



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

Criminal Appeal 215 of 2006

PETER NG'ANG'A NGARUIYA..... APPLICANT

-AND-

REPUBLIC.....RESPONDENT

***(An appeal from the Judgement of Senior Resident Magistrate Lucy Mutai dated 25th February, 2005
in Criminal Case No. 868 of 2004 at the Githunguri Law Courts)***

JUDGEMENT

The appellant, *Peter Ng'ang'a Ngaruiya*, was charged with the offence of rape, contrary to s.140 of the Penal Code (Cap.63, Laws of Kenya

the particulars were that, on 13th June, 2004 at [particulars withheld] in Kiambu District, within Central Province, the appellant had unlawful carnal knowledge of **M. W. K.**, without her consent.

PW1, **M. W. K.**, testified that she had been alone inside her house within [particulars withheld] Village, on 10th June, 2004 at 9.00 p.m. The appellant herein, at the said time, came along and knocked on PW1's door. When she sought to know who was knocking, the person concerned identified himself as *Ng'ang'a*. *Ng'ang'a* explained: he had come to ask PW1 to go out and escort her husband, who was very drunk, and unable to move along, back home.

PW1 responded by taking a torch, and opening the door; and at that moment she flashed her torch on the appellant herein, who was well known to her and is, somehow, related to her. PW1 and the appellant herein set out towards the place where her husband was reported to have fallen, drunk and disabled. As soon as they got to the said place, being led by the appellant, he held her by the neck and squeezed her neck. The appellant was armed with an iron bar at the time. He knocked PW1 down, and started undressing her; he removed her underwear, petticoat, and skirt. He then took out his penis, and had sex with PW1; he went on with the sex act for some time, and then got up. PW1 too, stood up, and went away, leaving the appellant at the scene.

PW1 testified that the *locus in quo* was in a lonely place, next to a river. There were no homes in the neighbourhood. She felt afraid, seeing that the appellant was armed with a metal bar. She did not scream.

Before leaving the *locus in quo*, PW1 put on her petticoat and skirt. But she could not find her underpants. She left the appellant as he was dressing up.

When she left the *locus in quo*, the complainant went up to a bar, at Kamburu Trading Centre; and there,

she found her husband. She had gone to that bar hoping she would find her husband. She asked him if he had sent the appellant herein, with a message for her; and the husband's answer was in the negative. She then told him what had just happened. The two of them reported the matter to Kamburu Administration Police Post, where PW1 stayed, while her husband and Police officers were searching for the appellant. They found the appellant, who was arrested and escorted to Githunguri Police Station. PW1 was issued with a P3 form, which she took to Kiambu District Hospital, where she was examined, and given treatment. She recorded a statement with the Police. She said she knew the appellant herein well, and had had no personal differences with him prior to the incident.

On cross-examination, PW1 testified that she had agreed to come out of her house and to walk along with the appellant in the night, because she knew him, and believed his account. She further said, directing her response to the appellant herein:

"I respected you and I never thought you would have done such a thing to me. I didn't scream because you were armed with a metal bar...You used to come home with my husband and I respected you as his friend."

It was PW1's testimony that the appellant herein had not been drunk, at the time of the incident in question.

PW2, **A. K.**, is the husband of PW1. He was at *Wazee Bar*, at Kamburu Trading Centre, when, at about midnight, PW1 came to him and reported that the appellant herein had raped her, near the river, and that she had accompanied the appellant after the appellant made false representations to her. The matter was immediately reported to Kamburu Administration Police post; and thereafter, the appellant was arrested at his home, and delivered to Githunguri Police Station. PW2 testified that he knows the appellant herein well; PW2's brother is married to the appellant's sister. The appellant was PW2's friend. On the material night, the appellant had been at the bar with PW2, but the appellant then left, without announcing his departure – and thereafter, the incident which is the subject of the criminal case, took place.

On cross-examination, PW2 testified that he was in shock, to see his wife looking for him at the bar, in the middle of the night. PW2 testified that he had had no personal differences with the appellant herein, prior to the incident of the material night.

PW3, **Evanson Kamau**, testified that on 13th June, 2004 at about mid-night, he was at *Wazee Bar* at Kamburu, with PW2, when PW1 came to complain that the appellant herein had just raped her. The matter was immediately reported to Kamburu Administration Police Post. PW3 was part of the team that arrested the appellant at his home, that night. PW3 said he knew the appellant herein well, and had had no personal differences with the appellant prior to the incident in question. PW3 said he could not remember very well the time when the report of the incident reached him and PW2 at the bar; it could have been between 9.00 p.m. and 10.00 p.m.

PW4, Force No. 66421 **P.C. David Njiraini**, attached to Githunguri Police Station, received PW1's complaint at his office at about 3.30 a.m. on the night of 13th – 14th June, 2004. The report had first been made at the Administration Police Post, before it was made at Githunguri Police Station. On 14th June, 2004, PW4 escorted the appellant herein, and PW1 to Kiambu District Hospital, where they were examined, and P3 Forms filled in, for both of them.

PW5, Dr. **Samson Gitonga**, was the medical officer at Kiambu District Hospital. He had filled in the P3 Form, in respect of PW1, on 14th June, 2004 at 4.00 p.m.

PW1 came before PW5 with a history of rape, said to have taken place in the Kamburu area. On physical examination, PW1 had no injuries; and on special examination, her genitalia was normal; she was not bleeding, and had no discharge. A high vaginal swab was taken, and spermatozoa was traced. Blood sample was taken for analysis, and the result on various diseases was negative. Traces of spermatozoa indicated recent sexual encounter with a male.

PW5 also filled in a P3 Form in respect of the appellant herein. Physically, he was alright, in the genitalia and the urinal region. His urine was taken to the laboratory for analysis, and the findings were entered on the P3 Form.

When the appellant herein was put to his defence, he made an unsworn statement. He said he was with his wife at 7.40 p.m on 13th June, 2004, and they remained at their house until 10.00 p.m. when he went to sleep. Then at 12.00 midnight, the appellant's door was knocked on, and Police came in to arrest him. He said he had not committed the offence, and only heard about the incident when he had been brought before the Court. He testified that he had previously had a commercial dispute with the family of PW1 and PW2, and he believed this was the reason he had been charged with the offence of rape.

DW2, *I W*, is the wife of the appellant herein. She testified that she had been in the company of the appellant herein at most of the material times. She said:

“On 10th June, 2004, at 9.00 p.m. the accused came home. We ate food and went to sleep. Later at night, some people came calling the accused...It was **Kahuro** and **Kamau**. They wanted the accused. They went away with the accused. I slept. On the next day I went to Police Station, where later the accused was charged with this offence.”

On the evidence, the learned Senior Resident Magistrate thus found:

“...I am convinced that the complainant was raped on the material night. The act was itself unlawful since she was squeezed [in] the neck after she was taken to some valley, and....at all material time the accused person was armed with an iron bar, which I believe did instill....fear in the....complainant....”

“...The prosecution has demonstrated that the accused person did commit the offence as charged. I proceed to declare the accused guilty as charged, and convict him accordingly...”

She sentenced the appellant to imprisonment for a term of ten years, after taking into account the plea in mitigation.

In the grounds of appeal, the appellant states that he had been convicted on the basis of unreliable evidence, and that proof-beyond-reasonable-doubt had not been achieved.

Learned counsel **Ms. Gateru**, for the respondent, opposed the appeal, and urged that the Court do uphold both conviction and sentence. She urged that the prosecution had proved the State's case to the required standard. PW1 had positively identified the appellant as the man who raped her; and this identification was based on recognition and was, therefore, most reliable. Counsel urged that the testimony of PW1 was clear and consistent, and had not been shaken by defence cross-examination. Counsel urged that the sentence imposed by the trial Court was not harsh or excessive, and had, besides, arisen after the appellant's mitigation had been taken into account.

I have noted that the learned Senior Resident Magistrate had undertaken a careful analysis of the evidence, and her conclusions could not but be true. After noting that it is true “the accused's specimen was not extracted, so as to see if it matched that found in the complainant's person”, the learned Magistrate considered certain highly material circumstances in the proof. She remarked:

“...that notwithstanding, I found that there is proof of penetration, which is ...essential. The prosecution did prove that the accused did penetrate the complainant sexually on the material night, so even without proof of ejaculation, the offence of rape is complete.”

I have reviewed all the evidence, and come to the conclusion that even though some of the witnesses were not clear on the date of the incident in question, it is for certain that this is as stated in the charge sheet: the night of 13th – 14th June, 2004. Between the testimony of the prosecution witnesses and that of DW2 (who says she was most of the time in the company of the appellant, on the material night), I would

believe the prosecution witnesses, as their evidence is highly consistent, in all respects realistic, and thus, reflective of truth. I do not believe the defence, its testimony at the trial, especially when the accused (now appellant) claims to have been *constantly* in the company of his wife (DW2), as from just after 7.00 p.m. on the material date, while DW2 says the appellant had joined her at home at 9.00 p.m. This remarkable inconsistency, on a point so material to the determination of criminal liability, shows clearly that the defence evidence is steering clear of the truth. Besides, credible evidence was adduced, that the appellant herein had been in the company of the complainant's husband (PW2), at the bar, but had left without announcement only a short while before the incident leading to the charge, took place. This is consistent with DW2's testimony, that the appellant had not been at home, in her company for some time upto about 9.00 p.m., at least, on the material night.

Like the learned Senior Resident Magistrate, I find that the appellant did, indeed, commit the offence charged. I dismiss the appeal, uphold conviction, and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 24th day of October, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms. Gateru

Appellant in person