REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 89 of 2005

ELIJAH MATHU GICHERU…….....................…APPELLANT

V E R S U S

REPUBLIC ……………………………………..…….RESPONDENT

J U D G M E N T

ELIJAH MATHU GICHERU, the appellant, was tried in the subordinate court with another on a number of charges. He was convicted of rape contrary to section 140 of the Penal Code. The particulars of offence were that on 1st January, 2004 at Kiambu District within Central Province, had carnal knowledge of **R N M** without her consent. He was also convicted of unnatural offence contrary to Section 162 of the Penal Code. The particulars of offence were that on 1st January, 2004 at Waguthu village in Kiambu District within Central Province had carnal knowledge of **R N M** against the order of nature. In addition, he was convicted of being in possession of narcotic drugs contrary to section 3 (1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read with Section 2(a) of the said Act. The particulars are that on 1st January, 2004 at Kiambu District within Central Province was found being in possession of seven rolls of cannabis sativa (bhang) in contravention of the said Act.

His co-accused in the subordinate court, one **JOHN NJOROGE KARIUKI**, was convicted of being in possession of narcotic drugs contrary to Section 3 (1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read with subsection 2 (a) of the said Act.

The appellant was sentenced to serve 20 years imprisonment in respect of the rape charge; 10 years imprisonment with respect to the unnatural offence charge; and 2 years imprisonment with respect to the charge of possession of narcotic drugs. The sentences for the rape and unnatural offence charge were ordered to run concurrently. The other accused, on the other hand, was sentenced to serve 2 years imprisonment for possession of narcotic drugs. The co-accused of the appellant does not appear to have appealed. The appellant however, has appealed to this court against both his convictions and sentences imposed. In addition to his petition of appeal, the appellant filed written submissions which he relied upon at the hearing of the appeal.

Mrs Gakobo, learned State Counsel, submitted that the prosecution evidence had proved the case against the appellant beyond any reasonable doubt. On the charge of rape and unnatural offence, Counsel submitted that there was the clear evidence of the complainant P.W.1 that she was abducted by two

people at night outside a church when she went to the toilet, and taken to a nearby banana plantation where she was raped and sodomised. She was held hostage by the appellant and in the morning the complainant managed to escape from the grip of the appellant at daybreak, screamed and ran and both the complainant and the appellant were seen by P.W.2 who was nearby. The appellant was actually arrested immediately. The rape and sodomy was reported to P.W.3 mother of the complainant shortly thereafter.

Counsel emphasized that P.W.1 was visibly distressed, had swollen eyes and was treated. In addition, P.W.6 confirmed that the complainant had swollen labia majora, and the vaginal wall was slightly reddish, which was consistent with rape. Also P.W.5 confirmed that appellant was of blood group '**A'** and P.W.1 was of blood group '**O'.** The clothes of P.W.1 were stained with semen of blood group '**A**' which could have come from the appellant. The evidence and circumstances were such that it was the appellant who committed the offence. Counsel submitted that though the appellant stated in his defence that the complaint was his girlfriend, those allegations were denied by P.W.1 and could not have been true, otherwise there would be no reason why the complainant (P.W.1) would have been distressed and for her to scream.

On the offence of possession of cannabis sativa, the State Counsel submitted that the substance recovered from the pocket of the appellant was confirmed to be rolls of bhang ***(cannabis sativa***). Counsel submitted that it was not true, as alleged by the appellant, that the rolls were planted on the appellant, as the appellant did not raise the issue of planting of the drugs when relevant witnesses testified.

On sentence, Counsel submitted that the sentences imposed were lawful and were neither harsh nor excessive.

In response to the State Counsel's submissions, the appellant submitted that he was asking the court to order the sentences to run concurrently.

The brief facts are as follows:- On 31/12/2003 a form 4 student the complainant (P.W.1) **R N M**) went for overnight church prayers at [PARTICULARS WITHHELD] Restoration Church. At around 12.30 am during the night, the complainant went out of the church to the toilet with one **M W** (who did not testify in the subordinate court). When **M W** went back into the church, the complainant remained outside as it was very hot in the church.

While there, two young men approached and one of them lit a torch in P.W.1's eyes blinding her, while the other held her by the neck so that she could not scream. They carried her to a nearby bush where they raped her. They then took her to another place, where the two people, together with others smoked bhang and took liquor. Then they ordered the complainant to undress, and she removed her clothes and they raped and sodomised her. One of the two then left saying he would have to go for work. The appellant later took the complainant saying he was going to lock her for one month. Near the main road, the appellant ordered the complainant to put on her clothes. As they moved, the complainant realized that they were near her home. The appellant tried to open the door of a house for the complainant, but since it was daybreak about 5 am, the complainant noticed a woman nearby and screamed and pulled herself free and ran towards that woman. The appellant gave chase, but the woman P.W.2 **AW** locked the complainant in her house. In the meantime neighbours came and arrested the appellant. The appellant was taken to the police. He was said to have been found with rolls of bhang. The report of the incident was reported to the police and the complainant was taken to Kiambu District Hospital, then Nairobi Women's Hospital where she was examined and treated. Later a P3 form was filled by P.W.6 Doctor **SAMSON GITONGA** on 21/1/2004 at Kiambu District hospital from the notes from Nairobi Women's Hospital. Samples of blood and saliva of the complainant and the appellant were taken to the Government Analyst. P.W.5 **ALBERT GATHURI MWANIKI**, a Government Analyst found the blood group of the complainant to be '**O'**. The blood group of the appellant was group '***A'***. The pants and clothing items of the complainant were found to be stained with semen and spermatozoa of group A secreta. This report was dated 24th March, 2008 and was produced as exhibit 5. Another Government Analyst report dated 9th February, 2004 filled by Simon Ndubi Atebe, Government Analyst, was produced by P.W.7 Police Constable **NICKSON BIWOTT** as exhibit 7C. This report states that the materials found in pockets of the appellant were rolls of cannabis sativa.

The appellant was consequently charged with the offences, on which he was convicted and sentenced.

When put on his defence, the appellant gave an unsworn defence. It was the appellant's defence that the complainant was his girlfriend and that on the 31/12/2003 the two met, talked and agreed to meet at Restoration Church. That he went to the church at midnight and met the complaint and asked her to accompany him home, and she agreed. On the way they met his sister with whom they walked together. On reaching home his sister proceeded to his mother's house, while the appellant and the complainant went into the appellant's house. Later the complainant asked him to escort her home because she did not want to be asked where she had slept. He escorted her and when they reached near her home, the complainant started screaming, and told those who came that he had raped her. It was his defence that if he had raped her, he would not have escorted her in a place close to her home. He stated that he wanted to call his sister as a witness but he did not have someone to send to call her.

I have re-evaluated the evidence as I am required to do in a first appeal. The appellant does not deny being with the complainant during the night of the incident. His story is that any association he had with the complainant was by consent of the parties, as they were friends.

Having re-evaluated the evidence I am of the view that the conviction of the appellant is mainly predicated on who to believe between the evidence of the complainant and the appellant. In my view, there was ample evidence to prove rape. The complainant was found with blood stained pants, there were injuries on the vagina, there were traces of spermatozoa. The evidence from Nairobi Women's Hospital is wanting. However, with the evidence of the Government Analyst who found the pants of the complainant to be blood stained as well as spermatozoa, and the unshaken evidence of the complainant, it is my view that there was forced sexual penetration. The spermatozoa is by a blood group '**A**' secreta, which is the secreta group of the appellant. The appellant also admitted that he was actually together with the complainant that night. In my view, forced sexual penetration was established. That penetration was also by the appellant. Even if the appellant was a friend of the complainant, he did not have any lawful justification to rape her. I will uphold the conviction on the charge of rape.

On the charge of sodomy, I find no tangible evidence to support this charge. Other than the allegation of the complainant, there should have been some independent evidence to support the allegation. The complainant was taken to hospital almost immediately. Therefore she should have been examined to establish the assault, or unnatural offence alleged. Failure to do so, creates a grave doubt in my mind. I give the benefit of that doubt to the appellant. I will quash the conviction and sentence for unnatural offence or sodomy.

On the offence of possession of narcotic drugs, the appellant suggested in cross-examination that the drugs were planted on him. The offence is alleged to be committed on 1st January, 2004. The Government Analyst report filled by S.N. Atebe on 9th February, 2004 found that the material in the envelop found on Elijah Mathu, the appellant, was cannabis sativa. In his defence, the appellant does not specifically dispute the allegations of the prosecution. I find that the prosecution proved its case beyond any reasonable doubt. I will uphold the conviction.

On sentence, sentencing is essentially an exercise of discretion by a sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless the sentencing court took into account an irrelevant factor, or that it failed to take into account a relevant one or that it applied a wrong principle or short of these the sentence is so harsh and excessive that application of a wrong principle must be inferred – see ***SHADRACK KOGO –VS- REPUBLIC – Eldoret Criminal Appeal No. 253 of 2003 (CA)***

In our present case the sentences are lawful. The appellant said nothing in mitigation. In his grounds of appeal, he now says that he was drunk or intoxicated. That consideration was not placed before the magistrate. Though the maximum sentence for rape is life imprisonment, in my view, for a first offender and in the circumstances of evidence tendered, a sentence of 20 years imprisonment, amounts to application of a wrong principle. It is a harsh and excessive sentence. I will reduce that sentence to 10 years imprisonment. However, I uphold the sentence on possession of narcotic drugs.

Consequently, I order as follows-

1. I quash the conviction for unnatural offence and set aside the sentence imposed.

2. I uphold the conviction for rape, and order that the appellant will now serve a sentence of 10 years imprisonment from the date on which he was sentenced by the subordinate court.

3. I uphold the conviction and sentence of the subordinate court for the offence of possession of narcotic drugs.

It is so ordered.

Dated and delivered at Nairobi this 4th June, 2008.

George Dulu

Judge.

In the presence of-

Applicant in person

Mrs Gakobo for State – absent.

Mwangi Court Clerk