REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 32 of 2006

[*From Original Conviction and Sentence in Criminal Case No. 2933 of 2003 of the Principal Magistrate's Court at Nyahururu – T.M. MWANGI – S.R.M*]

SAMUEL EKENO EKAI ……...…..……..…… APPELLANT

VERSUS

REPUBLIC ……...……....…….RESPONDENT

JUDGMENT

The appellant, *Samuel Ekeno Ekai* was charged with the offence of assault and causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars of the offence are that on the 16th day of August 2003 at Laikipia District within the Rift Valley Province, assaulted ***N L*** thereby occasioning her actual bodily harm.

The appellant also faced a second count of **rape** contrary to **Section 140** of the **Penal Code** and the particulars stated that on the 16th day of August 2003 at Polong Village in Laikipia District within the Rift Valley Province, unlawfully had carnal knowledge of ***N L*** without her consent.

The appellant pleaded not guilty to both charges and after a full trial, he was convicted and sentenced to seven (7) years imprisonment.

Being dissatisfied with the conviction and sentence imposed by the learned trial magistrate, the appellant has appealed to this court and raised several grounds of appeal.

The appellant challenged the evidence on identification by a sole identifying witness. The appellant also faulted the conviction that was based on vague and insufficient evidence to sustain the conviction, and finally the appellant urged the court to find the prosecution's witnesses did not establish a case to the required standard in criminal case.

This appeal was not opposed by the State. The learned Senior State Counsel, ***Mr. Koech*** conceded to the appeal and rightly so far the reasons that will come clear from the evidence.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence and arrive at its own independent determination of whether to uphold the conviction. In so doing, the court should bear in mind that it never saw or heard the witnesses give evidence and give due allowance for that (*see* the case of **Njoroge Vs Republic [1987] KLR 19**).

I hereby set out the brief summary of the evidence before the trial court.

N L, **PW 1** the complainant in this matter was grazing her cattle on 16th August 2003 *particulars withheld* Village at about 4.00 p.m. A person who was not known to her approached her and asked her whether she had seen his sheep. **PW 1** was trying to respond, the Assailant hit her with the rungu on the head and she fell down, she became unconscious. She gained consciousness after the assailant had left the scene and it is when she discovered she had also been raped.

Wilson Kimosop, **PW 2** was cycling within the same are a when he heard a woman screaming. Upon challenging, he saw a man with a rungu running away and the woman was lying on the ground gasping for air.

PW 2 took the complainant to the police where they reported the matter and to the hospital where she was treated for the injuries. The doctor who completed the P3 form failed to attend court and after several adjournments, the P3 form was produced by the prosecutor. It showed that the complainant had sustained injuries on her private parts, there was fresh blood and she was bleeding from the pelvic. The medical officer who filed the P3 form and formed the opinion that the complainant was subjected to forced sexual intercourse.

The other evidence was by the complainant's husband wish is of no evidential value as he was not at the scene where the offence took place.

Put on his defence, the appellant gave unsworn statement and denied having committed the offence.

After considering the evidence, the learned trial magistrate found that

"***There is overwhelming evidence on the part of the prosecution that the accused person did assault and rape the complainant in this case. I therefore find him guilty as charged and I convict him accordingly***."

The issue for determination is whether the evidence of the complainant regarding the identification of the assailant is safe to sustain a conviction. It is trite law that when a conviction is based on the evidence of a sole identifying witness the trial court should take abundant caution. In the case of **Maitanyi Vs Republic [1986] KLR 198** the Court of Appeal has had occasion to caution court to be careful when considering the evidence of a single identifying witness.

"***Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct magistrate were difficult."***

In this case, the complainant said that she had not known the assailant before, she became unconscious when she was hit with the rungu but she was able to identify the appellant during an identification parade. However, the evidence of identification at an identification parade was not produced. **PW 2** who rescued the complainant said that he never saw the assailant. This is a case that wholly depends on the correctness of identification and in view of the difficult circumstances under which the complainant identified the assailant; there is a possibility of a mistaken identity. The learned trial magistrate did not caution himself about the danger of convicting the appellant based on this evidence. I find the quality of evidence of identification poor; it was based on a fleeting glance of an assailant who inflicted very serious injuries on the complainant that she lost consciousness.

The upshot of the above is that the appeal by the appellant is allowed. The conviction and sentence are hereby quashed and the appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Dated at Nakuru this 15th day of March 2007.

MARTHA KOOME

JUDGE