REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 261 of 2006

JAMES MUREITHI GITAU……APPELLANT

V E R S U S

REPUBLIC…….. RESPONDENT

(From the original decision in Githunguri Chief Magistrate's Criminal Case No.466

of 2005 – Lucy Mutai (SRM)

J U D G E M E N T

JAMES MUREITHI GITAU, the appellant was convicted of the offence of rape contrary to Section 140 of the Penal Code. The particulars of offence were that on 1st March, 2005 at Kiambu District of Central Province unlawfully had carnal knowledge of N W N without her consent. He was convicted after a full trial and sentenced to serve 30 years imprisonment. He was dissatisfied with the decision of the trial court and has now appealed to this court on several grounds. In addition to his petition of appeal, the appellant filed written submission, which he relied upon during hearing of the appeal.

The learned State Counsel, Mrs Gakobo, opposed the appeal and supported both the conviction and sentence. Counsel submitted that the prosecution proved beyond any reasonable doubt that the appellant committed the offence of rape. Counsel submitted that P.W.1 was raped at 2 am but there was moonlight which enabled her to recognize the appellant who was a neighbour. In addition, P.W.1 stated that during the time of the rape ordeal, she felt the face of the appellant who had beards. Her screams attracted neighbours who came and arrested the appellant in the compound of P.W.1. The evidence of rape by P.W.1 was corroborated by the doctor P.W.4, who medically examined P.W.1 four hours later. The doctor found P.W.1 bleeding, which established that there was forced sexual penetration. In addition, P.W.5 the Government Analyst found blood stains on the clothes of P.W.1, as well as stains of semen from group "O" secreta. The appellant was also found to be of blood group "O". Counsel emphasized that the appellant was arrested by P.W.6, who found the appellant in the maize farm of the complainant. Counsel submitted that the circumstantial evidence irresistibly pointed to the guilt of the appellant. Counsel stated that the defence of the appellant was considered and found to have no merits. Counsel submitted, lastly, that the sentence was lawful.

In response to the State Counsel's submissions, the appellant submitted that he was arrested while going for work in the morning. That he met someone who asked him if he had seen a young man with milk. Then that person ran to the complainants house and came with many people who asked him to identify himself. He submitted that he met the first man at 5.40 am. He submitted that it was when P.W.1 saw him, that she said that he was one of the robbers.

I have evaluated the evidence on record. Indeed, the complainant P.W.1 was raped. The injuries and blood stains found by the doctor, P.W.4, clearly established forced sexual penetration. The incident occurred at night, at about 2 am. According to P.W.1 N W N, it was dark. She stated that she saw the face of the raper in the torch light. She also stated that she felt the raper's beard. The appellant had a beard. She also stated that she knew the appellant before. However, when neighbours came in response to her screams, there is no evidence that she informed any of those neighbours that she recognized or identified the raper. Certainly, she did not give any description of the raper.

The appellant was arrested by P.W.6 STEPHEN NJUGUNA WAITHERERO. This witness, after going to the scene, went back to his home, and on his way he met the appellant. The appellant stated in his defence that he was arrested by someone at 5.45 am, who asked him whether he had seen a milk boy. P.W.6 also stated that he was milking cattle before he arrested the appellant.

This is a case based on circumstantial evidence, as the complainant P.W.1 did not identify or recognize the appellant. It is a case based on the arrest of the appellant as well as his blood group which is "**O",** while the complainant appeared to have been raped by a person of blood group "O". In order to sustain a conviction on such circumstantial evidence the evidence must lead irresistibly to the conclusion that the accused committed the offence. There must be no other reasonable hypothesis that would weaken the irresistible conclusion of guilt.

In my view, the evidence against the appellant did not satisfy the requirement for circumstantial evidence to sustain a conviction. There is strong suspicion that the appellant committed the offence. However, suspicion, however strong cannot provide the basis for inferring guilt which must be proved beyond reasonable doubt by evidence – see SAWE –VS- REPUBLIC [2003] KLR 364. I will allow the appeal on that ground.

In addition to the above, the language used by witnesses in the trial is not indicated. That was an error that rendered the whole trial a nullity – see SWAHIBU SIMIYU –VS- REPUBLIC – Criminal Appeal No. 245 of 2005 (Ksm) C.A.

The upshot is that the conviction and sentence cannot stand.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th day of May, 2008.

GEORGE DULU

JUDGE.

In the presence of-

Appellant in person

Mrs. Gakobo for State

Mwangi Court Clerk.