REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeall 114 of 2005

(From original conviction and sentence in Criminal Case Number 1481 of 2003 of the Chief Magistrate's Court at Kikuyu –P. M. Murage, P.M)

PETER KHAEKA SHIKHOYI ……..…….. APPELLANT

VERSUS

REPUBLIC ……..……..……..……..……RESPONDENT

JUDGMENT

PETER KHAEKA SHIKHOYI, was found guilty and convicted of the offence of rape contrary to Section 140 of the Penal Code. He was sentenced to life imprisonment. Being aggrieved by the conviction and sentence, he lodged the instant Appeal. In his amended Memorandum of Appeal, the Appellant faults his conviction and sentence on the following grounds:-

(i). **THAT** the Learned trial Magistrate erred in both law and fact in convicting on the unsatisfactory and uncorroborated evidence of the Complainant.

(ii). **THAT** the Prosecution did not prove its case as required by law, thus the sentence imposed was harsh and excessive.

(iii). **THAT** the defence offered was not given adequate consideration yet it had dislodged the case for the Prosecution.

The brief facts of the Prosecution case were that on 20th September, 2004 at 11 a. m. the Complainant was in the house alone when the Appellant came to the house and pulled her to his. He put her on his bed, removed her pant and raped her. After the event she went and informed one R (PW5) a bible teacher who came and informed her father. Together with the father, they went to Gikuni Police Post and reported the incident. Later she was taken to hospital and was treated and she was issued with a P3 Form which was filled by Dr. Mwaura (PW6) of Kinoo Medical Clinic. He had examined her on 28th September, 2004 and had come to the conclusion that PW1 had been raped. He had observed pain and tenderness of the genitals and recent tear of the hymen. She also had vaginal discharge that showed presence of spermatozoa. The Appellant was thereafter arrested and charged.

Put on his defence, the Appellant elected to give a sworn statement denying the charge. The essence of his defence was that the charge was framed against him by the Complainant's parents who had in the past

interfered with his marriage and instigated the departure of his wife from the matrimonial home.

When the Appeal came up for hearing, the Appellant with my permission tendered written submissions in support of the Appeal. I have carefully read, considered and pondered over the same. The Appeal was opposed. Mrs. Kagiri, Learned State Counsel in opposing the Appeal submitted that the Prosecution had adduced sufficient evidence that established that the Complainant was raped on the date stated in the charge sheet. That the Complainant had testified that she had been raped by a person well known to her by the name Peter, the Appellant. That they had known each other for 5 years. The evidence of the Complainant was corroborated by the evidence of PW6 who confirmed that the Complainant had been raped. After the ordeal, the Complainant reported the incident to PW5. Regarding the defence, Counsel submitted that the issue of the Appellant being framed by the Complainant's parents was an afterthought as he had not raised it in cross-examination of the witnesses. Counsel further pointed out that the conduct of the Appellant after the incident was inconsistent with his innocence. He ran away from his house. On sentence, Counsel conceded that the same was harsh and excessive as the Appellant was a first offender. Counsel urged me to confirm the conviction but interfere with the sentence as appropriate.

I have carefully analysed and evaluated afresh the evidence before the Court by both sides bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See ***OKENO VS REPUBLIC (1972) EA 32 and NGUGI VS RPEUBLIC (1984) KLR 729.***

PW1 the Complainant alleged that at 11 a. m. the Appellant went and pulled her from her house to his house and raped her. In her own words she stated:-

"…***...On 20. 9. 2004 at 11 a. m. I was home alone. Accused came. He is called Peter. He pulled me from the house and took me to his house. He put me on his bed. He removed my pant. He raped me. He removed his short. I did not scream. I felt pain. That was first time I had sex….***"

I find it inexplicable that the Complainant could be pulled from her house to another, put on a bed, her pant removed and then raped. It would appear that the complainant offered no resistance at all. There is no evidence that the Appellant threatened her or even gagged her mouth so that she could not scream or act in such manner as to attract some help, attention and or assistance. To my mind what the evidence on record seem to suggest is that the Complainant could have been willing participant in the act if at all. One would have expected in the circumstances of the case that the Complainant would offer some form of resistance rather than act voluntarily like a lamb being led to the slaughterhouse. There is evidence that the Appellant and the Complainant together with her parents resided on the same plot. At the time of the alleged incident, i. e 11 a. m. there was one person in the plot according to PW1. How come PW1 did not seek the assistance and or intervention of this person. Even after the event and strangely enough, PW1 did not as much as inform this person of her ordeal under the hands of the Appellant.

The evidence on record also shows that sometime after the alleged rape, PW1's parents came home. The Complainant did not again tell them about her ordeal. It is only at about 6 p. m. that she volunteered the information to a bible teacher (PW5), the alleged rape having been committed at 11 a. m. One even wonders why the Complainant did not go to report to the Police nearby since 11 a. m and which from the evidence is not far from where PW1 was alleged to have been raped. Infact it is a walking distance. In my view the Complainant's evidence her conduct soon after the alleged ordeal is highly questionable and suspect.

The Appellant submitted that the evidence of the Complainant was not corroborated at all. It would appear that this submission has considerable merit although strictly speaking corroboration is no longer a legal requirement. The correct legal position is stated in the case of ***CHILA VS RPEUBLIC (1967) EA 722 AT PAGE 723 PARA V:-***

"…..***The Judge should warn ….. himself of the danger of acting on uncorroborated testimony of the Complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless Court is satisfied that there has been no failure of justice…..***"

In the circumstances of this case, the trial Magistrate never warned herself of the dangers of acting on the uncorroborated evidence of the Complainant. The evidence of both PW2, PW5 and PW6 could not pass as corroborative evidence. For PW5 she was told by PW1 of the incident eight hours later. In her testimony PW5 did not as much as refer to the physical condition of PW5 whilst making the report. The record shows that by the time PW1 made the report she had already taken a bath, washed her underpants and clothes thereby further erasing the would be corroborative evidence. She was behaving normally. As for PW6 he only examined PW1 eight hours later and it would seem that he relied on the treatment records of the Doctor who first attended to the Complainant. We are told by PW6 that:-

"……***On 28. 9. 2004 I examined Complainant who had been raped. She was 17 years female. There was pain and tenderness of genitals and recent tear of hymen. She had vaginal discharge. It showed presence of spermatozoa…..***"

The evidence of this witness does say when, and by whom she was raped and whether the spermatozoa belonged to the Appellant. It is not the kind of evidence that can pass as corroborative evidence.

Is it possible that the there could still be presence of spermatozoa eight days after the event? I have my own doubts. Even assuming that the spermatozoa were present was that evidence sufficient to connect the Appellant to the crime? Once again I entertain any own doubts. The spermatozoa could have belonged to somebody else. The Prosecution had to prove beyond reasonable doubt that the alleged spermatozoa found on the Complainant was none other than Appellant's. The Prosecution did not establish a nexus between the Appellant and the alleged spermatozoa or rape through medical evidence. The Prosecution should have led medical evidence for instance from Government analyst showing the nexus between the spermatozoa found in PW1 and the Appellant. In my view failure to connect the Appellant with the alleged sexual act by way of medical evidence seriously dented the Prosecution case.

Moreover, PW6 as not the first medical personnel to attend to the Complainant. PW6 in this regard testified thus:-

"…..***She had been treated….***" In cross-examination, he stated:- "….***She had been treated elsewhere……..***"

The evidence of the first medical personnel to attend to the Complainant was for unexplained reason left out. This was vital evidence and failure by the Prosecution to avail such evidence tainted the Prosecution. Such evidence would have provided the necessary corroboration if at all. It is also possible that perhaps this medical personnel did not see any features on the Complainant consistent with rape. I have been urged by the Appellant to draw an inference that failure by the Prosecution to lead evidence of the Doctor who first attended to the Complaint was because such evidence would have tended to be adverse to the Prosecution case. Considering defence advanced by the appellant such invitation is irresistible.

In his sworn statement of defence the Appellant basically advanced an alibi defence. The defence was not displaced or disapproved by the Prosecution. Further the Learned Magistrate made no finding on the same which was an error in my view. A person setting up an alibi defence assumes no responsibility of proving it. It is the duty of the Prosecution to disapprove it. See ***WANG'OMBE VS REPUBLIC (1980) KLR 149.*** The Prosecution did not discharge the burden. Accordingly the Alibi defence set up by the Appellant remained unchallenged. Further the Appellant alleged that there was grudge between him and the parents of the Complainant. Indeed it was the evidence of the Appellant that the parents of the Complainant had interfered with his marriage until his wife left him. The evidence was not all contraverted by the Prosecution. That a person would rape a daughter of a neighbour well known to him at 11 a. m. in the same plot and in the presence of person and continue residing in the same plot seems to me to be too incredible to be true. Contrary to the submission of the Learned State Counsel that the Appellant disappeared from the plot soon after the incident and that therefore his conduct was inconsistent with his innocence, the evidence on record does not show or suggest that the Appellant ever ran away from the plot. The evidence on record does suggest more than meets the eye in this case. I believe that had the Court considered the Appellant's defence seriously, it would have come to the

conclusion that the case for the Prosecution was far form proved and would have found in favour of the Appellant.

Accordingly, I allow the Appeal, quash the conviction and set aside the sentence imposed on the Appellant. The Appellant shall forthwith be set free unless otherwise lawfully held.

Dated at Nairobi this 24th day of January, 2006.

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Kagiri for State

Erick Court clerks

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MAKHANDIA

JUDGE