

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 119 of 2008

TIMOTHY KARUGU GICHUKI.....
.....**APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Senior Resident Magistrate's Court Karatina in Criminal Case No.1159 of 2006 dated 29th May 2008 by L. Mbugua, Senior Resident Magistrate)

JUDGMENT

TIMOTHY KARUGU GICHUKI, the appellant herein was tried on a charge of rape contrary to *Section 3 (1)* of the Sexual Offences Act No. 3 of 2006. After undergoing a trial, he was convicted and sentenced to 15 years imprisonment. He has now appealed to this Court to challenge both the conviction and the sentence.

On appeal, the Appellant listed six (6) grounds to persuade this Court to interfere with the decision. The Appellant basically raised three main grounds. First, it is argued that there was no credible evidence to prove the offence. Secondly, that the trial magistrate convicted him on the basis of extraneous matters which were not presented to Court. Thirdly, that the Police breached his constitutional rights under *Section 72* of the Constitution. When the appeal came up for hearing, Mr. Orinda, learned Senior Principal State Counsel conceded the same on one main ground: That is to say that the trial magistrate convicted the Appellant on the basis of some inadmissible evidence.

I have carefully perused the recorded evidence and it emerges that the prosecution's case was supported by the evidence of five witnesses. The particulars of the offence are that the 2nd day of December 2006 in Nyeri District within Central province, intentionally and unlawfully committed an act which caused penetration of LWG with his genital organ. The Appellant's wife, Eunice Njoki Karuku (P. W. 3) testified but was declared a hostile witness midstream when it turned out that she was contradicting the statement she recorded at the Police Station. The trial court made an order to disregard her evidence. P. C. Selina Ngera (P. W. 4) said she recorded the statement of P. W. 3 which she produced in evidence. In his judgment, L. Mbugua, learned Senior Resident Magistrate accepted that statement as an exhibit. The learned Magistrate, upon perusing the statement, found that the Appellant's wife (P. W. 3) had stated that she had forcefully opened the door leading to their house where she found the complainant naked save for a black underpant whereas the Appellant was shirtless. On the basis of the aforesaid statement the learned Senior Resident Magistrate formed the opinion that the Appellant committed the offence he was charged with. It is not in dispute that P. W. 3 was declared a hostile witness and that her evidence were disregarded. When a witness has been declared a hostile witness, the evidence of such a witness will be worthless hence cannot be relied upon to sustain a conviction. It was a great misdirection on the part of the convicting magistrate to rely on such a statement of a witness who disowned her statement. Such evidence to say the least was unreliable. Such a witness is untrustworthy. The Court of Appeal expressed itself succinctly in the case of **NDUNGU KIMANYI =VS= REPUBLIC [1979] K.L.R. P. 282** at page 284 *inter alia* as follows:

“The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

The evidence of P. W. 3 in a recorded statement was unreliable. I do not understand how the learned trial magistrate relied on this piece of evidence whereas he had disregarded the same when the witness was declared a hostile witness. On this account, I am satisfied Mr. Orinda rightly conceded this appeal.

The Appellant had complained that he was held in Police custody before being taken to court beyond the period fixed by *Section 72 (3) (b)* of the Constitution. The Appellant in ground 5 of the Petition alleged that he was held in Police custody from 2nd December 2006 until 9th January 2007 when he was taken to Court for plea. It is obvious he was held in Police custody for more than 30 days. I expected the State to explain cause for this delay. Mr. Orinda offered no evidence to explain the reasons for the delay. I find that the appellant was held for more than 30 days a period beyond the 24 hours the Police were allowed to hold such a suspect before taking him to Court. The Appellant's constitutional rights under *Section 72 (3)* of the constitution were breached. Where a constitutional breach is not explained, the accused is entitled to an acquittal irrespective of the strength of the evidence presented by the prosecution.

For the above reasons this appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant should be

set free forthwith unless lawfully held.

Dated and delivered this 13th day of November 2009.

J. K. SERGON

JUDGE

In open Court in the presence of Miss Ngalyuka for State and the Appellant in person.