REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 183 of 2006

JULIUS IRUNGU MACHARIA ….....…… APPELLANT

VERSUS

REPUBLIC.…… RESPONDENT

(Being an appeal from the conviction and sentence of

G.K. Mwaura Principal Magistrate in Principal Magistrate's

Criminal Case No. 2393 of 2005 at Murang'a)

JUDGMENT

The appellant in this case was charged in the lower court with two counts. In the first count he was charged with *attempted murder contrary to section 220 (a) of the Penal Code.* In the second count he was charged with *rape contrary to section 140 of the Penal Code.* After trial in the lower court he appellant was convicted on both counts and was sentenced to 20 years imprisonment on each count. He has preferred this appeal against conviction and sentence. This is the first appeal. In deciding this appeal I am guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570)."

PW 1 on 4th June 2005 at about 6p.m. she decided to visit her neighbour. When she was about 100 metres from her home she saw the appellant on the road. She passed him and went to her neighbour's home. She did not find her neighbour at home and she decided to return to her house. As she walked she realized that someone was following her. By then it was 6.30p.m. and there was still day light. She was hit from behind and when she turned she saw that it was appellant. On hitting her she fell down. He began to struggle her when she was down. Using a hard object the appellant hit her on the head and the eyes. The appellant then removed her clothes and later this witness lost consciousness and only recovered while at Nairobi Women hospital. At first when she regained consciousness she was confused and dazed. However when she fully recovered she told the person attending her at hospital that the attacker was by the appellant. She knew the appellant as a neighbour. At one time he was tenant on her grandmother's plot. At the hospital she was told by the doctor that she had been raped. She at the hospital experienced great pain from her private parts which pain she did not have before the attack. She also had severe injuries to her head. PW 2 was her daughter. On 5th June 2005 at about 7p.m. a neighbour came to their house and requested that she gives her her mother's dress. This was because her mother had been found unconscious in a bush naked. This witness fainted but later arranged for her mother's transfer to Nairobi Women's Hospital. PW 3 was the neighbour who found the complainant in a

bush. She found her severely injured on the face and blood was oozing from her private parts. On getting a dress they dressed her with other women and took her to the hospital. PW 5 was a clinical officer at Murang'a District Hospital. He examined the complainant on 14th October 2005 and found that she was physically and sexually assaulted on 4th June 2005. She was admitted for one day at Murang'a District Hospital then referred to Nairobi Women's hospital. At the time when she was at the Murang'a hospital she was unconscious. At Nairobi women's hospital it was observed that she had skull fracture on her left side. Her eyes were also red. There were injuries on the chest. This clinical officer when he examined her observed that she had a foot drop. In his view PW 1 suffered grievous harm and was also raped. PW 6 was the police officer who after the report was made to him went to the scene where PW 1 had been found and recovered a black skirt, rubber shoe, bra and petticoat. These were later identified by PW 1. PW 7 arrested the appellant on 13th October 2005. In unsworn statement the appellant in his defence denied the offence and attributed the charge he faced to a grudge of PW 1. What is not clear from that line of defence is why when PW 1 was so severely injured and raped would pin it on the appellant if it were not true. I have considered the ground of appeal of the appellant. PW 1 was clear in her recognition of the appellant prior to the incident and at the time the incident occurred. The evidence in my view is overwhelming and sufficient for a conviction. The appellant did raise an issue that his constitutional rights were violated because he was arrested on 13th October 2005 and was kept in custody until the day he was produced before court on 18th October 2005. I have had the benefit of checking the calendar and found that 13th October was a Thursday. It is not clear at what time the appellant was arrested on that day. It is therefore not clear whether the 24 hours would have expired in the day or in the night on Friday. The appellant was produced before court on Tuesday the 18th of October. If there was delay in my view the delay would be probably only have been the Monday 17th October. Section 72 (3) (b) of the constitution provides that a party should presented before court for a non capital offence within 24 hours of arrest. In my view the production of the appellant in court on 18th October did not breach that provision. Having reexamined the lower court's evidence I find that I am in agreement with the lower court's conviction of the appellant on both counts. I just like the lower court do reject the defence offered by the appellant. PW 1 recognized the appellant. The appeal against conviction is dismissed. On sentence the appellant was sentenced to 20 years on each count to run concurrently. Bearing in mind the severity of the offence committed by the appellant whereby PW 1 was left for death in a bush I find that the sentence meted out to the appellant by the lower court was not to be excessive or harsh. The appellant's appeal against sentence is also hereby dismissed.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 28th day of October 2008.

BY

M. S. A. MAKHANDIA

JUDGE