REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 171 OF 2006

BETWEEN

JOHN MWENDA MWANGI..... APPELLANT

-AND-

REPUBLIC….....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate L. Mutai dated 30th March, 2006 in Criminal Case No. 610 of 2005 at the Githunguri Law Courts)

JUDGEMENT

The main charge brought against the appellant herein was rape, contrary to s.140 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on 23rd March, 2005 at [Particulars withheld] Village in [Particulars withheld] Location, Kiambu District in Central Province, unlawfully had carnal knowledge of ***M W K***, without her consent.

The appellant faced an alternative charge, of indecent assault on a female contrary to s.144(1) of the Penal Code. The particulars were that he, the appellant, on 23rd March, 2005 at [Particulars withheld] Village in [Particulars withheld] Location in Kiambu District, Central Province, unlawfully and indecently assaulted ***M W K*** by uncovering her nakedness and touching her private parts.

There was a second count to the main charge; that the appellant, committed an assault causing actual bodily harm, contrary to s.251 of the Penal Code (Cap.63); and the particulars were that he, the appellant, on 23rd March, 2005 at [Particulars withheld] Village, [Particulars withheld] Location, Kiambu District in Central Province, unlawfully assaulted ***M W K***, occasioning her actual bodily harm.

M W K, an elderly lady, said she did not know her age, but remembered having witnessed the First World War (1914 – 1918). She lives alone, and has the help of her immediate neighbour who fetches water for her.

On 23rd March, 2005 at about 9.00 p.m., the complainant was lying in bed, in her house, and a lantern lit the room. She then heard the voice of a person calling from the outside: grandma, grandma. She sought to know who it was; and the man calling said he was ***Kagwima,*** and that he had been sent by "the father" who wanted to see the complainant. The man asked for the door to be opened, which the complainant did,

but then found herself facing a stranger, and not ***Kagwima.*** This stranger asked to be allowed to sleep in the complainant's house, a request which she declined. The stranger then issued threats, forcing the complainant to scream; but things got worse, when he carried the complainant out of the house, and took her into her farm. As the complainant had gone to bed without inner clothing, the stranger conveniently laid her down, lifted her dress, removed his own trousers, and inserted his penis insider her vagina. When she screamed, the stranger threatened to kill her. He went further: he inserted his fingers inside the complainant's vagina, drew out bodily matter which he then forced into the complainant's mouth. The complainant was injured by sharp plant stems, at the *locus in quo*.

A lady, by the name ***Wanjiru,*** came towards the *locus in quo*, and the stranger, who was not known to the complainant, save that he was wearing *khaki* clothing, took off; and at that moment members of the public came to the complainant's rescue.

The complainant was taken to Kigumo Healthy Centre, and later on, to Kiambu District Hospital, where tests were done on her. She was later issued with a P3 Form for medical records.

On cross-examination by defence counsel, the complainant testified that she had gone to bed, on the material night, at 9.00 p.m., but her lantern was on. She said she could tell that the man who entered her house on the material night was not ***Kagwima***. She testified that she had screamed three times, when she felt threatened, in the presence of the stranger who intruded upon her. Neighbours had heard the complainant's screams, and this is how ***Wanjiru*** and others had come to her rescue. ***Wanjiru*** came to the *locus in quo* screaming, and this forced the attacker to decamp.

PW2, ***David Mukaro Kamocha***, a farmer at [Particulars withheld] village, was at his home at 9.30 p.m. on 23rd March, 2005 when he heard screams in the neighbourhood. When he went outside his house, he heard neighbours say that there was a suspect, who had escaped towards the ridges. He saw a person walking fast, towards his compound, from the direction where the screams were emanating. This person remained silent when PW2 asked him, three times, to identify himself. He started running, with PW2 in pursuit. PW2 kept asking him to identify himself; but he would not do so. As more people came out on to the road, and the person in question kept running away, PW2 was able to see that this person was ***Mwenda,*** the appellant herein. PW2 who was following ***Mwenda,*** asked him why he was running away, and whether he had anything to do with the screams at the place he was running from, that evening; and ***Mwenda*** denied any connection with the cause of the screams.

When PW2 thus confronted ***Mwenda, Mwenda*** was wearing a white shirt which looked soiled; it had blood stains. This is PW2's testimony on the state of ***Mwenda's*** clothing:

> "I asked him about the blood when he said he had been fighting somebody."

It was PW2's testimony that he was able to see the state of ***Mwenda's*** clothing because "there was clear moonlight." Many people came out, and ***Mwenda*** was arrested that night.

On the following day, PW2 who had returned to his house after ***Mwenda's*** arrest, learned that ***Mwenda*** had been escorted to the Police Station; PW2 also learned that the screams of the night had been emanating from the complainant's compound; and he learned that the complainant had been raped.

Responding to cross-examination by counsel, PW2 said he had heard the screams from the complainant's compound at about 9.30 p.m. It was after he heard the screams, that PW2 had seen ***Mwenda*** walking away through his (PW2's) compound. PW2 said that the clothes worn by ***Mwenda*** on the material night were soiled with mud, and he had been able to see ***Mwenda*** well, because he had a torch, and there was a bright moonlight.

PW3, ***John Gathumbi Ndura***, a farmer from [Particulars withheld] Village, was in his kitchen, with his wife, on 23rd March, 2005 at 9.30 p.m, when he heard screams. He came outside, and asked aloud, just what was happening. The noise was coming from the direction of the complainant's house. PW3 armed himself with a club, and saw somebody coming along the road towards his (PW3's) house with

neighbours following; somebody shouted to PW3 to grab the person who was being chased by the villagers. PW3 arrested ***Mwenda,*** the appellant herein. The appellant's white shirt was soiled with blood; and his trousers were soiled with mud. PW3 left the appellant herein under the control of young men from the village, as he went to the complainant's house, where he learned that she had been raped. The complainant was bleeding on her left leg.

The appellant temporarily made an escape from the young men guarding him, and PW3 returned there and witnessed it; but he was sought and re-arrested. PW3 witnessed the re-arrest; and the appellant was taken to Kagwe Police Post. PW3 later saw the appellant at the Police Post; he had at this time changed his soiled pair of trousers. The appellant was PW3's neighbour, and he had known the appellant for long, before the material night.

On cross-examination by counsel, PW3 said relations between him and the appellant's family were good. He had apprehended the appellant along the road close to his house; and he believed that the appellant, if he had not committed an offence, would have stopped when challenged by PW2, in connection with the screams which were emanating from the complainant's plot. The appellant did not tell PW3 why he was running away; he refused to go with PW3 to the complainant's home, on the material occasion; and the accused's shirt was bloody.

PW4, a member of a vigilante group at [Particulars withheld] village, said he was at home on 23rd March, 2005 at 9.30 pm, when he heard screams from one homestead. PW4 called other vigilante group members, and they proceeded to the complainant's home. The vigilante group members, after learning of the evening incident, went to ***Mwenda's*** home; they learned that the appellant had just been there, and had changed clothes and departed. PW4 demanded the trousers which the appellant had removed and left behind; these were given to PW4, together with one black shoe for a right leg, which belonged to the appellant. The shoe was muddy; the trousers were also muddy. As PW4 and his fellow-vigilantes made a search in the neighbourhood, they learned that the appellant had just sneaked back into his home, and they returned there, arrested the appellant herein, and escorted him to Kagwe Police Post. PW4 handed over to the Police officers the trousers and the shoe which he had recovered from the appellant's home.

PW4 testified that the appellant had been made to undress at the Police post, and his shorts were found to have blood stains on one side. The trousers which PW4 had recovered, were also found to be stained with blood. On the following day, PW4 visited the *locus in quo*, and recovered another shoe, bearing the likeness of the one which he had recovered at the appellant's home ? except that it was for the left leg. PW4 took this shoe to Kagwe Police Post, after which he recorded a statement with the Police officers. He later visited the scene again with a Police officer; and the Police officer took soil samples from the *locus in quo.*

PW5, ***Akech Omondi***, an analyst at the Government Chemist, received samples on 4th April, 2005 from ***P.C. Wanyonyi*** acting under the instructions of the OCS, Githunguri Police Station. The witness had received one black, muddy shoe, a light-green, muddy pair of trousers, and soil samples. He was required to ascertain if the soil sample from the shoe and the trousers were similar to the soil collected from the *locus in quo*. PW5 conducted the analysis and found that the soil from the shoe and the trousers was similar to the soil collected from the scene.

PW6, ***John Kimani Mungai***, holder of a Master's degree in forensic science, is a Government Analyst working at the Government Chemist in Nairobi. He was requested by ***PC Wanyonyi*** of Githunguri Police Station to examine certain samples and to generate a DNA profile, as a basis for establishing source. He found that the DNA profile from the blood on the pair of trousers for the suspect, and that on the pair of shorts for the suspect, matched the DNA profile for the complainant's blood. On cross-examination PW6 confirmed that:

> "The blood stains on the dirty white shorts matched the blood sample extracted from the complainant."

PW7, Police Force No. 4248 ***PC Walika Mwinzi*** of Kagwe Patrol Base testified that he was on duty at

about 11.30 p.m., on 23rd March, 2005 when the complainant was escorted in by members of the public. The complainant reported that she had been raped by the appellant herein. PW7 arrested the accused, and obtained certain items connected to the scene of crime. The appellant was wearing a pair of trousers, pants, and whitish dirty shorts which were stained with blood; and PW7 kept these items as exhibits. PW7 escorted the appellant to Githunguri Police Station, where he was charged with the commission of an offence on the material date.

PW8, Police Force No. 31665 ***Snr. Sgt. Bernard Murundaji*** of Githunguri Police Station testified that he was at work on 24th March, 2005 at about 7.00 a.m. when he saw an Occurrence Book entry which recorded that an incident of rape had been forwarded from Kagwe Police Post; and the suspect had been arrested and was in the Police cells. PW8 was required to investigate the matter. At 11.00 a.m. on 24th March, 2005 the complainant was brought to Githunguri Police Station, after being treated at Kiambu District Hospital. She was an old lady, too frail to walk on her own, and she had an injury on the knee. PW8 recorded the complainant's testimony on 30th March, 2005 and issued her with a P3 Form which was completed at Githunguri Health Centre. The complainant's blood was extracted for investigations. PW8 later visited the *locus in quo*, and found signs of struggle. He collected soil sample from the scene, as well as a dry maize stem which she suspected would have inflicted injury on the complainant's leg, during the incident which was the basis of the criminal case. PW8 also collected a black shoe for the left leg, which had been found at the *locus in quo*; this shoe was found to match the right-foot one which was already held at Kagwe Police Post. PW8 took all the exhibits to the Government Chemist, for analysis; and the analysis report was subsequently brought back to him. PW8 charged the appellant with the offence of rape.

PW9, ***Dr. Samson Gitonga*** of Kiambu District Hospital testified that the P3 Form in respect of the complainant had been prepared by ***Dr. Njuguna***, who works with PW9 and whose signature is well known to him. He testified that the complainant, an old lady of 90 years of age, had presented with a history of rape which took place on 23rd March, 2005, at 9.30 pm within the [Particulars withheld] area. The complainant was found to have skin laceration on the right leg - an injury which was two weeks old at the time of examination. The degree of injury was assessed as harm. The complainant's genitalia was examined, and the vagina walls found to be reddish, with no obvious injuries. No spermatozoa were found. Blood was extracted and tested; and the complainant was treated for S.T.D. and possible H.I.V.

After being put to his defence, the appellant made an unsworn statement in which he gave a time-scenario in relation to the incident covered by the charge, which was totally at variance with the prosecution evidence. The appellant said he had gone to Kagwe shopping centre, where he remained until 7.00 p.m., on the material date. After he left for his home, he heard screams, and so he began running towards the place where the noises were emanating. He heard the voices of people around the *locus in quo*, and he decided to catch up with those people; but, as he went, he was challenged to stop. The appellant said he had declined to stop, and walked on as he was being followed. The man who was giving chase asked that the appellant be apprehended; he was apprehended, and suffered a beating at the hands of the crowd; and his shoe fell off during this commotion. The appellant said he was then released by the crowd; he went to his home and cleaned himself. Neighbours came into his home and took him away, first to the complainant's home, then to Kagwe Police Post, and lastly to Githunguri Police Station.

The learned Senior Resident Magistrate carefully reviewed the evidence and, of the testimony of PW5, ***Akech Omondi***, she remarked:

> ***"[The] Government Chemist told the Court how, on 4th April, 2005 he received a muddy black shoe, a light green, muddy pair of trousers, and soil sample collected from the scene of crime. He was requested by OCS, Githunguri Police Station to ascertain if the soils on the shoes [and] trousers, and that from the [locus in quo], were the same. This he did, and his findings were that the soils from the three samples were similar…***
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> ***"[I find PW5's evidence] very clear and unshaken, and I have no reason to doubt the same. Although I considered the fact that soils from [one continuous stretch of land may not be the***

same], [in] the circumstances of this case I was …convinced that the soil on the aforesaid shoe, on the pair of trousers, and the soil sample itself, extracted from the scene of crime, all came from the said scene of crime."

The learned Magistrate remarked that there was further corroborative evidence, in the shape of PW4 recovering one shoe from the appellant's home, while its counterpart was found at the *locus in quo*. The appellant had at no time denied being the owner of the two black shoes. The trial Court drew the entirely logical conclusion, in my view, that:

"For one shoe of the accused to have been traced to the scene of crime meant…that, indeed, the accused person was present at the scene of crime at the material time."

The learned Magistrate found still more implicating circumstance in the testimony of PW6, the Government Analyst, who found that the blood stains on the accused's dirty pair of shorts and trousers matched the DNA profile generated from the complainant's blood sample. From this evidence, the learned Magistrate found that the appellant herein had been in contact with the complainant, on the material date.

While acquitting the appellant on the 2nd count, for lack of sufficient evidence, the learned Magistrate found him guilty on the charge of rape, convicted him, and sentenced him to a term of 40 years in jail.

In his appeal, the appellant contended that the evidence upon which the Magistrate had relied, in reaching her decision to convict, was "flimsy if not sketchy"; that the trial Court failed to attach due weight to the defence statement; that the learned Magistrate erred in law, in imposing a harsh and excessive sentence.

Learned counsel ***Ms. Gakobo*** submitted that the trial Court's decision to convict the appellant had been based on sound circumstantial evidence, which pointed to the appellant as the culprit, to the exclusion of any other person.

Ms. Gakobo submitted that, since the Penal Code (Cap.63) provided for a punishment of up to life imprisonment for the offence of rape, the sentence imposed by the trial Court, of 40 years' imprisonment, was in every respect lawful. The circumstances in which the offence had been committed, in particular the fact that the appellant had taken advantage of the frailty of the 90-year-old complainant, and the manner in which the act of rape had been committed, made a good case, counsel submitted, for the severe sentence which the learned trial Magistrate had imposed. In counsel's words: "The sentence was commensurate with the trauma visited upon the complainant." Counsel urged that the conviction be upheld, and the sentence affirmed.

There would, in the opinion of this Court, be absolutely no basis for doubting that the appellant had been accurately identified as the culprit, and duly fixed with responsibility. Of circumstantial evidence, as often the perfect mode of proof in a criminal case, it was held in the English case ***R v. Taylor, Weaver and Donovan*** [1928] 21 Cr. App. R. 20:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics."

The movements of the appellant about the time of the material incident, clearly placed him within the range of persons who would legitimately be suspected of having committed the offence. Beyond that threshold, the appellant was moving from the *locus in quo* itself; he refused to identify himself, when challenged; he took to his heels, when confronted; he was reluctant to be escorted back to the *locus in quo*; he had blood on his clothes; he was anxious to change his dirty and gory apparel; one of his shoes was found at the *locus in quo*, whereas the other had been taken by him to his home, just about the material time; the soil on his shoes and clothes was found to be chemically alike to the soil at the *locus in quo;* the blood on the appellant was found to match the DNA profile of the complainant's blood; so the appellant must have physically engaged the complainant during the material night, an engagement which

generated blood from the complainant's body; the complainant's only engagement of a violent kind, on the material night, was during a rape ordeal. There was direct evidence, that a man raped the complainant on the material night, and it is during that rape ordeal, that the complainant was hurt, and had an experience of bleeding.

The comprehensive circumstantial evidence dovetailed into the direct evidence of rape, to make a water-tight case against the appellant herein. The learned Magistrate, I believe, reached the only right conclusion. The appellant had raped the complainant. He was, thus rightly convicted.

The complainant appeals also against sentence, which he describes as harsh and excessive. As learned counsel ***Ms. Gakobo*** urges, the term of imprisonment awarded, of 40 years, was only a fraction of life-sentence, which was allowed by law; and so, the sentence imposed by the trial Court should not be disturbed.

While being mindful of the first mandate of the High Court, to do justice, I have anxiously considered learned counsel's submissions on sentence, in this matter.

The offence was committed before the Sexual Offences Act, 2006 (Act No. 3 of 2006) was enacted, and the applicable law was the Penal Code (Cap.63), s.140, which thus stipulates:

> ***"Any person who commits the offence of rape is liable to be punished with imprisonment with hard labour for life."***

So, in a literal sense, learned counsel is right, that the sentence imposed by the trial Magistrate was by no means illegal. The manner in which the High Court must perceive a sentence of such a kind, is regulated by legal principles well embedded in case law. In the Court of Appeal for Eastern Africa decision in ***Ogalo s/o Owoura v. Reg*** (1954) 21 EACA 270 it had been stated:

> ***"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R (1950) 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor'. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case…."***

On that basis, this Court would not ordinarily interfere with a sentence such as that which was imposed by the trial Court, in the instant case. There would have to be special cause justifying a variation of the sentence so imposed; and one of such causes would be, if the sentence imposed is clearly, manifestly excessive.

My perception on this matter remains the same as it was in ***Yussuf Dahar Arog v. Republic***, H.Ct.Cr.App.No. 110 of 2006 (Nairobi), a cognate case (and in which the trial Court had imposed a 40-year term of imprisonment). I had in that case reduced the term of imprisonment, after considering relevant matters (as follows):

> ***"[The statutory term] is, of course, maximum sentence, and within that constraint, the Court has a wide discretion which it exercises on judicial principles. Such principles would, I believe, take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform, and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury.***
>
> ***"Such principles would not, in my opinion, and taking into account the circumstances of this case, accord with an extremely harsh sentence such as the one in question herein. I would***

consider a 40-year term of imprisonment, in the circumstances of this case, to be manifestly harsh and excessive…."

I think it is right that this Court should intervene, and reduce the sentence imposed by the learned Magistrate in the instant case.

Accordingly I hereby dismiss the appeal as regards conviction, but allow the appeal on sentence. I substitute the sentence imposed by the trial Court with a fifteen-year term of imprisonment, as from the date of the judgement of the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 31st day of October, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Ndung'u

For the Respondent: Ms Gakobo

Appellant in person