REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 51 of 2004

STANLEY KAMAU KARIUKI …….....…….APPLELLANT

VERSUS

REPUBLIC ……RESPONDENT

(From original Judgment and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.1163 of 2003 by G.K. MWAURA – PM)

J U D G M E N T

Stanley Kamau Kariuki, the appellant was charged before the Senior Principal Magistrate's Court at Murang'a with three counts. The first count was that of robbery contrary to section 296 (1) of the penal code. The particulars given in respect of this count were that on 8th February, 2003 at Marumi village in Maragua district of the Central Province, robbed **M W M** of cash ksh.300/= and a pull over all to the total value of Ksh.1500/=. The second count was one of rape contrary to section 140 of the penal code. The particulars pertaining to this charge were that on the 8th February, 2003 at [particulars withheld] in Maragua District of the Central Province, had an unlawful carnal knowledge of **M W M** without her consent. The third but alternative count that the appellant faced was one of indecent assault on a female contrary to section 144 (2) of the penal code. The particulars were that on the same date and place as in count I & II the appellant unlawfully and indecently assaulted **M W M** by touching her private part.

The appellant pleaded not guilty to both counts, was tried, found guilty and convicted. He was thereafter, sentenced to serve 10 years imprisonment on each of the two counts. He was also ordered to undergo hard labour and to be under police supervision for five years on completion of the sentence. The Learned Magistrate further ordered that the imprisonment terms to run concurrently but made no finding on the alternative count. The conviction and sentence aforesaid triggered this appeal. In his petition of appeal, the appellant faults the learned magistrate for convicting him when the case was not well investigated, that his semen was not taken for analysis to ascertain whether it corresponded with the ones taken from the complainant, that the complainant did not tell PW2 that she had recognized the person who raped her, that the complainant did not mention the appellant in her first report at Githimu police station, that it was merely an afterthought for the complainant to report the incident at Kigumo police station four days later, that upon arrest nothing was recovered from him belonging to the complainant, that Learned magistrate misdirected himself in holding that he had disappeared from home soon after committing the offence and finally that the Learned magistrate should not have relied on the evidence of single identifying witness to convict him.

The background facts are brief. On 8th February, 2003 at about 7.30pm, the complainant (PW1) an old woman aged 75 years was walking home along a footpath. As she approached Kigumo health centre a person whom she later identified as the appellant approached her from behind and greeted her. A

conversation ensued as they walked along. The appellant in the process even invited her to his house to partake of the meat he had bought. The two walked together for a distance of about 100 meters when suddenly the appellant went ahead and stood in front. When the complainant attempted to go past him, the appellant slapped her on the face several times and she fell down. The appellant then dragged her into the bush, forcibly removed her pants and raped her for about ½ an hour. When done, he again slapped her severally as he demanded money from her. The appellant then took her purse and removed ksh.300/=. He then dragged her back to the road and went away with her pull over. The complainant collected herself and went and reported the incident to a neighbour by the name **M**. (PW2) alleging that she had been raped by the appellant. **M**. took the complainant to her husband. The following day, the complainant was taken to Githumu Hospital where she was treated. Later she reported the incident at Kigumo police station and was issued with a P3 form which was later filled by PW5. According to the complainant she saw the appellant well during the incident as there was moonlight. Further they were together for about an hour and talked. In process she was able to recognize the appellant by his voice as well. The appellant was a person well known to her as she had known her since childhood. Following the incident, it is the prosecution case that the appellant disappeared from the homestead and it was not until 28th August, 2003 that he was arrested in connection with another matter. He was then charged with the instant offences.

Put on his defence, the appellant opted to give sworn statutory statement. He testified that on 8th February, 2003 he was at his rural home assisting his parents on the farm. He then left home for Ngong where he remained until sometimes in June, 2003 when he came home briefly and gain left for his place of work at Ngong. In the month of August he visited his parents home once more and was then arrested and beaten. He was then taken to Kigumo police station and later charged. He categorically denied his involvement in the crime therefore.

In support of his appeal, the appellant submitted that he was a victim of mistaken identity as the alleged offence was committed at night. Further the appellant submitted that he was not mentioned by the complainant in her first report. That the police officer to whom the first report was made was not called as a witness nor was the doctor who first attended to the complainant. The appellant invited me to draw an adverse reference due to the failure by the prosecution to call these vital witnesses. The appellant also invited me to bear in mind that the case could as well have been fabricated against him. As for the 1st count, the appellant maintained that there was no robbery. That there was no evidence that the complainant saw the person who attacked her with any object and yet the medical evidence on record talked of the complainant being injured by a blunt object. The appellant also pointed out that the investigating officer was not called to testify regarding why it took him almost six months to arrest the appellant. Finally the appellant submitted that the sentence awarded was harsh and excessive.

The appeal was vehemently opposed. **Mr. Mugwe**, learned state counsel in opposing the appeal submitted that the prosecution proved its case beyond reasonable doubt. That the complainant first reported the incident at Githumu police station which evidence was backed by the testimony of PW6. Counsel maintained that the evidence of PW1 was firm and convincing. She recognized the appellant who was a person well known to her since his childhood. Her encounter with the appellant lasted almost one hour which according to counsel was sufficient time for purposes of recognition. Counsel also pointed out that during the incident there was moonlight which enabled the complainant to see the appellant. Counsel also reverted to the evidence of PW4 to buttress his case. Counsel submitted that on the material day shortly after the incident the appellant boasted to PW4 that he had been having sex with a woman and he noticed that the appellant was wearing a woman's pull over. To counsel this pull over could have been the one robbed of the complainant during the incident. As for the appellant's defence, counsel dismissed it as a complete sham which failed to shake the prosecution case.

This is a first appeal. It is my duty to re-evaluate the evidence, make my own findings and draw my own conclusions on the evidence which was before court. In doing so, however, I must give allowance to the fact that, unlike the trial court, I did not have the advantage of hearing and seeing witnesses testify. **(See Okeno V Republic(1972) EA. 32.)**

In convicting the appellant the learned Magistrate stated:

"….**after considering all the evidence in this case, and warning myself on the perits (sic) of relying on the testimony of PW1, since she was attacked at night when conditions for a reliable identification may be difficult rendering mistakes possible there is no doubt at all that in the circumstances of this case the complainant was not mistaken at all. Her evidence over is reliable and sufficient. There is however still the additional supporting testimonies of PW3 and PW4 that the accused was at the crime scene at the material time and bragged about having had sexual intercourse. In my view the accused denied (sic) is not true at all and I proceed to dismiss it and I find that the complainant clearly and positively identified the accused…."**

It is clear from the foregoing that the appellant's conviction was predicated upon evidence of identification, nay, recognition as the complainant claimed to have known the appellant since childhood as well as circumstantial evidence in that the appellant was in the neighbourhood of the scene of crime and even bragged to some witnesses as to how he had been having sex with a woman. From that extract it is also clear that the learned magistrate properly addressed himself to the law governing identification of an accused in difficult circumstances and duly warned himself of the dangers of relying on the evidence of a single identifying witness. He also went out of his way to look for any other evidence that would have placed the appellant at the scene of crime which he found in the evidence of PW3 and PW4. This is as it should be.

On my part, I note that the offence was committed at 7.30pm. This was just after nightfall. It may or may not have been so dark as render identification difficult. However, PW1 stated that there was moonlight and although no inquires were made regarding the source of light, its intensity, its source in relation to the complainant or the appellant and or for how long the appellant was under observation by PW1 as to enable her positively identify the appellant, **(See Maitanyi V Republic, (1986) KLR 198**), I am nonetheless of the view that failure to make the said inquiries were not fatal to the prosecution case. There was other evidence that enabled the complainant to recognize the appellant. First there is the evidence that complainant knew the appellant from childhood. This evidence was not challenged at all by the appellant. The complainant too was with the appellant for close to an hour. All along they were talking. At some point and just before the incident, the appellant had invited the complainant to his house to share and or eat the meat he had bought. The encounter upto this point was friendly. The complainant was not apprehensive at all as would have interfered with her power of recognition and or identification of the appellant. The appellant was not disguised at all as would have made it difficult for the complainant to recognize him. Indeed for the appellant and the complainant to have engaged in the discussions freely as they walked along suggests that they knew each other and therefore there was no need for the complainant to be afraid and or apprehensive of the appellant. Again during and after the rape, the appellant was freely talking to the complainant saying how the complainant was not supposed to be wearing underpants. He raped her for about ½ an a hour and when done with the complaint, he demanded money which he took from the purse of the complainant. He then asked the complainant were his hat was. When the complainant said that she did not know where it was, the appellant dragged her to the road and searched for the same before he left the scene. From the foregoing it is quite clear that the appellant and the complainant were in close contact for a long time making it easy for the complainant to recognize the appellant even if the moonlight could have been feeble. Further throughout the incident, the appellant was talking to the complainant and since the complainant had known him since childhood and more so according to the complainant, the appellant had recently been employed as a farm hand by a neighbour, her recognition of the appellant by voice cannot be doubted. It is also not worthy that the complainant was so confident regarding her identification/recognition of the appellant such that the first person she encountered **H M M** (PW2) she told him of her harrowing experience under the hands of the appellant. Further though it is not clear from the recorded evidence, it does however appear that the complainant told her daughters the ordeal she had undergone under the hands of the appellant as well, for the following day the said daughters confronted the parents of the appellant and reported what the appellant had done to their mother. It would also appear from the appellant's cross-examination of the complainant that the complainant had mentioned the name of the appellant to the youth of the area, for they started looking albeit unsuccessfully for the appellant. Finally the complainant gave the name of the appellant in her first report to the police. In my judgment the totality of this evidence is to point at the appellant irresistibly as the person who perpetrated on the complainant the acts of robbery and rape.

I appreciate that the evidence of a single identifying witness in difficult circumstances must be tested with the greatest care and can only be a basis for a conviction where the court is satisfied that the testimony of a single witness can safely be accepted as free from possibility of error. **See Abdalla Bin wendo & another V R (1953) 20 EACA 166, Roria V R (1967) EA 583 and Maitanyi V R (1986) KLR 198.** This requirement is not made lesser in cases of recognition either.

As I have already stated, this was a case of recognition as opposed to visual identification since the complainant knew the appellant prior to the incident. In the case of **Anjononi V R (1980) KLR 59 at page 60,** the court of appeal observed:-

"…….**The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification of the assailants. Recognition of an assailant is more satisfactory, more assuring, and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another….."**

However there is a caveat on such evidence of recognition. The caveat was set out in the case of **R V Thurnbull (1976) 3 ALC E.R 549 at page 552** in this terms.

"…..**Recognition may be more reliable that identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made….."**

Having taken all the foregoing into account, I am unable to hold that the identification and or recognition of the appellant in the circumstances of this case could have been an error. To my mind, the recognition was positive and free from possibility of error.

Even if I was to accept the possibility of error, is there any other evidence on record that may lend credence and assurance as to the guilt of the appellant? I have no doubt at all that indeed there is. Soon after the incident the appellant bragged to **F K** (PW4) that he had just had sexual intercourse with a woman. This was shortly after the appellant had been raped in the same neighbourhood. He was wearing a woman's pullover. There is the evidence of the complainant that she lost her pull over to the assailant during the robbery. It may well be that the pull over the appellant was wearing could have been that of the complainant. There is also the evidence of PW3, **A M**. According to this witness he bumped into the appellant unexpectedly as he was going home. The appellant was coming down the hill. He greeted him and out of the blue told him not to betray him. When PW3 asked him whether he had wronged anyone, he answered that he knew him well and should not betray him. The witness did not know what he meant until the following day when he received information regarding the robbery and rape perpetrated on the complainant. It was then that he connected the crime with what the appellant had told him the previous night. It is significant to note that the encounter between the appellant and this witness was again in the neighbourhood of where the crimes on the complainant were committed. What was it that he was pleading with PW3 not to betray him for!

There is evidence that soon after the offences were committed, the appellant went under. He disappeared from the homestead and it was not until six or so months later that he was apprehended in connection with another offence. The appellant has questioned why it took that long to be arrested. He claims that he never went under but was all along at his place of work at Ngong. The Learned Magistrate found this defence hollow and I am in agreement. The appellant if at all he ever came back home on the various occasions he mentions in his statutory statement of defence, he must have received word that he was being sought for as it were the offence was committed to a person who did not hide about it but mentioned it to various people. I believe that soon after committing the offence, he disappeared from the homestead and it was not until 6 months later that the police managed to arrest him albeit for a different offence. The appellant also thinks that the case was framed against him. However nowhere in the recorded evidence does he advance the reason that could have led the complainant and all the other

witnesses to gang up and bear false testimony against him. He alludes to no previous and or ongoing disagreement between the complainant and himself as would have acted as a catalyst for the complainant to frame him with the case. The same argument can be reiterated in respect of the testimonies of PW2, PW3, PW4 and PW6. As for PW2, PW3 and PW4 these are people who knew the appellant very well. If therefore there was any misunderstanding and or disagreement that could have led them to falsely testify against him, he would definitely have raised the issue with them in his cross-examination. He only alluded to PW4 having been paid money to testify against him. However that allegation is not backed by any evidence at all. Indeed even in his sworn statutory statement he does not allude to such possibility. Infact he is totally silent on the issue of being framed in the case as well as witnesses being bought to falsely testify against him. Finally I doubt whether the complainant would go to such an extent as to injure herself as attested to by the clinical officer (PW5) merely to frame the appellant.

Of course the appellant has taken issue with the evidence of the alleged injuries sustained by the complainant. His complaint is that though PW5 concluded that the complainant was injured by a blunt object, the complainant herself in her testimony did not mention that she saw the appellant with any object. This submission I suppose is meant to counter the evidence in support of the 1st count. To my mind however, blunt objects come in all forms. There is evidence that the appellant slapped the complainant severally. He also pushed her to the ground. Finally he also dragged her from the scene of the crime. All these could have resulted in the complainant suffering laceration on the right chick, tenderness on the neck, swollen red left eye and bruises on the middle right leg as attested to by PW5. The appellant need not have had a blunt weapon to cause these injuries.

Finally I wish to comment briefly on the evidence of PW5. He is the clinical officer who examined the complainant for purposes of P3 form. Although the complainant presented to him a history of rape and robbery, in his testimony he did not specifically say that the appellant was raped as was expected. This does not mean that the witness was not certain that the complainant was not raped. It may be that the question was not put to him by the prosecution. It is also noted that the appellant did not allude to that fact in his cross-examination of the witness and or the complainant. I have looked at the P3 form introduced in evidence and I am in no doubt at all that the complainant had been involved in sexual activities going by the comments thereon. Failure by PW5 to positively state in his evidence that the appellant was raped did not in anyway prejudice the appellant nor did it poke holes in the prosecution case.

All said and done, I think that the prosecution did a commendable job. The witnesses who were not called were not material witnesses and could not therefore have advanced the prosecution case further than where it had reached. In any event nothing stopped the appellant from summoning them with the assistance of the court if he felt they could be of assistance to his case. The conviction of the appellant on the offences charged cannot be assailed. Both offences were proved beyond reasonable doubt. Rape was committed on the complainant by none other than the appellant. In the process he also robbed her of Ksh.300/= and her pull over. In doing so he visited personal violence on the complainant by slapping her and threatening to rape her again in the event she refused to part with the money. The acts of the appellant fits in very well with ingredients of simple robbery as captured by section 295 of the penal code.

As for sentence I note that the same was legal. I would even want to imagine that the sentence on rape considering the manner and circumstances in which it was committed and the victim was even linient.

The upshot of all the above is that this appeal cannot succeed. It is accordingly dismissed in its entirety.

Judgment accordingly.

Dated and delivered at Nyeri this 29th June 2007.

M.S.A MAKHANDIA

JUDGE