REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 56 of 2006

PAUL MUTUKU MUNYOKI……………………....…………………APPELLANT

VERSUS

REPUBLIC……………………………………..…………………RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 10563 of 2004 of the Senior Principal Magistrate's court at Kibera – Mrs. S. Muketi PM)

JUDGMENT

PAUL MUTUKU MUNYOKI the appellant was charged before the subordinate court with one count of rape contrary to section 140 of the Penal Code. The particulars of the offence were that on 13th December 2004 at Ngong Township in Kajiado District within Rift Valley Province, had carnal knowledge of A. W. M without her consent. He was charged with an alternative count of indecent assault contrary to section 164 of the Penal Code. The particulars were that on 13th December 2004 at Ngong Township in Kajiado District, unlawfully and indecently assaulted A. W. M by touching her private parts. He was also charged with a substantive charge of grievance harm contrary to section 234 of the Penal Code. The particulars were that on 13th December 2004 at Ngong Township in Kajiado District within the Rift Valley Province, unlawfully did grievous harm to A. W. M.

After a full trial, he was found guilty of the offence of rape and the offence of grievous bodily harm. He was sentenced to life imprisonment for the offence of rape and was discharged under section 35(1) of the Penal Code on the offence of grievous harm. Being aggrieved by the decision of the subordinate court, he has appealed to this court on grounds, that –

1. The learned trial magistrate erred in convicting and sentencing him to life imprisonment notwithstanding that evidence from the doctor did not support the complainant's allegation.

2. The learned trial magistrate erred in believing and accepting the unsatisfactory evidence of PW1 the complainant who claimed to have been raped and assaulted by him without considering that nothing that was found in his possession could have corrected him with the offence in question e.g. the clothes he was wearing during the time of the alleged crime, be cause if he was the rapist his clothes must have been blood stained.

3. The learned trial magistrate erred in sentencing him to life imprisonment in reliance to PW1's evidence, the complainant who said he had assaulted her without considering that instead of seeking assistance from the nearest neighbours went to seek assistance from a different plot, thus rendering her evidence fabricated and doubtful hence unsafe to rely upon to convict.

4. The learned trial magistrate erred in law and fact in convicting him on unproved circumstantial evidence without considering the evidence of the doctor who said complainant was not raped but was assaulted in her private part.

5. The learned trial magistrate erred by rejecting his defence statement and misdirecting herself in shifting the burden of proof to him.

The appellant also filed written submissions. At the hearing of the appeal, the appellant relied on his written submissions. He also submitted that he fell in remand after arrest and was injured.

Learned State Counsel, Mrs. Gakobo, opposed the appeal. It was counsel's contention that the identification of the appellant was positive and without possibility of error. Counsel submitted that, though the offence was committed at night, there was light and the complainant PW1 knew the appellant previously for four years, as they lived at the same plot. Counsel submitted that the appellant had passed the complainant, who was collecting clothes from a line, before committing the offence. They even exchanged greetings. Then the appellant came from behind and pushed her to the ground and raped her. Counsel also submitted that after the appellant raped the complainant he dragged her to his house and put his hand into her anus and pulled her rectum. The complainant faintly walked out of that house and sought for assistance from neighbours including PW2, and was later taken to hospital.

Counsel submitted that PW2 testified that PW1 told him that it was the appellant who had injured her. At that time, the complainant (PW1) was bleeding. PW1 also gave the same story to the police. There was no evidence of a grudge between the complainant (PW1) and the appellant therefore there was no reason for fabricated evidence.

Counsel further contended that the doctor PW3 confirmed injuries on the complainant which was pareatal tear from the exterior vaginal opening to the anal opening. This doctor (PW3) relied on treatment notes from Kenyatta National Hospital.

On alleged failure to call vital witnesses, that is the people who initially treated the complainant at Kenyatta National Hospital, and the doctor from Nairobi Women's hospital, counsel contended that the failure to call those witnesses was not fatal to the conviction, as there was sufficient evidence to prove the charges.

On sentence counsel supported the life imprisonment sentence for the offence of rape, though the appellant was a first offender, as the offence was committed in a brutal manner. On the discharge of the appellant under Section 35(1) of the Penal Code with regard to the charge of grievous harm, counsel argued that the offence called for a custodial sentence as the appellant had caused the respondent life threatening injuries. Counsel asked the court to use Section 354(3)(ii) of the Criminal Procedure Code to impose an appropriate sentence on the charge.

In response to the learned State Counsel's submissions, the appellant submitted that no witness testified to having actually witnessed the incident. He contended that the appellant was drunk and that he had two wives who had taken the opportunity to take his property away. He also contended that the appellant had a husband with whom they stayed together in his house for free.

The brief facts are as follows. On 13.12.2004 at about 10.00 p.m., the complainant (PW1) A. W .M, came back home to Ngong from a funeral and collected clothes from the hanging line. As she was collecting the clothes the appellant, who was a neighbour, was present. She knew the appellant for four years and saw him in the security lights from neighbours, which were on. They even greeted each other and exchanged pleasantness. The appellant passed by as if he was going to the toilet. However, shortly thereafter the appellant held her from behind, pushed her to the ground, raised her dress, tore up her pant with a knife, threatened to kill her and bury her alive, and held her throat so that she could not shout and went on to rape her. Then he dragged her to his house, put his hand into her anus and pulled her rectum. It was at that point that she managed to scream, but went out of breath. After the appellant went out of the house, she managed to walk out of the house to the fence and saw a watchman called Gideon (PW2)

and told him that the appellant had injured and raped her. She was later taken to hospital, initially Zamzam hospital, then Nairobi Women's hospital, where she was referred to Kenyatta National Hospital where she was hospitalized for 10 days. Thereafter she reported to Ngong police station and was issued with a P3 form. It was her evidence that she left her pant in appellant's house.

PW2 GIDEON MUSYOKI testified that on 13.12.2004 at 11.00 p.m. he was on duty as a watchman when a woman, who according to him was drunk, came and asked him for help. Though initially he told her to go away she insisted. When he took her to the security light he saw that she was bleeding from the anus. She said it was the appellant who had done that to her. Then he called the KAMAU, the son of the landlord, but the complainant collapsed. They called the police. They took the complainant to hospital. When he later took the police to the appellant's house and knocked, he refused to open. The door was therefore forced open and appellant was taken by the police.

The complainant was, after discharge from hospital, examined by DR. Z. KAMAU (PW3) on 30.12.2004. The doctor found that the complainant had suffered a perennial tear extending from posterior virginal wall to the anal opening – fourth degree perennial fear (worst degree). The appellant was arrested and charged with the offences.

In his defence, the appellant gave unsworn testimony. It was his defence that he was arrested on 13.12.2004 by 2 police officers and a watchman who broke his door and told him that a woman had been hurt and she was involved. That woman later, on 26.12.2004, took a police officer to the plot and showed him his house. He stated that he was injured in custody in 2005 and had been treated. He urged the court to acquit him.

The case was tried by one magistrate and taken over another magistrate. Faced with the above evidence the magistrate who delivered judgment stated thus at page J2 of the judgment –

"The accused and complainant were neighbours. On the aspect of identification therefore, the evidence adduced was that of recognition. These people knew each other and they exchanged pleasantness on that day.

Was the accused mistakenly identified? The complainant did not do any guess work. They had spoken at one moment with the accused. The (*sic*) exchanged pleasantness. This gave the complainant time to see and recognize the accused. He did not just pounce on her, he held a conversation with her. The idea of the accused person being mistakenly identified, therefore does not arise.

The accused was not framed. There was no evidence or prior grudges between him and the complainant for the court to draw an inference that he may have been framed'.

The court therefore convicted the appellant and sentenced him.

This being a first appeal, I am duty bound to re-evaluate the evidence on record a fresh and come to my own inferences and conclusion. See **OKENO – vs – REPUBLIC [1972] EA 32**.

The appellant's first ground of appeal is that the learned trial magistrate erred in convicting him while the doctors evidence did not support the charge. The evidence of the doctor (PW3) clearly showed that the complainant had suffered a tear in her delicate parts the vagina and anus of the worst type. It is to be noted that, according to the evidence of the complainant the appellant was armed with a knife. There is nothing to show that the doctor evidence does not support the charge.

As for the rape, medical evidence may support the allegation of rape. But the absence of medical evidence does not mean that an offence of rape cannot be established, provided there is credible evidence of sexual penetration without the consent of a complainant. As to the type of injury suffered, the complainant stated that the appellant pulled and tore her rectum. Considering that the rectum and the vagina are quite close organs, the tear found by the doctor, in my view, cannot be said to be inconsistent with the complainant's allegations.

The second and fourth ground of appeal is that the evidence of the complainant is not corroborated, that is that the clothes of the appellant were not found to have blood stains and the pant of complainant was not found in the appellant's house and produced in court. Again his ground of appeal cannot succeed. I my view, the fact that there was no blood stained clothes found, or the absence of pants of the complainant who claimed to have left her pants in the house of the appellant, per se, could not vitiate the conviction. That could be additional evidence, but its absence is not fatal to the case of the persecution herein. The conviction of the appellant was predicated on identification or recognition. In **PAUL ETOL E & ANOTHER – vs – REPUBLIC CA No. 24 of 2000** (unreported) the Court of Appeal held –

"**the appeal of second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. ……………….. it is true that recognition may be more reliable than identification of a stranger; but even when a witness is purporting to recognize someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.**

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It is essential that there should have been an inquiry as to the nature of the light available which assisted the witness in making the recognition. What sort of light, its size, and its position vis – a – vis the accused would be relevant".

In our present case the light at the scene of rape was described by the complainant as neighbours security light. That was electricity light. The size, intensity, and distance and position vis-à-vis the accused was not described. However, the complainant knew the appellant previously. Also the appellant talked to the complainant before attacking her. Even during the attack, he threatened her with death. That was also verbal. In my view the evidence on record is that the appellant was recognized by the complainant by both appearance and voice. Even, in the house in which the appellant later pulled the complainant to, there was light from an oil lamp.

In my view, even though this case was based on evidence of a single identifying witness, it was sufficient to establish that it was the appellant who assaulted the complainant. In addition, the complainant, when she met the watchman (PW2) immediately informed him that she was assaulted by the appellant. I am of the view that the identification or recognition of the appellant was without possibility of error. I therefore dismiss ground 2 and 4 of appeal.

The third ground of appeal is that the appellant did not seek assistance from neighbours who were closer, but went and sought assistance from distant neighbours. Firstly, there is no law that requires a person to seek for assistance from close neighbours before seeking help from others. Secondly, there is no evidence that there were neighbours who were closer than where the complainant went to seek for help from. Thirdly, the complainant sought for assistance from a watchman who was outside, which, in my view, was a more natural thing to do. I find no basis for this ground of appeal and dismiss the same.

The fifth ground is that the learned trial magistrate rejected the defence by shifting the burden of proof. In considering the defence the learned trial magistrate stated at page J2 of the judgment –

"**His defence spoke of his arrest and though in law he was under no obligation to prove anything, the same did not cast any doubt on the prosecution evidence".**

Though the learned trial magistrate did not specifically state that she dismissed the defence, she went on to convict the appellant. In my view, the learned trial magistrate complied with the provisions of section 196(1) of the Criminal Procedure Code. She disbelieved the appellant's defence because it did not shake the prosecution evidence. There is nothing in the judgment to indicate that the learned trial magistrate shifted the burden of proof to the appellant. That ground of appeal is also dismissed.

I appreciate that some witnesses from Nairobi Women's hospital and Kenyatta National Hospital were not called to testify. The absence of their evidence would create an adverse inference if the prosecution case was barely proved – see **BUKENYA – vs – UGANDA [1972].**

In our present case the evidence against the appellant on the offence of grievous harm is overwhelming. However the evidence of the offence of rape is doubtful. The complainant was taken to hospital the same night. She said that the appellant ejaculated in her twice. There is no evidence that the complainant was examined and found with any spermatozoa or semen. Therefore, in my view, the offence for rape was not proved beyond reasonable doubt. I give the benefit of the doubt to the appellant. I will quash the conviction and set aside the sentence of the offence of rape.

On the offence of grievous harm I find that the evidence is overwhelming. I find that the conviction is safe and I will uphold it. Learned State Counsel has urged me to vary the sentence. The learned trial magistrate applied section 35(1) Penal Code to discharge the appellant. The maximum sentence for the offence is life imprisonment. The appellant was treated as a first offender. Sentencing is the discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion, unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error in principle must be inferred – see **SHADRACK KIPROTIC KOGO – vs – REPUBLIC Criminal Appeal No. 253 of 2003 Eldoret (CA**) **–** (unreported).

In view of the maximum sentence of life imprisonment for the offence and the nature of injury inflicted on the complainant, which is of the worst degree, I find that the learned trial magistrate applied a wrong principle in discharging the appellant. That would not be by the interest of justice. It was not commensurate with the nature of the offence. I will set aside the sentence of the learned trial magistrate and substitute therefor a sentence of ten (10) years imprisonment for the offence of grievous harm.

Consequently, I quash the conviction for the offence of rape and set aside the sentence of life imprisonment imposed. I uphold the conviction for the offence of grievous harm. I substitute the discharge granted to the appellant under Section 35(1) of the Penal Code, and substitute thereto a sentence of imprisonment for a term of ten (10) years for the offence of grievous harm. The sentence will commence from the date of the appellant's conviction by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 9th day of July 2007.

George Dulu

Judge

In the presence of-

Appellant

Mrs. Gakobo for state

Eric **–** Court Clerk