REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Criminal Appeal 59 of 2006

KENNEDY LUSAKA WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, KENNEDY LUSAKA WANJALA, was convicted for the offence of rape contrary to section 140 of the Penal code. He was then sentenced to 30 years imprisonment.

Being dissatisfied with the conviction and the sentence, the appellant lodged an appeal to the High Court, citing the following 6 grounds of appeal;

(i) The alleged recognition was doubtful as the circumstances prevailing at the time of the incident were not conducive for positive identification.

(ii) The trial court failed to warn itself of the danger of convicting an accused person on the strength of the uncorroborated evidence of a single witness.

(iii) The medical evidence was inconclusive on the allegation of rape.

(iv) The case was not proved beyond any reasonable doubt.

(v) The burden of proof was shifted to the appellant, when his defence was rejected.

(vi) The court failed to find that the appellant's rights under section 72 (3) of the Constitution had been violated.

In his submissions, the appellant pointed out that the incident which led to his being charged with rape, had occurred at night. He said that it was a dark night. And, as the complainant was raped within a corridor, the appellant expressed the view that the "shades" from the wall and the off-cut fence must have made the spot even darker.

Furthermore, as the complainant said that she was beaten and generally harassed, the appellant feels that the circumstances prevailing were not conducive for positive identification.

It was also submitted by the appellant that the complainant failed to specify the length of time which she

took in observing her assailant.

But the appellant went on to state that even though the complainant did say that the actual rape ordeal lasted some 10 minutes, that implied that during the said 10 minutes, the complainant was too close to her assailant to have identified him.

Had the complainant identified him, the complainant says that she would have pointed him out in the dock. It was however emphasized by the appellant, that the failure by the complainant to point him out was attributable to the failure by the prosecution to ask her if she had identified her assailant in court.

Another issue raised by the appellant was to the effect that the prosecution had failed to explain how they traced his home, whereas PW1, the complainant, had said that she did not know his home. Therefore, the appellant submitted that the police could not have known his home, especially when the only name which PW1 provided them with was "Ndovu", which is not his name.

The complainant's first report was said to have been one in which she complained of assault. Therefore, the appellant believes that he ought not to have been charged with the offence of rape.

In any event, the torn pant and skirt were not produced in evidence. And the P3 form indicated that there was no spermatozoa, no trauma or swelling or tenderness, on the person of the complainant. Therefore, the appellant submits that there was no evidence to support the complainant's contention of rape.

It is the appellant's submission that if sexual intercourse is alleged, the prosecution must prove that there had been ejaculation. He also said that sperms do remain inside the body of the woman for more than 3 days. Therefore, as PW1 was examined within 2 days of the alleged rape, the appellant submits that there ought to have been evidence of spermatozoa.

In this instance, it is the view of the appellant that the P3 form only supports a probable offence of assault, not rape.

The appellant also submitted that the opinion expressed by the Clinical Officer (PW2), amounted to nothing more than speculation, which was without any proper foundation. Therefore, the learned trial magistrate is said to have made a gross error by relying on the opinion of the clinical officer.

Another issue raised by the appellant was that the prosecution had failed to charge him with an "alias Ndovu", who is the person that PW1 said, had raped her. He stated in his defence that he was a mason. In other words, he was not the "Ndovu" who PW1 said used to make and sell chapattis and mandazi.

The appellant did produce a medical note which indicated that at the time of the alleged incident, he was undergoing medical treatment. However, that treatment chit was rejected by the trial court, as being a forgery.

It is the appellant's case that the court was wrong to have rejected that piece of evidence. And, by rejecting the said evidence, the court is blamed for having shifted the burden of proof to the appellant.

Finally, the appellant submits that his constitutional rights, pursuant to section 72 (3) of the constitution was violated. He was arrested on 21/7/2005, and was later taken to court on 25/7/2005. In effect, the appellant was not brought before the court within the period of time stipulated by the Constitution. As the delay in bringing him to court was unexplained, the appellant invited this court to carry out its duty of enforcing the provisions of the Constitution. According to the appellant, by enforcing the Constitution, the court would be obliged to acquit him, regardless of any evidence which may have been adduced against him, if the court was satisfied that the appellant was brought to court late.

I will now proceed to give due consideration to the appellant's submissions whilst also re-evaluating the evidence on record. I will also give consideration to the submissions by the learned state counsel, as well as to the relevant provisions of the law.

PW1, LUCY WAMBOI GITHUA, was at home on 7/7/2005. At about 8.00 p.m. she went out to buy tomatoes and onions, from a kiosk which was nearby.

After making the purchase, PW1 heard a voice calling her by name. As she thought it was her uncle calling her, PW1 went towards the direction from which the voice came. However, when she reached the place, PW1 was grabbed by the hand, and pulled into a corridor.

According to PW1, her assailant was armed with a knife. When PW1 screamed, the assailant boxed her in the left eye and head.

Once PW1 was pulled into the corridor, she was ordered to stand up from the ground where she had fallen. Her skirt, petticoat and pant were forced down, and PW1 was pushed against a wall, where the assailant proceeded to rape her.

The ordeal lasted some 10 minutes, after which PW1 was ordered to sit down. She remained seated for almost an hour, whilst the assailant stood.

At about 10.30 p.m., the assailant led PW1 to the road. By that time she had put on her skirt and petticoat. Once they got to the road, the assailant kicked PW1's backside, and told her to go, but not to tell anybody of the incident.

It was PW1's evidence that even though it was a dark night, "it was not very dark." She was therefore able to recognize her assailant, as he used to sell mandazi to her.

During cross examination, PW1 said that she had recognized the appellant well because he was close to her and because the darkness was not total.

PW1 also said that prior to the incident, the appellant had been disturbing her every now and then.

According to PW1, she is the one who led to the arrest of the appellant, although when she testified, PW1 could not recall the actual date of arrest.

PW2, REUBEN MUNYASI, was a clinical officer attached to the Kitale District Hospital. He examined PW1, who had a history of having been raped by a person known to her.

PW2 found that PW1 was swollen on both sides of her face. She also had tenderness of her anterior and posterior chest. Upon examining the complainant's private parts, PW2 found no trauma, swelling or tenderness. But he did find wetness over her labia and a foul characteristic smell of semen. When the discharge was examined, it was found to have pus cells and man epithelial cells-parts, which were created due to friction. Although no spermatozoa was seen, PW2 concluded that PW1 had been raped.

PW3, LUCIA KIBOI MUCHIRIO, was the grandmother to PW1. She testified that on the material night, at about 10.00 p.m. PW4 went to her house. PW4 is the husband to PW1. He was accompanied by a boy, who asked PW3 if PW1 was at her house.

According to PW3, PW4 was trembling, and asked her to let him know if PW1 did come.

Later, at 11.00 p.m. PW4 and PW1 went back to PW3's house. PW3 noticed that PW1's eye was swollen. She also said that PW1 told her that she had been raped by one, Ndovu.

PW4, STEPHEN MWAHA SHIVACHI, is the husband to the complainant. On the material night, he was at home resting, as he was unwell. At about 8.30 p.m., PW1 told him that she was going out to buy onions and tomatoes. PW4 drifted off into sleep.

He woke up at 10.00 p.m., and found the sufuria burning. PW1 was not present, although the T.V. was on.

PW4 checked for his wife at her home, but she was not there. When PW4 was preparing to go, with a neighbour, the police post, he saw PW1 arriving. She was crying, and said that she had been raped by Ndovu, which she said was the nickname of someone she knew.

According to PW4, the appellant could not be found at the kiosk where he used to sell chapati and mandazi. That was for a period of 3 weeks.

PW4 testified that when the appellant was finally arrested, PW1 was present.

PW5, PC TOM JUMA, was a police officer, then attached to the Kitale Police Station. On 7/7/2005 PW5 received a complaint from PW1, that she had been raped. He recorded the report in the O.B. and advised PW1 to seek medical treatment.

Later, PW5 arrested the appellant on 21/7/2005.

According to PW5, when PW1 made her report, she had injuries on her face. She also gave the name of her assailant as Ndovu. However, PW5 explained that he did not charge the appellant under that name as the appellant gave his proper names.

When the appellant was put on his defence, he said that he was arrested at his house on the morning of 21st July, 2005. The time was between midnight and 1.00 a.m., said the appellant. He confirmed that it was PW5 who effected his arrest.

Although he was charged with the offence of raping PW1, the appellant denied the charge. He also emphasized that he was a mason. He denied being a cook who makes mandazi.

Finally, the appellant produced a medical chit which indicated that he was treated at the Kitale District Hospital on 7/7/2005. From that date upto 20/7/05, the appellant says that he did not even go to work. He said that the doctor had told him not to go out in the cold, and to keep warm. He said that he complied, by staying in the house.

Having summarized the evidence, I note that both PW1 and the appellant do acknowledge that at the time the complainant was being raped, she and her assailant were definitely in very close proximity. The question is whether the said proximity was a hindrance or an added advantage, for purposes of PW1 positively identifying her assailant.

PW1 said;

"I had recognized this person, inspite of the darkness. It was not very dark, but I knew this person before. He was a customer who used to sell mandazi to me. I was near him and saw him well for sometime."

From that piece of evidence, I am convinced that the close proximity between the complainant and her assailant was not a hindrance to the identification of the assailant. Instead, it enabled the complainant to positively identify the appellant as her assailant.

Next, I find that contrary to the appellant's assertions, the evidence of PW1 was duly corroborated in its material particulars. I say so because both PW3 and PW4, who saw PW1 shortly after the incident, said that she had suffered injuries which were consistent with the manner in which PW1 was assaulted before she was raped.

Furthermore, PW1 told both PW3 and PW4 she had been raped by a person known to her.

The question as to whether or not PW1 was actually raped is vital. That is because the appellant insists that in the absence of spermatozoa, on the person of PW1, rape had not been proved.

Pursuant to section 139 of the Penal Code, rape is defined as follows:

"***Any person who has unlawful carnal***

knowledge of a woman or girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

In this case PW1 was first threatened with harm, if she screamed. The person issuing the threat was armed with a knife, which he said he would use to stab PW1, if she screamed. And when she screamed, PW1 was boxed in the left eye and head. Thereafter, her skirt, petticoat and pant were removed by her assailant. As the assailant did so, and even when he opened his own trouser, he was holding the knife.

In effect, there were a combination of several ingredients, all of which indicate that PW1 was threatened with harm; was harmed; and was forced into sex. She definitely did not consent to the sexual intercourse.

The fact that PW1 had had sexual intercourse was verified by the clinical officer, who found her with;

"***Wetness over the labia and a foul characteristic smell of semen."***

His explanation was that the many epithelial cells-parts and pus cells which were found when the discharge on PW1 was examined, showed that there had been friction. The clinical officer further explained that the smell of semen meant that PW1 had been with a man.

During cross-examination of both PW1 and PW4, the appellant implied that he was not disputing the fact that PW1 had had sexual intercourse. If anything, he only indicated that PW1 may have had intercourse with her husband.

Although PW2 said that no spermatozoa was found on PW1, he made it clear that the foul smell of semen indicated that PW1 had been with a man.

The appellant's assertion that spermatozoa can last within the body of a female for more than 3 days is not supported by any medical evidence. Therefore, I find it to be an argument that is without any factual or legal backing. For that reason, it can only be disregarded, as I hereby do.

In similar vein, I disregard the appellant's contention that rape or sexual intercourse can only be deemed complete if there was ejaculation. The law certainly does not lay down any such an ingredient in the definition of the rape.

As regards the first report made by PW1, the record shows that during cross examination PW3 said;

"***Complainant said she was raped and assaulted by someone she knew***."

PW4 also said that PW1 told him that she had been raped. And when the complainant made a report at the Kitale Police Station, on the same night, PW5, who received the report, said that the complainant's complaint was of rape.

In the result, I have no doubt that the complainant's first report was about rape.

As regards the question whether or not PW1 was escorted by a police officer when she went to Kitale District Hospital for examination, PW2 said that he did not know if PW1 had been accompanied. But whether or not the complainant was accompanied by a police officer would not, in my understanding of the law, render invalid the results of the medical examination. No legal provision or precedent has been brought to my attention which could lead me to decide otherwise.

And, contrary to the appellant's contentions that PW2's views were mere speculations, I have demonstrated, from the analysis hereinabove that the clinical officer founded his opinion on tangible material, which was derived from the medical examination of the complainant. Therefore, the learned trial magistrate was not in gross, or any, error when she placed reliance upon the testimony of the clinical officer.

At the time when the appellant was arrested, PW1 was present. She said so in her evidence –in-chief, and reiterated the position during cross examination. PW4 also said that PW1 was present when the appellant was arrested, but the appellant did not even raise that issue in cross-examination.

As PW1 had made it clear to PW3, PW4 and PW5 that she knew who had raped her, and as she was present at the time of the appellant's arrest, I am satisfied that there was no mistake about the person being arrested. He was the same person whom PW1 had recognized at the time of the incident. Therefore, notwithstanding the absence of any explanation as to how the police and PW1 found the appellant's home (which PW1 said she did not know), I have no doubt at all that the complainant did not lead to the arrest of the wrong person.

According to PW1, PW4 and PW5, the appellant disappeared from the place where he used to sell chapatti and mandazi; the disappearance is said to have happened from the date when PW1 was raped.

But, according to the appellant, he was resting at home, on the advice of the medical doctor who had treated him at the Kitale District Hospital.

In effect, the appellant was not present either at the place where he carried out the alleged masonry work, or where the complainant used to buy mandazi from him. He was unavailable. That explains the delay in his arrest, even though he had been recognized by his victim.

Was the trial court wrong to have rejected the medical evidence adduced by the appellant, to show that he was undergoing treatment from 7/7/2005?

As the learned trial magistrate observed, the word "out-patient" is cancelled on the medical chit, leaving the word "In-patient." That would imply that the appellant was admitted into hospital. However, the appellant testified that he was "just in the house." In the event, his oral evidence was not supported by the document which he produced in court. Therefore, it was only reasonable for the trial court to reject that piece of evidence, especially when it is taken into account that the court had already come to the conclusion that PW1 was a credible witness. Obviously, once the court did accept the evidence of PW1 as being factually correct, the court could not proceed to also accept the defence case, which was wholly inconsistent with the evidence of PW1, as correct.

I, too, am of that persuasion. I find that the defence advanced by the appellant did not cast any doubts on the case put forward by the prosecution. I also find that the evidence produced by the prosecution was sufficient to, and did, prove the case against the appellant beyond any reasonable doubt.

In the result, the conviction was properly founded.

Even though that be the position, the appellant says that he should nonetheless be acquitted as his constitutional rights were infringed. He cites the case of **ALBANUS MWASIA MUTUA VS. REPUBLIC, CRIMINAL APPEAL NO. 120 OF 2004**, for the proposition 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 the provision in the first place ……."***

But in the same vein, the Court of Appeal recently expressed itself as follows, in the case of **MORRIS NGACHA NJUGUNA & 3 OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 232 OF 2006.;**

"***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 …..."

With that view, I am not only bound, but I am fully in agreement. I would only add that by virtue of section 72 (6) of the Constitution;

"***A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person."***

That is the remedy provided by the Constitution itself. It is that provision that the courts would be obliged to enforce, if they came to the conclusion that the appellant or an accused person's constitutional right had been infringed. I have found nothing in the constitution which says that a person who would otherwise be convicted, on the basis of evidence produced in court should, nonetheless be acquitted simply because he was not brought before the court within such period of time as is prescribed by section 72 (3) of the constitution.

In conclusion, the conviction and sentence are upheld, as the appeal is dismissed.

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

FRED A. OCHIENG.

JUDGE.