REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 12 of 2005

PETER MUTUKU WAMBUA ……..……... APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case Number 1073 of 2004, of the Senior Resident Magistrate's Court at Kangundo dated 24/03/2004)

JUDGMENT OF THE COURT

1. The appellant, PETER MUTUKU WAMBUA was charged before the Senior Resident Magistrate's Court at Kangundo with three different offences. In the first count, he was charged with rape contrary to section 140 of the Penal Code. The particulars of the offence were that:-

"**On the 9th day of October 2003 at Machakos District within the Eastern Province, had carnal knowledge of R N W without her consent."**

2. In the second count, the appellant was charged with assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of offence were that::-

"**On the 9th day of October 2003 at Machakos District within the Eastern Province, unlawfully assaulted R N W, thereby occasioning her actual bodily harm."**

3. In count three, the appellant was charged with indecent assault of female contrary to section 144 of the Penal Code, the particulars of the offence being that:-

"**On the 9th day of October 2003 at Machakos District within the Eastern Province, unlawfully and indecently assaulted R N W by touching her private parts namely vagina."**

4. The appellant pleaded not guilty to all the three counts and went through a full trial during which the prosecution called eight (8) witnesses. The appellant chose to say nothing when he was called upon to defend himself.

5. The facts of the case are that sometime during the night of 9/10/2003, at about 1.00 a.m, the complainant was asleep in the house together with her 5 year old child and sisters when she was woken up by a knock at the window. That on looking to see what was happening, the complainant saw a man looking through the broken window panes. That the man, whom the complainant later identified as the

appellant, broke into the house and grabbed the complainant after he had broken the door. That after forcefully removing her knickers, the appellant had sexual intercourse with the complainant three times and also assaulted her. That during the attack, the complainant screamed and attracted the attention of some neighbours who came to her rescue and also helped the complainant to fix the door. The complainant thereafter reported the matter to the police, leading to the arrest of the appellant and subsequent arraignment before court.

6. PW1 was R N W, (N) a 26 year old single mother who at the time of the incident was staying with her mother at L. She testified that at about 1.00 a.m on the night of 9/10/2003, she was asleep in the house together with her 5 year old child and her younger sisters when she heard a knock at the window and on looking she realized that the window panes were broken and a man whom she could not immediately recognize was lighting a match to see his way into the house. She said that soon thereafter the door to the house was broken and the man whom she later identified as the appellant entered the house. She said that after realizing that she was under attack, she prayed and later lit a small lantern and that when the appellant entered, she recognized him although she did not know his name.

7. Ndila further stated that when the appellant entered the house, he grabbed her and a struggle ensued. She said she knew the names of the appellant's parents as B and W and that the appellant used to fetch water from their (N's) home. N said that the appellant knocked her down onto the floor after he got into the house and that she bit his left hand, and also firmly held onto to him. That the appellant struck her on the right cheek, sending her screaming but she continued the struggles with the appellant. In that moment, N said the children started crying but that the appellant forced them back to sleep and forced Ndila into the next bed where he had sexual intercourse with her twice after forcefully removing her knickers which were produced in court as PExhibit 2.

8. N also said that after the second sexual intercourse, she tried to run away but that she could not because the appellant held her back. She said that the appellant lit another match stick and that the whole time, the lantern was still burning and that she could clearly see the appellant. It was then N said that the appellant had sexual intercourse with her a third time before going away. She said she bled profusely but still managed to go to her neighbour's house, one MARY MUTUA (PW3) to whom she reported the incident, telling her that it was the appellant who had raped her. She said she gave the names of the appellant's parents to PW3. N also said that other neighbours later came around and helped her to fix the door.

9. N further told the court that before the appellant left the house, he wiped himself clean using a cardigan which was produced in court as PExhibit 3. She said that when her mother came home, she reported the attack to her and that her mother made a report to the chief who later arrested the appellant. N was categorical that the appellant was her attacker because she had seen him many times before as he came to draw water from their home. She said that she was able to identify the appellant at the police station because of the finger which she had bitten off and which was yet to heal. She also said that she remembered a date in the month of August of the same year when the appellant was at their home (N's) to fetch water and that she was the one who gave him the water. N told the court during cross-examination that she had no doubt in her mind that it was the appellant who attacked her.

10. PW2 was DR. THOMAS MUTHOKA of Kangundo hospital. He testified that he was the one who filled and signed the P3 form in respect of Ndila following allegations that Ndila had been sexually assaulted by the appellant. Dr. Muthoka said he carried out the examination on N some two days after the assault and confirmed that N had sustained injury on the right cheek in semi-circular marks. Dr. Muthoka also said that Ndila had erosion of the cervix accompanied by a vaginal discharge which had pus and red blood cells. The doctor said he could not detect any spermatozoa because of the 2 day delay. The P3 form was produced as PExhibit 1.

11. PW3 was MARY MUTUA (Mary) from L a who said N was her neighbour and a relative though they lived about 1 ½ km apart. Mary recounted how N had gone to her home on the morning of 9/10/2003 and started crying and later revealed that she (N) had been raped by the appellant. Mary said that Ndila described her attacker as the son of B and W and that she also told her that she had bitten the

appellant's right thumb. Mary said she reported the matter to the Assistant Chief. The appellant had no questions for this witness.

12. PW4 was DR. WAIRAGU, a medical officer at Kangundo Hospital. His testimony was that on the 11/10/2003, he was requested to examine and that he did examine one PETER MUTUKU WAMBUA, the appellant herein regarding a scar on Mutuku's finger. That on examination, he found a linear scar 1cm long. He said that the scar was about 6 weeks old. That he could not tell what object may have caused the injury. The P3 Form in respect of the appellant was produced as PExhibit 3. There is however some discrepancy as to the date of the examination between the oral testimony and the documentary evidence as per PExhibit 3. According to the documentary evidence, the examination took place on 26/01/2004 which date would seem to tally with the age of the scar which Dr. Wairagu put at 6 weeks. In his testimony in chief, Dr. Wairagu spoke of 11/10/2003 as the date when he examined the appellant. For purposes of this judgment, I am prepared to accept 26/01/2004 as the date of the examination that was done by Dr. Wairagu.

13. PW5 was Number 43648 Corporal ESTHER MWAU, of Kangundo Police Station. She recounted how on 11/10/2003, she received a report from N who alleged that she (Ndila) had been raped by somebody who was known to her. She said that on receiving the information from Ndila, Corporal Mwau issued Ndila with a P3 form and also took her to Kangundo Hospital for examination. Corporal Mwau was the investigating officer of the case and in answer to the only question put to her by the appellant; she stated that though she did not visit the scene of crime, she still investigated the case.

14. At the close of the prosecution case, the appellant was required to answer the charges against him in accordance with the provisions of section 211 of the Criminal Procedure Code (CPC). This is what the appellant told the court:-

"**I elect to say nothing."**

15. In his judgment, the learned trial magistrate found that there was overwhelming evidence to establish the offence of indecent assault against the appellant as per the alternative charge. The learned trial magistrate also found that the prosecution had proved its case against the appellant beyond any reasonable doubt on the second count. The appellant was sentenced to 3 ½ years in prison on the second count and 20 years imprisonment with hard labour on the alternative count.

16. It is against the above conviction and sentence that the appellant has appealed to this court. In his original home-made Petition of Appeal, the appellant set out 6 grounds of Appeal which when reframed are that:-

a. that the learned trial magistrate erred in both law and fact in basing his conviction of the appellant on evidence that did not sufficiently establish that the appellant had participated in the crime;

b. that the learned trial magistrate further erred in law and fact when he failed to appreciate that the prosecution case was based on inconsistent evidence.

c. that the learned trial magistrate erred in both law and fact in failing to appreciate that the case against the appellant was not properly investigated.

d. that the learned trial magistrate erred in both law and fact in failing to appreciate that there was no medical evidence connecting the appellant with the offence.

e. that the learned trial magistrate erred in both law and fact in failing to find that the conditions for the identification/recognition of the appellant were not free from error.

f. that the learned trial magistrate fell into grave error when he failed to find that failure to call the arresting officer was fatal to the prosecution's case.

17. In an amended Petition of Appeal, which the appellant referred to as his submissions, the appellant also complained that he was gravely prejudiced during the hearing of the case because the language in which the proceedings were conducted was not indicated on the face of the record.

18. The state, represented by Mr M O'Mirera Principal State Counsel conceded the appeal but for the reason that the proceedings in the lower court were partially conducted by an incompetent prosecutor, thereby nullifying the entire proceedings. According to the record, and a fact which the learned Principal State Counsel referred to, the plea in this case was taken by Police Constable Mbonge on 24/12/2003 when the appellant pleaded not guilty to all the charges against him. Mr O'Mirera however asked the court to order a retrial. He advanced four reasons for this request:- (a) that the appellant still had many years of his 20 year prison term remaining unserved, (b) that the offences with which the appellant was charged were so serious that the appellant ought not to be let off the hook on this mere technicality; (c) that the prosecution witnesses will be readily available and finally (d) that the appellant would suffer no prejudice by a retrial. The appellant did not oppose the prosecution's request for retrial.

19. It is my duty as the appellate court of first instance to reconsider the whole of the evidence on record and evaluate it afresh with a view to reaching my own conclusion in the matter. This requirement was stated by the Court of Appeal for East Africa in the now well known case of OKENO vs R (1973) EA 32, where at page 36 of the judgment the court stated thus:-

"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs R (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R, (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness, see Peters vs Sunday Post, (1958) EA 424."**

20. Such is the burden that is upon this court, even when the prosecution says it concedes the appeal. I must weigh the evidence afresh, consider the record and determine whether the appeal should indeed be allowed on the grounds put forward by the learned Principal State Counsel or on the grounds put forth by the appellant or neither.

21. I have reconsidered the evidence and evaluated it afresh. From the exercise of reconsideration and evaluation, I make the following findings:- (a) that the plea was taken by Police Constable Mbonge and the language (interpretation) was shown as English/Kiswahili/Kikamba; (b) when the case next proceeded to hearing on 14/01/2004, 24/02/2004,, 9/03/2004, and 17/03/2004, the court prosecutor was one Inspector Njenga but the language in which the proceedings took place was not indicated nor was there any indication as to the language in which the five witnesses gave their testimony.

22. The issues that now arise for determination are whether (a) the taking of the plea before a Police Constable nullified the entire proceedings; (b) whether failure by the court to indicate the language in which the proceedings were conducted was prejudicial to the appellant and; (c) whether, if the answer to both (a) and (b) is the affirmative, this case should be remitted to the lower court for a retrial.

23. On the first issue, the Court of Appeal has held in PENGINEPO HASSAN KUVUA vs R Criminal Appeal No. 131 of 2004 (Msa) that in circumstances such as those prevailing in this case at plea taking, the plea must be considered to have been a nullity. That the proper trial having taken place before a competent court and by a competent prosecutor, then one can safely say that no prejudice was occasioned to the appellant. In the present case, the record does not show that Mr N.N. Njagi took the plea afresh on 14/01/2004 when the trial commenced, but it is clear that the appellant did not admit the charges, and that is why, the case proceeded to full hearing. In the circumstances, I do not think that what happened on 24/12/2003 should be a reason for nullifying the rest of the proceedings.

24. The second issue in my view caused a miscarriage of justice to the appellant. The courts have held that failure to indicate the language in which the proceedings are conducted are a good ground of appeal. I therefore find and hold that the appellant's appeal must succeed on this ground. Accordingly, I quash the conviction on both count two and the alternative charge and set aside the imprisonment terms of 3 ½ and 20 years respectively imposed upon the appellant.

25. Should I order a retrial in this case? I am inclined to do so. The offence herein was committed in or about 9/10/2003; while the trial ended on 24/03/2004 resulting in a prison term of 20 years on the alternative charge of indecent assault. I believe that the charges against the appellant were serious and I think that if properly considered, the evidence available on the record could very well result into a conviction. Mr O'Mirera told the court that the witnesses will be readily available to testify if the case is remitted to the lower court for retrial. I am persuaded that I should order a retrial.

26. Accordingly, I order that the appellant shall be tried de novo before a different magistrate on the self-same charges. In the meantime, the appellant shall remain in prison custody pending his production before a magistrate for his retrial. Orders accordingly.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE