REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 100 of 2007

(Arising from Original BGM SPM CR. C. No.2639 of 2004)

PETER SIFUNA BARASA………………….....……………APPELLANT

VS

REPUBLIC…………………………………………….RESPONDENT

JUDGMENT

Peter Sifuna Barasa hereinafter referred to as the appellant was charged and tried before the Senior Resident Magistrate in Bungoma for the offence of rape contrary to section 140 of the Penal Code. He faced an alternative charge of indecent assault on a female contrary to section 144(1) of the Penal Code. The particulars of count 1 as indicated in the charge sheet are that;

"On the 14th day of July 2004 at Bungoma District within the Western Province, had carnal knowledge of E A B without her consent."

He denied both the main and the alternative counts. The learned trial Magistrate found him guilty on the main count and convicted him accordingly. She sentenced him to serve ten years imprisonment. Surprisingly, she left the alternative charge hanging and made no findings on the same. Being dissatisfied with the conviction and sentence, the appellant filed this appeal through Makali & Co. Advocates. He relies on 11 grounds of appeal as enumerated in his petition of appeal as hereunder;

1. *That the learned trial Magistrate erred in law and fact in convicting the appellant on the basis of a defective charge which did not disclose an offence in law.*

2. *That the learned trial Magistrate erred in law and in fact in convicting the appellant on the offence charged in the face of the glaring irregularities in the medical evidence which irregularities case serious aspersions on the authenticity of the P3 form produced and the matter thereof.*

3. *That the learned trial Magistrate erred in law and in fact in holding that the evidence of alleged "eye witness" was corroborative on the issue of rape which finding was totally unsupported on the evidence on record and hence occasioned a miscarriage of justice.*

4. *That the learned trial Magistrate erred in law and in fact in holding that PW 4, the Clinical Officer treated the complainant PW 1 on 14/7/2004 in the absence of any shred of evidence when the evidence adduced by DW2, the Medical Superintendent of Health clearly pointed to the fact that the complainant was never treated at the said hospital as alleged.*

5. *That the learned trial Magistrate erred in law and in fact in holding that the evidence of assault on the appellant had no bearing on the offence charged when the totality of the evidence clearly pointed*

to on frame – up of the appellant.

6. That the learned trial Magistrate fell into an error of law in holding that the evidence of the Clinical Officer was credible when the totality of the evidence adduced clearly pointed to the fact that his evidence was questionable when juxtaposed against the Hospital records.

7. That the learned trial Magistrate erred in law and infact in disbelieving the defence testimony without any candid and/or cogent reasons.

8. That the learned trial Magistrate misdirected herself on the burden and incidence of proof and consequently arrived at a judgment insupportable in law.

9. That the learned trial Magistrate erred in law and in fact in invoking the Sexual offences Act, in sentencing, which Act was not in force at the time the appellant was charged and which Act the appellant had not been charged under.

10. That the sentence meted out to the appellant was harsh in all circumstances of the case.

11. That the learned trial Magistrate did not address here mind judiciously to the evidence in totality and ended up descending into the arena by canvassing theories not supported by the evidence on record.

He has asked the court to allow the appeal, quash the conviction and set aside the sentence. Learned counsel for the state conceded ground 9 to the effect that the learned trial Magistrate erred in law in invoking the Sexual offences Act in sentencing while the same was not in force as at the time the alleged offence was committed. He also conceded ground 1 and agreed that the main charge was defective for failure to include the word "*unlawful*" in the particulars of the offence. As rightly held by the Court of Appeal in *DANIEL NYARERU ACHOKI -V- R. Cr. Appl. No.6 of 2000,* for a charge of rape or even attempted rape to be sustainable, it must include the following ingredients in its particulars:

1) That the act of sexual intercourse was unlawful.

2) That the act of sexual intercourse was without the consent of the woman or girl.

These two expressions are used in the Penal Code's definition of rape and they must therefore be included in the particulars of the charge. The omission of any one of them renders the charge incurable defective and a conviction cannot lie however strong the rest of the evidence might be. The trial Magistrate was furnished with the relevant authorities on the issue but she gave them a total blackout and did not mention them in her judgment. I am in agreement with both counsel herein that count 1 was incurably defective and a conviction would not therefore be sustainable. For this sole reason, I must quash the conviction on the charge of rape. As rightly submitted by learned counsel for the state however, the alternative charge of indecent assault is still on record and this court has power to consider the evidence on the same and if the charge is proved, then the appellant can still be convicted on it. This was actually the position in the Nyareru Achoki Case [supra]. I will therefore proceed to re-evaluate and re-assess the evidence adduced before the trial court and form my own decision as to whether the same supports a conviction on the alternative charge. This I am enjoined to do by the law as a Court of 1st appeal as held in the celebrated case of *OKENO -V- REPUBLIC [1972] E.A.32* and many others.

The evidence before the trial court was to the effect that on the material date at around 6.00 p.m. the complainant went to untether her cows from her co-wife's compound. As she was doing so, somebody emerged and grabbed her by her neck, pulled her beside the house and dropped her down. He then tore her panties and had carnal knowledge of her. She screamed loudly for help and PW2 who was passing by rushed to the scene. He told the court that he found that person between the complainant's thighs. That person was identified as the appellant herein. PW2 asked the appellant what he was doing and instead of answering him, he started running away. PW3 who was also passing by met the appellant as he ran away and assisted PW2 to chase after him. PW2 told him that the person running away had raped a woman.

They did not manage to catch him and he disappeared into the maize plantation. The complainant took her torn pant and went to the area chief and reported the matter. From her evidence and that of the Clinical Officer i.e PW4, she went to hospital for treatment the same evening but her P3 form was completed much later on i.e on 16.9.2006. The same confirmed that indeed the complainant had been raped. One of the grounds of appeal was on the inconsistency of the medical evidence adduced by the prosecution and the defence. I have considered the argument advanced by counsel for the appellant on that issue. I note however that the medical evidence was relevant only in respect of the 1st count and the same is not relevant in respect of the alternative count. The said inconsistency does not therefore affect the evidence in respect of the alternative court.

The appellant denied having committed the offence and stated that the charge was preferred against him after he reported an assault complaint against the complainant's husband. As rightly observed by the learned trial Magistrate, if there was any assault, it arose as a result of the rape complaint as the complainant's husband was quarrelling the appellant for having raped his wife. The learned trial Magistrate did not ignore the appellant's defence as claimed. She did consider it and found it untenable. The evidence shows that all the parties knew one another very well before the date in question. There was no issue of mistaken identity or any reason whatsoever advanced as to why the complaint, her husband and 2 totally independent witnesses could fabricate the case against the appellant herein. My finding is that the appellant did as a matter of fact have unconsentual sexual intercourse with the complainant. PW2 literally found the appellant *"with his pants down"* in the act. Touching does not necessarily denote the use of hands. It includes the act of different parts of the body coming into contact with each other. The appellant did therefore touch the complainant's private parts by inserting his penis into her private parts. This amounts to indecent assault on a female as envisaged by section 141 (1) of the Penal Code under which the appellant was charged. My considered finding therefore is that the evidence on record proves the alternative count beyond any reasonable doubt. In the result, I allow the appeal on the conviction against the charge of rape. I quash the same but substitute thereof a conviction on the lesser charge of indecent assault on a female contrary to section 144 (1) of the Penal Code. I also set aside the sentence of 10 years imprisonment and substitute thereof a sentence of 5 years imprisonment with hard labour.

W. KARANJA

JUDGE

28/2/2008

DELIVERED today in open court in the presence of Mr. Ndege for the state and Mr. Makali for the appellant.

W. KARANJA

JUDGE