REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Criminal Appeal 446 of 2005

FREDRICK KIRUHI WAIRIMU ……...…..……..APPELLANT

VERSUS

REPUBLIC ……..……..……..RESPONDENT

(From the original and sentence in criminal case No. 9210 of 2003 of the Senior Principal Magistrate's Court at Kibera)

JUDGMENT

FREDRICK KIPURI WAIRIMU the appellant was charged before the subordinate court with the offence of rape contrary to section 140 of the Penal Code. He was also charged with an alternative count of indecent assault of a female contrary to section 144(1) of the Penal Code. After a full trial he was found guilty of the main count of rape and convicted. He was sentenced to serve 18 months in prison sentence.

Being aggrieved by the decision of the trial magistrate he filed this appeal. In his amended petition of appeal he listed four grounds of appeal, that –

1. The learned trial magistrate erred in law and in fact in convicting him while there was no medical evidence on PW1 the complainant or on himself to establish any nexus with the commission of the offence charged.

2. The learned trial magistrate erred in law and in fact in replying wholly on the evidence of a single witness, PW1 the complainant while the evidence of that witness was full of glaring inconsistencies which made it unsafe and evidentially weak to rely upon to base so grave and weighty a conviction.

3. The learned trial magistrate erred in law and in fact in omitting to observe and warn herself that the prosecution had failed or omitted to call several essential witnesses namely PW1's husband, the chief and the arresting officers and thereby occasioned a miscarriage of justice.

4. The learned trial magistrate erred in law and in fact in not holding and finding that the prosecution case had not been proved beyond doubt and thus occasioned a miscarriage of justice.

The appellant also filed written submissions. Learned State Counsel Ms Gateru opposed the appeal. She submitted that although no medical evidence was adduced, the prosecution had proved the case against the appellant beyond any reasonable doubt. She contended that the crucial witness was PW1 (N) who gave a vivid account of how she was raped by the appellant outside her house. The appellant was armed with a pistol and threatened the complainant (PW1) with death if raised the alarm. Although the incident occurred at 9.00 pm PW1 positively identified the appellant since he was a person whom she had

previously known as being married to a niece PW1/ She contended that the learned magistrate warned herself of the dangers of convicting on the evidence of a single identifying witness.

Learned State Counsel submitted that the appellant's contention that there were contradictions in the evidence of PW4 had no basis. However, if there were minor inconsistencies then those did not go to the root or shall the prosecution case.

On the failure to call crucial witnesses, the learned State Counsel submitted that though the husband of the complainant who found her crying was not called testify, that failure to call the witness was not prejudicial to the appellant, nor was it fatal to the prosecution case. The failure also to call the investigating officer was not fatal.

On the defence, learned State Counsel submitted by the trial magistrate and found to have no merits.

This being a first appeal, I am bound to analyse the evidence before the lower court and come to my own conclusions and inferences – see KENO –vs- REPUBLIC [1972] EA 32.

I have evaluated the evidence on record. Indeed, the conviction or the appellant was based in visual identification by a single identifying witness. In RORIA –vs- REPUBLIC [1967] EA 583 at page 584, Sir Clement De Lestang V.P. said –

"**A conviction resting entirely on identify invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of a United Kingdom which the power of the court to interfere with verdicts:**

There may be a case in which identify is in question and if any innocent people are convicted today I should think that in nine cases out ten – if there are as many as ten – it is a question of identity".

The evidence of identification in this case causes me some amount of uneasiness. The complainant stated in evidence that she knew the appellant as a person who was married to a niece of her husband. She did not state in evidence whether she recognised him by voice or by appearance. There is no evidence as to whether there was light at the scene. The complainant PW1 also stated in evidence that she was reluctant to report to the police, which in any view, is unusual conduct for somebody who has been raped and her husband has asked her to view, the identification of the appellant was far from positive.

The appellant has also complained about the failure of the prosecution to all crucial witnesses. These were the husband of the complainant and the investigating officer. In BUKENYA –vs- REPUBLIC [1972] ea 549, Lutta Ag. V.P. held –

"**(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.**

(iv) Where the evidence called is barely adequate, the adverse to the prosecution"

In the instant case, it was necessary to call the husband of the complainant who went to the scene and found the complainant crying. He would have clarified what he found and what he was told by the complainant. He would also have clarified whether the place was lighted. The chief to whom the incident was first reported was not called to testify. He would have stated what was actually reported to him. The police officer to whom the incident was first reported was also not called to testify. No explanation was given by the prosecution on their failure to call these crucial witness. Since the prosecution in this case was hardly adequate to sustain a conviction, I draw the conclusion that the evidence, if called, would have tended to be unfavourable to the prosecution.

Though the appellant complained about lack of medical evidence to convict him to the offence, in my view, lack of medical evidence would not be fatal in our present case if there was other evidence to prove

that he indeed committed the offence.

Having evaluated the evidence on record, I find that the conviction of the appellant was unsafe and is not sustainable.

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

Dated and delivered at Nairobi this 9th May 2007.

George Dulu

Judge

In the presence of –