



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 393 of 2006**

**SEURI SAILEVO LEMOTINGA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the original decision in Criminal Case No. 940 of 2005 in the Chief Magistrate's Court at Kibera – Ms. H. Wasilwa PM)***

**JUDGMENT**

SEURI SAILEVO LEMOTINGA, the appellant, was charged before the subordinate court with rape contrary to section 140 of the Penal Code (count 1). The particulars of offence were that on the night of 26<sup>th</sup> December 2004 at Nairobi Area Province had carnal knowledge of EM M without her consent. In the alternative, he was charged with indecent assault contrary to section 144(1) of the Penal Code. The particulars of offence were that on 26<sup>th</sup> December 2004 at Nairobi Area Province unlawfully and indecently assaulted B M M by touching her private parts.

Count 2 was for rape contrary to section 140 of the Penal Code. The particular of offence were that on the night of 26<sup>th</sup> December 2004 at Mugoya Estate Phase III Langata, within Nairobi Area Province had carnal knowledge of B A S without her consent. In the alternative, he was charged with indecent assault on a female contrary to section 144(1) of the Penal Code. The particulars of offence were that on the night of 26<sup>th</sup> December 2004 at Nairobi Area Province unlawfully and indecently assaulted B A S by touching her private parts.

Count 3, on the other hand, was for assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of offence were that on the night of 26<sup>th</sup> December 2004 at Nairobi Area Province, unlawfully assaulted B A S thereby accasioning her actual bodily harm. Count was for being unlawfully present in Kenya contrary to section 13(2) (c) of the Immigration Act (Cap 172). The particulars of offence were that on 27<sup>th</sup> January 2005 at Nairobi Area Province, being a Tanzanian citizen, was found unlawfully present in Kenya without a valid entry pass.

After a full trial, he was acquitted of count 1. He was however, convicted on count 2, 3 and 4. He was sentenced to serve 10 years jail on count 2, sentenced to serve 1 year jail on count 3, and ordered to be repatriated to Tanzania on count 4 after completion of sentence in count 2 and count 3. The prison sentences on count 2 and count 3 were ordered to run concurrently.

The appellant was aggrieved by the decision of the subordinate court. He therefore filed this appeal to this court. In addition to his petition of appeal, the appellant filed written submissions, which he relied upon during the hearing of his appeal.

The learned State Counsel, Ms. Gateru, opposed the appeal and supported the convictions and sentence. Counsel submitted that the prosecution proved its case against the appellant beyond any reasonable doubt. Counsel contended that the appellant was positively identified with regard to the offences of rape and causing actual bodily harm, as he was positively identified by PW1 at the scene. There was also an identification parade where the said witnesses identified the appellant. Though the incident occurred at about 4 am, the lighting conditions were conducive to positive identification, as the appellant chased PW1` outside the house, where there was electricity light. Counsel also submitted that the lamp in the house was alight. The assault was also confirmed by PW5 Dr. Kamau, who assessed the injury suffered as harm and produced the P3 form as an exhibit.

Counsel further submitted that the evidence on record was that the appellant was a Tanzanian, and had no permit to be in Kenya. Consequently, the three counts on which the appellant was convicted were proved.

On the sentence, the learned State Counsel submitted that the sentences were neither harsh nor excessive. The maximum sentence for rape was life imprisonment, while the maximum sentence for assault was 5 years imprisonment. There sentences of 10 years and 1 year imprisonment respectively, were infact lenient and legal.

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – see OKENO –vs- REPUBLIC [1972] EA 32.

I have evaluated the evidence on record. The conviction of the appellant on counts 2, and count 3 are predicated on the evidence of identification by a single witness PW1 BETTY AKANYA SHIPONI. Such identification can found a conviction. However, caution has to be exercised by courts before founding a conviction on the evidence of a single identifying witness. In the case of ODHIAMBO –vs- REPUBLIC [2002] 1 KLR 241 – Chunga CJ, Lakha and Ole Keiuwa JJA held”-

**“1. Courts should receive evidence on identification with great circumspection particularly where circumstances are difficult and do not favour accurate identification.**

**2. Where evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court way reasonably conclude that identification is accurate and free from the possibility of error”,**

In our present case, the conditions for positive identification were difficult. The time was at night. The light in the house was light from an oil lamp. There was no evidence on how bright that light was, and in any event, it was put off soon after the intruder came into the house. The security lights from neighbouring houses were not described. There is no description of the type, brightness and distance of the security lights. There was no description as to how those lights were placed in relation to the appellant. Admittedly, the learned Magistrate warned herself on the dangers of convicting on the evidence of a single identifying witness. However, in my view, she failed to evaluate the circumstances of the identification to ensure that there was no possibility of error or mistake in the identity of the appellant. In my view, has the learned magistrate directed her mind to all the circumstances of the visual identification by the single witness, she would not have arrived at the conclusion that the identification was free from the possibility of error

Secondly, the appellant was arrested because of PW4 P O N, the husband of the complainant B A S. The arrest was not because of a description given by the complainant, but because the appellant failed to show up when PW4 called on all watchmen in the area to go and see him. The appellant was identified by the complainant at an identification parade. However, it is quite possible that her husband, PW4,

described the appellant to the complainant before the parade. The description of the appellant given by the complainant, that the appellant had a space between the upper teeth did not add value to the identification. Many Masai and Kalenjin people have similar spaces between the teeth. I take judicial notice of that fact. In my view, the evidence of visual identification of the appellant on record is not adequate to sustain a conviction in a criminal case.

The evidence that remains with regard to count 2, and count 3 is evidence of suspicion. The appellant behaved in a suspicious manner when he kept away when PW4 was looking for watchmen. Such evidence cannot however, be adequate to sustain a conviction in a criminal case. This position was succinctly stated by Kwach, Lakha and Okubasu JJA in the case of SAWE –vs- REPUBLIC [2003] KLR 364, when the Court of Appeal held, inter alia –

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**“7 Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”**

I will have to quash the convictions on count 2 and count 3.

On count 4 the appellant was found guilty of being unlawfully present in Kenya without a valid entry permit. He was said to be a Tanzanian. In his defence, the appellant admitted that he was a Tanzanian. He did not say that he had a permit or was lawfully present in Kenya. In my view, the offence was proved. He was not subjected to a separate, sentence but was ordered to be repatriated on completion of the prison sentences. I will uphold those orders of the subordinate court.

Consequently, I order as follows –

1. I allow the appeal, quash the convictions in counts 2 and count 3 and set aside the sentences.
2. I dismiss the appeal with regard to count 4 and uphold the conviction and also uphold the orders of the subordinate court on the same.
3. Consequently, the appellant will be repatriated to Tanzania on his being discharged from prison.

It is so ordered.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April 2008.**

**George Dulu**

**Judge**

**In the presence of –**

**Appellant in person**

**Ms. Gateru for State - absent**

**Mwangi - court clerk**