section 72 (3) and (b)* **of the constitution in absent (sic) of any valid reasons for not complying with the laid down laws……"**

Essentially what the appellant is saying is that his constitutional rights under *section 72 (3)* of the constitution were breached because he held in police custody upon arrest for a period in excess of six weeks. Despite the issue having been raised early enough, the state did not see the need to respond to the same. The record shows that the appellant was arrested on 5th may, 2007 going by what appears in the charge sheet. PW2, the investigating officer also confirms that the appellant was arrested on the same date. However it was not until 15th May, 2007 that he was presented in court. The delay was therefore for 6 days and not 6 weeks as claimed by the appellant in his petition of appeal. For the kind of offence confronting the appellant, he was required to be presented in court within 24 hours of arrest failing which burden was cast on the prosecution to prove that the appellant was brought to court as soon as was reasonably practicable.

In the case of **Dominic Mutie mwalimu V Republic, Criminal Appeal number 217 of 2005** (UR) the court of appeal observed in part:-

"……In our view, the mere fact that an accused person is brought to court either after twenty-four hours of fourteen days as the case may be stipulated in the constitution does not ipso facto prove a breach of the constitution…."

However the prosecution is under duty to offer an explanation for the delay. So that if the twenty-four hours or the fourteen days is exceeded the burden of proving that the arrested or detained person was brought to court "**as soon as was reasonably practicable"** is on the person making the claim. Otherwise the reasonable time for a non-capital offence is twenty-four hours and for a capital offence is fourteen days. If the period of twenty four house or fourteen days is exceeded and it is still claimed the time taken to bring the arrested or detained person was never the less the reasonable and practicable one, then the person making that claim must prove it. That is the basis of the court of appeal other decision on the issue to wit, **Albanus Mwasia Mutua V Republic Criminal Appeal number 120 of 2004** (UR) and **Paul Mwangi V Republic, Criminal Appeal number 169 of 2006** (UR).

However no such explanation was forthcoming in the circumstances of this case. The appellant was a poor old man then aged 72 years. He was not represented by counsel at the trial. He was venerable and could not sufficiently ventilate this issue. It therefore behoved the learned magistrate to take it upon herself to seek such an explanation in terms of **Paul Mwangi (supra).** The learned magistrate failed to do so and thereby abdicate her constitutional duty. Even in this appeal, the state was unable to respond to this issue. It remains unanswered. In other words the delay is not charging the appellant within the prescribed remains unexplained to date. That being the case, the trial of the appellant in the subordinate court was a nullity and I so hold. The consequence of this holding is that the appeal is allowed, the conviction quashed and the sentence imposed set aside. The appellant should forthwith be released from prison custody unless otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE