



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 1 of 2007

GEOFFREY MWANGI NGUTHE APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by G. P. NGARE, Resident Magistrate, in the Resident Magistrate's Criminal Case No. 1401 of 2005 at KANGEMA)

JUDGMENT

The appellant was charged before the lower court with rape contrary to **Section 140** of the Penal Code. After trial the appellant was convicted and sentenced to 7 years imprisonment. He has brought this appeal against conviction and sentence.

This court is duty bound to reevaluate the evidence of the lower court. That duty is susitanly set out in the case of **OKENO vs REP (1972) EA 32**. In that case the Court of Appeal had the following to say:-

“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) E.A. (336) and 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 vs R.(1957) E.A. 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 finding and conclusion; 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 witnesses, see Peters vs Sunday Post (1958) E.A. 424.”

PW 1 the complainant stated that she had visited her grandmother on the 24th December 2005. On 26th December 2005 after attending a crusade at 6 p.m. she on her way home met a man who was wearing sunglasses and a cap. By that time it was 7 p.m. but it was still bright. This person passed her but as she proceeded in her journey he grabbed her by the head and put a cloth on her mouth which cloth had some white dust. She was unable to breath and this person pulled her down. She had the voice of the appellant asking in Kikuyu ***“whether all was alright.”*** The appellant was holding her by her legs as the other person continued to press the cloth over her mouth and nose. She lost consciousness until the following morning. She regained consciousness at 5 am and she felt her body was weak. She also found that her mouth was full of soil. Similarly her dress was also full of soil. She waited until 6 am and when she tried to get up she realized that she was weak. She saw a lady passing by to fetch water and she called out to her. The lady asked her to get up and walk but she was unable. She called her uncle and her uncle on arriving took the complainant to the police station. A report was made at the station and at the chief’s

office. The complainant was examined at Kangema Health Centre. The examination proved that she had been raped. P3 was filled. On cross examination the complainant stated that she knew the appellant very well. That on 25th December 2005 he had slept at their home. Further that the appellant had previously made advances to her.

PW 2 was the Clinical Officer who examined the complainant and who prepared the P3. He found that she had foul smelling vaginal discharge and her hymen was perforated. Further examination showed spermatozoa was evident. The appellant was also examined and was found to have a urine infection.

PW 3 was the lady who responded to the complainant's call for help. When she approached the complainant she asked the complainant to identify herself which she did. The complainant told her that she had been tied up by two men and that she had spent the night at that place. She tried to help the complainant walk home but she fell down. It was then that she called her grandmother from their home. The rest of the evidence of the prosecution relating to the report made to the police station by the complainant. That evidence shows that the complainant identified the appellant as one of the persons who had committed the offence.

The appellant on being put to his defence gave an unsworn statement. The appellant stated that he is a barber and also burns charcoal. On the material date he had gone to check on the charcoal that was burning and returned to his home at 8 am. He then waited at his home for visitors that were expected. He named those visitors who he said had come to see his newborn child. Later they escorted the visitors to the bus stage and they were there at the stage from 4 to 6.30 p.m. The visitors boarded a vehicle at 6.30 p.m. and another man alighted with luggage. That luggage was stored at the barber shop. The appellant thereafter shaved Mwangi DW 2 and another customer. At 8 p.m. the person who had left the package invited them for a drink at the bar. Both the appellant and DW 2 joined that other person and took beer. Thereafter DW 2 and the appellant went home together, the appellant arriving first. DW 2 Harrison Mwangi Wachira and DW 3 the wife to the appellant gave identical evidence to that of the appellant. The lower court in considering that evidence rejected the defence of the appellant. The lower court found that the complainant had given a history of her knowledge of the appellant and had stated that their two families had known each other for a long time. Having re-examined the lower court evidence, I find that I am in agreement with the learned magistrate's finding. The appellant was well known to the complainant. He often visited the home of the complainant and had even spent the night in their home the previous night. He had made advances to the complainant. All of this was not contradicted by the appellant nor was it questioned in cross examination. The complainant in the first available opportunity identified the appellant. The defence brought two witnesses who almost word to word matched their testimony. DW 2 admitted that he was a friend to the appellant. DW 3 was the appellant's wife. It is not surprising with that relationship that their evidence was almost word perfect. PW 1 clearly recognized the appellant from his voice when he spoke at the scene.

Having weighed the prosecution's evidence with that of defence I find that the prosecution proved its case beyond reasonable doubt. I, just like the lower court do reject the defence offered by the appellant. I have also reconsidered the sentence of the lower court and I find that the same is neither excessive nor harsh. In the end the appellants appeal is hereby dismissed.

DATED AND DELIVERED THIS 22ND DAY OF JULY 2008

MARY KASANGO

JUDGE