REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Criminal Appeal 75 of 2006

ALEX WAFULA .....APPELLANT.

VERSUS

REPUBLIC .....RESPONDENT.

J U D G M E N T.

The appellant, ALEX WAFULA, was convicted for the offence of attempted rape contrary to section 141 of the Penal Code, and he was then sentenced to 20 years imprisonment.

In his appeal to the High Court, the appellant submitted that his alleged identification or recognition was not free from the possibility of error. As far as he was concerned, the circumstances prevailing at the time the offence was committed were difficult, as it was dark, and as the attack on the complainant, PW1, was sudden. Furthermore, PW1 was injured in the cause of the attack, and she was also threatened with death.

Therefore, the appellant submitted that the complainant's senses were impaired by the darkness, sudden attack, fear, shock, distress and pain from the injuries suffered in the attack.

Another issue raised by the appellant, to illustrate that the complainant did not positively identify her attacker, was the failure by the complainant to give the appellant's name to PW2, when the latter went to the rescue of the complainant.

The appellant also submitted that at the time of his arrest, he had not been associated with the attack on the complainant. As far as he was concerned, he was arrested only because he was required by the chief of the area.

Again, as the police officer who arrested him had been looking for him for only one week, yet he was arrested some two weeks after the incident, the appellant submits that that clearly shows that PW1 did not give his name to persons in authority.

The appellant also faulted the learned trial magistrate for shifting the burden of proof to him, just because he made a decision to remain silent when he was called upon to give his defence. In his view, the trial court drew an adverse inference from the appellant's silence.

Finally, the appellant says that because he was taken to court some 5 days after his arrest, he ought to be set free, because his constitutional rights had been infringed. It is his contention that it would matter not that there was evidence that would otherwise sustain his conviction; once his constitutional rights were infringed, the appellant says that his trial became a nullity, by

virtue of section 72 (3) of the Constitution of Kenya.

I will now give due consideration to the submissions made by both the appellant and the learned state counsel, Mr. Mutuku. I will also re-evaluate the evidence on record, and draw my own conclusions therefrom.

PW1, JESCA WAFULA, was the complainant. On 15/10/2005 at about 7.00 p.m. PW1 was coming from Chesamis where she had gone to visit her sick father. As she was getting close to her home, at Wehonia Farm, PW1 met the appellant, who held her neck. The two of them struggled, and PW1 fell down. She was then pulled into a river, which was nearby. Her pants were torn by the assailant, who threatened to kill her, if she did not give in to his demands.

The assailant then opened his trouser zip and then fell on PW1.

When PW1 realised that the assailant was about to rape her, she screamed.

Her screams attracted the attention of PW2, who was passing along the road. PW2 went to the rescue of PW1, whereupon the assailant ran off.

PW2 and one Sirengo thereafter escorted PW1 home. On 16/10/2005, morning, PW1 reported to the village elder, who referred her to the police.

PW1 had suffered injuries on her neck, which the assailant had scratched with his long nails. PW1 also suffered injuries to her neck, which had been twisted by the assailant.

The skirt, blouse and pantie which PW1 had worn on the material day were produced in court. Also in evidence was the bag which PW1 had been carrying on her back, at the time of the attack.

During cross examination, PW1 said that the appellant was well known to her. She knew his two names, Alex Wafula. She also knew the place where the appellant lived, close to Wehonia Forest.

PW2, AGNES NANJALA WEKESA, was a neighbour to PW1. However, PW2 said that the appellant was a stranger to her.

PW2 recalled that on 15/10/2005, at about 7.00 p.m., she was walking back home, when she heard the cry of a lady. At that stage, PW2 thought that the person crying out was drunk. However, as PW 2 approached the spot from where the cry came from, PW2 saw a young man emerge from a ditch and run away.

Inside the said ditch, PW2 saw PW1. PW2 then assisted the complainant to gather her bag and vegetables which had been scattered on the ground. Thereafter, PW2 assisted the complainant home.

According to PW2, it was dark, therefore she was unable to identify the young man who had attacked PW1.

PW3, CPL MARTIN KIPKEMOI, was a police officer attached to the Sikhendu Police station. He testified that on 16/10/2005 PW1 reported that she had been attacked by a young man on the previous night. PW3 said that the police looked for the appellant. He also said that the police told the vigilantes in the area about the incident. Thereafter, on 3/11/2005 three vigilantes took the appellant to the police station.

It was the testimony of PW3 that PW1 had a swollen neck. He issued a P3 form to PW1, which was filled in at the Kitale District Hospital.

In cross examination, PW3 said that the incident was reported on 16/10/2005. He also said that PW1 did tell the police where the appellant's home was. Although PW3 sent for the arrest of the appellant, the latter was not traced at home. It is thereafter that PW3 sent the local vigilantes and Kenya Police Reservists, who knew the appellant, to go and arrest the appellant.

PW4, PATRICK WANJALA WEPUKHULU, was a resident of Sikhendu Amani Farm. He was a vigilante, whose duties included the stamping out of crime in the village.

On 2/11/2005 PW4 saw some four people ahead of him; one of the four was the appellant. When the appellant alighted from the bicycle he was riding on, he went to greet PW4, who was in the company of other vigilantes. After the greetings, the appellant is said to have ran away. However, PW4 pursued the appellant and assisted in having him apprehended.

According to PW4, the vigilantes were looking for the appellant because they had been asked to do so by both the chief and the police at Sikhendu. The police had looked for the appellant for about one week, as the appellant had been escaping.

PW4 also said that the police had been looking for the appellant because it had been reported that the appellant had raped a lady called Jesca.

PW5, REUBEN BUNYASI, was a clinical officer attached to the Kitale District Hospital. He did examine PW1, who had presented herself at the hospital, with a history of assault and attempted rape.

Upon examination of PW1, the clinical officer found tenderness on her neck and scratch marks too. Those injuries were attributed to the struggle between PW1 and her assailant.

PW1 also complained of chest pains and backache. She also had a bruised wound on her left arm. Indeed, the arm was so painful that PW1 was unable to raise it.

After examining PW1, the clinical officer filled in the P3 form, which was later adduced in evidence, during the trial of the appellant.

During cross examination PW5 said that the appellant was not taken to PW5 for examination. But PW5 did not know why the police did not do so.

After the prosecution closed its case, and the learned trial magistrate placed the appellant on his defence, the appellant opted to say nothing. He also did not have any defence witness.

Having set out the evidence, the same shall now be re-evaluated, within the context of the submissions made before me.

First, there is no doubt that the incident took place at about 7.00 p.m., on a dark night.

The attack was not expected by PW1. Therefore, it must have taken her by surprise. However, the attack did not last only a split-second, as would have been the case, say when a pick-pocket accomplished his task and then vanished.

Here, the assailant held PW1 by the neck. The two then struggled, as the assailant told PW1 that he would kill her, unless she allowed him to do what he wanted.

The two continued struggling, and then the assailant pushed PW1 down, causing her to fall.

Next, the assailant pulled PW1 into the river, where he tore her pants. As the assailant did so, he again told her that he would kill her if she did not allow him to have his way with her. He then tore her pants, pulled PW1 down and tore her pants completely.

Even though PW1 did not specify the amount of time that all those events took, I am satisfied that it was more than a flitting moment.

Secondly, although it was dark, it must be noted that the complainant and the assailant were physically as close as can be. The assailant was literally holding the complainant. Then, after he had pushed her down, the assailant fell onto PW1.

Given the fact that PW1 had known the appellant; as they were neighbours, I am persuaded that the close proximity and the duration that the two spent during the incident, was sufficient for recognition of the appellant.

As regards the first report which PW1 made, I do not deem it to have been to PW2, as the latter was not a person in authority.

The first person in a position of authority who PW1 reported to was the village elder, who then referred her to the police.

When PW4 testified, he made it clear that the chief had told them to look for Alex, the appellant. He also said that the police too had been looking for the appellant.

As PW1 was the only person who had recognised the person who had tried to rape her, and as Corporal Martin Kipkemoi (PW3) said that PW1 had told the police where the appellant's house was located, there can be no doubt that PW1 did disclose the identity of the appellant, when she made her report to both the provincial administration as well as to the police.

In my considered view, had not PW1 identified the appellant when she reported to the police, PW3 would not have said;

> "***The report was made on 16/10/2005.***
>
> ***You were not traced at first. It was a Sunday. The complainant told us your home that is how I sent to arrest you."***

The police could only have sent for the arrest of the appellant, from his home, if they had his specific identity.

The appellant was not found at home by the police. Later, he was still not found by the vigilantes, who know him, and who had been sent to look for him, by both the police and the area chief.

Obviously, the police and the vigilantes knew exactly who they were looking for. And that knowledge is only attributable to PW1, as she was the only person who had recognized the appellant, during the attack on her.

Meanwhile, contrary to the appellant's contention that he was only being sought because the chief was looking for him, PW4 stated clearly that the appellant was said to have raped a lady called Jesca.

I also find no material inconsistency between the number of days between the date of the incident (15/10/2005) and the date of the appellant's arrest (2/11/2005); and the 7 days which PW4 spent in looking for the appellant. I say so because it is the police who first looked for the appellant, with a view to arresting him. When they did not find him, the police told the vigilantes and the Kenya Police reservists to look for the appellant. That explains why the period spent by the police in searching for the appellant was less than the period between the date of the incident and the date of his arrest.

As regards the assertion that the learned trial magistrate had shifted the burden of proving the appellant's innocence, to the said appellant, I find no merits in the same. Nowhere in the judgment did the trial court draw any adverse inference from the appellant's decision to remain silent.

There is no doubt that an accused person has the right to choose any of the three methods of defence prescribed by law. He can say nothing, or he can give evidence on oath. If he testifies on oath, he may be cross-examined by the prosecution. He may also call witnesses. Thirdly, the accused may give an unsworn testimony, and he would then not be cross-examined.

The choice is solely at the discretion on the accused.

Finally, the charge sheet indicates that the appellant was arrested on 2/11/2005. Both PW3 and PW4 confirmed that that was the date when the appellant was arrested. And the record of the proceedings shows that the appellant was first presented in court on 7/11/2005.

In **DAVID WAIGANJO WAINAINA VS. REPUBLIC, CR.A. NO. 113 of 2005** the Court of Appeal restated the words they had earlier uttered in **Albanus Mwasia Mutua vs. Republic Cr. A. No. 120/2004**, when they said;

"…… ***the burden of proving that the person*** *arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."*

The subsection being referred to therein was section 72 (3) of the Constitution.

The Court of Appeal went on to hold as follows;

"In the present appeal, there has been no explanation why the appellant was detained in police custody for nine months before he was brought to court. In our view, it would not be difficult for the police/prosecution to investigate the delay and come up with an explanation.

It is not enough to say that the state should have been given time to investigate and leave the matter there. The state must ask for time to carry out investigation. It would be improper to expect this Court to take over the role of the State to investigate inordinate delays."

That was one of the grounds upon which the Court of Appeal allowed the appeal. In doing so, they took into account the fact that the appellant in that case had been in custody for eight (8) years.

In the case of **KAZUNGU KASIWA MKUNZO & ANOTHER VS. REPUBLIC (2006) eKLR**, the Court of Appeal said that under section 77 (1) of the Constitution, an accused person ought to be afforded a hearing within a reasonable time by an independent court established by law. However, the said court noted as follows;

"***The constitution, wisely does not set out*** *what is a "reasonable time" because in determining that issue, the court would have to take into account a whole lot of factors such as the diary of the court, the number of judicial officers available to hear such cases and such like factors."*

Some of the other factors that can come into play include the place of arrest, in terms of locality, and the distance between it and the court. In some instances, even the distance between the chief's camp and the nearest police station becomes a factor, because in most of Northern Kenya, arrests are made either by vigilantes, village elders, chiefs or their assistants or Administration Police Officers.

After the initial arrest, the suspect is taken to the nearest police station for re-arrest. However, depending on the exact place of arrest, the persons effecting arrest may face real challenges in obtaining any form of transport, first to the chief's camp, and then onto the nearest police station.

And even after the police re-arrest the suspect at the local police station, they have to arrange for the suspect to be transported to the court.

Sometimes, such as in the area of Kakuma or Daadab, the distances to be covered are vast. The terrain is not at all friendly, nor is the weather. The transport is very sparse, and there is a real risk of banditry attacks. Then, the Resident Magistrate Lodwar, has to travel to Kakuma for sessions, for one week, in every month. And, when the said Resident Magistrate is on leave, one magistrate travels from to Lodwar for a week, in every month, to attend to cases there.

Considering that the High Court at Kitale handles appeals from that region, I trust that it becomes understandable when I say that the acquittal of an accused person simply because he was taken to court late, is likely to occasion an injustice to the society and the persons working within the justice system, in that area. Yet, on the other hand, I appreciate that the citizens of Kenya, living in those areas, have an equal constitutional right to other Kenyans who live elsewhere in the country.

In **GERALD MACHARIA GITHUKU VS. REPUBLIC, CR.A. NO. 119 of 2004** the Court of Appeal noted that there had been no attempt by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as reasonably practicable.

In that case, the appellant was taken to court 17 days after his arrest. Although the court was satisfied that the appellant was guilty as charged, the court acquitted the appellant because his constitutional rights had been violated.

The court observed that the delay of 3 days did not give rise to any substantial prejudice to the appellant. That notwithstanding, the appellant's conviction was quashed. And in arriving at that decision, the Court of Appeal took into account the fact that the appellant had already been in custody for in excess of 12 years.

In **RONALD MANYONGE CHEPKUI VS. REPUBLIC, KITALE HCCRA NO. 87/06** I had occasion to make the following statement, after giving consideration to the case of **GERALD MACHARIA GITHUKU VS. REPUBLIC** (above-cited);

"***In my considered opinion, the Court of Appeal*** *did not lay down a strict rule which requires the court to grant freedom to either accused persons or appellants as soon as it became clear that they were not arraigned in court within the time prescribed by section 72 (3) of the Constitution. Had that been the intention of the court, I believe that it would not have needed to delve into the circumstances of that particular appellant, because it would then not have mattered at all, whether he had only been in custody for a couple of days."*

I still hold the same views on the issue.

Since my said decision, my attention has been drawn to two other cases, about which I was not aware, as at the time of that judgment.

First, in **ANN NJOGU & 5 OTHERS VS. REPUBLIC, NBI MISC. CR. APPL. NO. 551 OF 2007**, the Hon MUTUNGI J. ordered the immediate release of six persons whose constitutional rights had been infringed, by the fact that they had not been brought to court within 24 hours of their arrest. In making the said order, the learned judge noted that in view of the violation of the applicants' rights, their prosecution would be a nullity.

He said;

"*Finally, all should note that there is as yet* ***NO known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of the criminal proceedings complained against***."

Of course, in that case the applicants had brought an application to challenge their continued detention in police custody, without being charged in court, within the period of time prescribed in the Constitution. Therefore, the state were put on notice that they needed to explain why the applicants had been in custody longer than is permitted by the constitution.

In contrast, the appellant herein failed to raise the issue before the trial court. And even before the superior court, the appellant did not raise the issue in his grounds of appeal which he filed on 20/7/2006. He only raised the issue, for the first time, when making his submissions in court. By so doing, the appellant did not allow the learned state, counsel an opportunity to investigate the reasons for the delay in bringing him to court, in the first instance.

As the issue was in the nature of an ambush on the state, I do not believe that it would be fair to accuse the state of failing to offer an explanation for something which was not anticipated, and which had taken place some two years previously.

In ***MORRIS NGACHA NJUGUNA & 3 OTHERS VS. REPUBLIC CRIMINAL APPEAL NO. 232 OF 2006***, the Court of Appeal said;

"***If the 2nd appellant felt his rights under the constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the constitution to enable the relevant court investigate the issue. As the matter stands now, the issue having not been raised in the two courts below, we can only base our decision on the material before us. The material is inadequate and on that basis, it cannot be said that the 2nd appellant's rights under section 72 (3) (b) of the constitution were breached."***

That decision was made and delivered by the Court of Appeal on 12/10/2007. To my mind, it makes it clear that if any accused person believes that his constitutional rights have been infringed, he ought to make an appropriate application, which will then determine the issue.

It is also my considered opinion that should the court before which the application is made, come to the conclusion that the applicant had not been brought to court within the prescribed time, the person who is found to have unlawfully arrested or detained the applicant shall be entitled to compensation therefor. That remedy is prescribed in section 72 (6) of the Constitution of Kenya.

In the event, the appeal herein fails. I therefore confirm both the conviction and sentence against the appellant.

Dated, signed and Delivered at Kitale, this 29th day of January, 2008.

FRED A. OCHIENG.

JUDGE.