REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 190 OF 2004

GEORGE MWANGI KARIUKI …………....…………….. APPELLANT

VERSUS

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

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's court at Nanyuki in Criminal Case No. 1896 of 2003 dated 8th June 2004 by Mr. E. G. Mbaya – R.M.)

J U D G M E N T

George Mwangi Kariuki, whom I will hereafter refer to as the appellant was charged with the offence of defilement of a girl contrary to section 145(1) of the Penal Code and in the alternative indecent assault on female contrary to section 144 (1) of the Penal Code. The appellant pleaded not guilty to both counts. His trial then commenced before **Mr. E. G. Mbaya, RM** on 19th February 2004 and was concluded with the judgment of the court on 8th June 2004. The appellant was found guilty of the main count and accordingly was sentenced to 7 years imprisonment. In imposing the sentence, the learned magistrate seems to have forgotten that the said sentence ought to have been served with hard labour as required.

Be that as it may, the appellant was aggrieved by the conviction and sentence. He therefore preferred this appeal on the grounds that he was not properly identified, there were no independent witnesses and finally that the complainant's evidence was contradictory.

Now the brief facts of the case. On 13th July 2003 at about 8 p.m., the complainant was on her way home from her aunt's place near Sportsman arm hotel Nanyuki in the company of her cousins R and K. On reaching Nanyuki River bridge a person whom P.W.1 later identified as the appellant approached them from behind and held P.W.1. Despite her protest that person dragged her towards the river. When Robert and Ken asked the person to leave P.W.1 alone, the person called in aid other people who chased R and K away. The person then dragged P.W.1 all the way into the river and threw her into it. He then held her neck and choked her. He removed her from the river and led her into the bush, tore her pant and raped her several times. When done he again threw her in the river and left. P.W.1 pulled herself together and ran to the police station and reported the incident. She was immediately taken to hospital for treatment. P.W.1 stated that the person who raped her was the appellant as he was a person well known to her previously. He gave the information to the police. The appellant was eventually arrested and charged.

Put on his defence, the appellant elected to give an unsworn statement of defence. He stated that he was arrested over another offence on 10th October 2003 from Riverside hotel and taken to the police station. It was alleged that he had stolen Kshs.5000/= from some bar patrons. He was charged with the offence. Shortly thereafter he was again charged with the instant offence. He denied that he committed the offence and advanced the defence of Alibi. That he was in Nyeri when this offence is alleged to have

been committed.

In support of his appeal, the appellant who appeared in person submitted that no identification parade was conducted, that the complainant came with the exhibit, that the medical officer who testified as PW3 conceded that he never examined the appellant an finally that the investigating officer and other crucial witnesses never testified.

Mr. Orinda, Principal State Counsel opposed the appeal on the grounds that identification parade was not necessary as the complainant knew the appellant. That failure to call crucial witnesses did not prejudice the appellant's case as they never witnessed the defilement. That the doctor who gave evidence was not the one who examined the complainant. He only produced the P3 form on behalf of the doctor who examined the complainant as the said doctor was said to have proceeded overseas for further studies. Further the appellant never requested that the doctor who examined the complainant be availed. Concluding his submissions, the learned principal state counsel stated that the conviction was safe and sentence imposed lenient.

This court being the first appellate court has a duty to revisit the entire proceedings in the trial court afresh, analyse it, evaluate it and come to its own conclusions, of course always bearing in mind that it did not have the advantage of hearing the witnesses or seeing their demeanor and therefore giving allowance for the same. See **Okeno v/s Republic (1972) E.A. 32**.

I must say from the onset that the evidence tendered and which led to the conviction of the appellant left a lot to be desired. Crucial witnesses such as the two cousins who were with the complainant and allegedly saw the appellant drag the complainant into the bush and towards the river were never called to testify. These witnesses would have provided the necessary support to the evidence of the complainant with regard to the identification. I have deliberately avoided to use the word corroboration as in sexual offences corroboration is no longer a requirement. I am also aware that by dint of section 124 of the Evidence Act, in a Criminal case involving a sexual offence if the only evidence is that of alleged victim of the offence, the court can receive the evidence and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. I think that the circumstances under which the offence was committed required that these two witnesses be summoned to testify. It is not suggested anywhere in the proceedings that these two witnesses could not be traced without undue expense or difficulties. After all they were cousins of the complainant who were residents in Nanyuki town not far from the scene of the alleged crime. Could the failure have been a deliberate ploy on the part of prosecution to hide evidence which they deemed unfavourable to them. There can be no other explanation. In the case of **Bukenya and another Uganda (1972 E.A. 549**, the court of appeal held that the prosecution is duty bound to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent to its case. Otherwise failure to do so may in an appropriate case lead to an inference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. There is no reason advanced by the prosecution why those two crucial witnesses were never called. The irresistible inference which must be drawn is that their evidence might have been adverse to the prosecution. I do not agree with the submissions of the learned principal state counsel that the two witnesses would not have offered crucial evidence as to the question of defilement as they had already been chased away by the time the offence was committed. To my mind their evidence was crucial with the regard to the identification of the appellant.

The record shows that the offence was allegedly committed at night. At 8 p.m. to be precise and at a place isolated near a river. The assailant is alleged to have approached the victim from behind. It was dark. How then would P.W.1 have recognised the assailant. Throughout her evidence in chief, the complainant does not allude to any source of light that would have enabled her to see the assailant sufficient to be able to identify him. The issue of light only arose in re-examination by the prosecution. The court should not have entertained this line of re-examination as the issue never arose in cross-examination of the complainant by the appellant. In allowing that line of re-examination, the appellant was prejudiced as he lost the opportunity to counter that evidence by cross-examination.

Even if we were to accept that indeed there was lighting from Buccanier club and also from a hotel

opposite the club, such evidence was unreliable in the sense that the court never made inquiries in terms of **Maitanyi v/s Republic (1986) KLR 198**. In this case it was stated that:

"………**. It is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not careful test if none of these matters are unknown because they were not inquired into ………"**

This having not been done in this case, it cannot be said that the purported identification of the appellant by the complainant was not free from possibility of mistake.

The identification of the appellant, it would appear was touted as recognition. However it is not clear whether the recognition was by voice. But this seems to be the case as it was at night. If that be the case then again the learned magistrate ought to have subjected that evidence to what was stated in the case of **Choge v/s Republic (1985) KLR 1** that is:

"………**. In relation to the identification by voice care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognised it and (c) that the conditions obtaining at the time it was made, were such that there was no mistake in testifying to which was said and who said it ………."**

Once again in failing to conduct such examination, the alleged recognition of the appellant by the complainant by his voice cannot be sustained.

It does also appear that there was no proper charge laid before the trial magistrate as the particulars of the charge failed to disclose that the act complained of was unlawful. It is in my view a mandatory requirement to state in the particulars of the charge sheet in cases of defilement not only that the accused had carnal knowledge of the complainant but also the fact that such carnal knowledge was unlawful. That is to say that the prosecution should have included the word "unlawful" had carnal knowledge of he complainant in the particulars of the charge in this case. Failure to do so rendered the charge fatally defective. For proper exposition of the law on the issue. Please see **Phabious Muriithi Kariga v/s Republic Criminal Appeal No. 369 of 2006** (unreported).

In view of the foregoing, I think that the appellant's conviction on the count cannot be allowed to stand. Consequently, this appeal is allowed, the conviction of the appellant quashed and the sentence set aside. I order that the appellant be and is hereby set free forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 29th day of October 2007.

M. S. A. MAKHANDIA

JUDGE