REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 297 of 2005

(From Original Conviction and Sentence in Criminal Case No. 3116 of 2004 of the

Principal Magistrate's Court at Kibera)

PETER KARERA …….. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

JUDGEMENT

PETER KARERA faced three counts of **Robbery with Violence** and one count of I**ndecent Assault contrary to Section 144(1) of the Penal Code.** After a full trial, he was found guilty and convicted only for the charge of indecent assault and sentenced to 20 years imprisonment. He now challenges both the convictions and sentence.

The facts of the case was that 10 men broke into P.W.1's room where she was sleeping with her cousin not called as a witness. P.W.1, the complainant in the indecent assault charge stated that one of the people spoke to her ordering her to open her legs. She recognized him as a garbage collector who had collected garbage at her home twice weekly for a period of 5 years. She looked at his face as he was near with a torch and knew it was the Appellant she knew well. That was the same person who inserted his fingers in her vagina and also fondled her buttocks after trying her hands and legs. The Appellant was identified later by the complainant in an identification parade conducted by P.W.3 Ag. **IP Ogwa.** The Appellant denied involvement in the offence but admitted working as a garbage collector in the complainant's home.

The Appellant raised four grounds of appeal one that identification was unsafe being that of a single witness, two complainant's cousin a vital witness was not called, three the Appellant defence was not adequately considered and fourthly sentence was harsh.

Mr. Makura represented the state and opposed the appeal against conviction but conceded to the appeal against sentence.

Mr. Makura submitted that evidence of identification was proper. Counsel submitted that complainant identified the Appellant in an identification parade. Further that the court warned itself of a danger of convicting on single evidence of identification and that therefore the conviction was safe.

I have carefully analyzed and evaluated afresh the evidence adduced before the trial court bearing in

mind that I neither saw nor heard the witnesses and giving due allowance.

The Appellants conviction was predicated by the evidence of recognition by a single identification witness. In **CHOGE –V- REPUBLIC 1985 KLR 1, HANCOX, NYARANGI JJA & PLATT** AG. JA. held:-

"***9. Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it..***"

I have considered the circumstances under which the complainant, P.W.1, heard the voice she says she recognized as that of the Appellant. The complainant said that the Appellant went to her bedside many times but that for two times that night he sat on her bed to torch her and talk to her. The first time they were three men with two strong torches which they flashed inside her room. The Appellant placed his hands on her buttocks and asked her if she wanted to die. Then the complainant said that she thought that she was dreaming. The Appellant then told her that they did not want the vagina. That was when she recognized his voice and looked at him. Appellant then started pulling down her shorts. At that point she was tied on her legs and hands. The Appellant kept telling her to open her legs so he could have sex with her. That Appellant then inserted his fingers in her private parts as he continued to talk to the complainant asking her whether she was a virgin and if she had given birth. The second time is after the group had ransacked other rooms in the house the Appellant went back to the complainant, put a lighted torch near her eyes and told her that he had intended to rape her but that their boss had refused. That the Appellant inserted the fingers first in her private part and told her that she was not a virgin and then in her anus. That was when she screamed as a result of which, one of the accomplices who was armed with a gun ordered the Appellant out of the room otherwise he could shoot him. The complainant said that during the second visit the Appellant sat on her bed talking to her with his torch on for 7 minutes.

I have considered that the complainant had opportunity to talk with the Appellants on two occasions that night. The Appellant actually held long conversations with the complainant. The complainant knew the Appellant before quite well. She said she paid him money monthly for the garbage collection. The Appellant also stated so to P.W.3 during the identification parade that the complainant knew him well. The conversations were long so that the complainant heard the Appellant speaking several words. I do find that the words spoken by the Appellant to the complainant were sufficient for the complainant to hear and recognize his voice being a person she had known for five years. I have no doubt that the learned trail magistrate came to the correct finding that the complainant had identified the Appellant through recognition of especially his voice.

As for failure to call the complainant's cousin the same was explained by the prosecution at page 18 of the proceedings. The case was started ***de novo*** before the succeeding magistrate after the one who heard the case ceased to have jurisdiction over the matter. Even though the witness was important I do find that failure to call her was not deliberate and an adverse inference cannot be made.

The Appellant claimed that his defence was not given due consideration. I do not agree with the Appellant. The defence was given due consideration by the learned trial magistrate and was analyzed together with the prosecution case. The learned trial Magistrate acted correctly when she rejected the Appellants defence after an analysis of the evidence before her. I find no merit in the appeal against conviction and I dismiss it.

On appeal against sentence, Mr. Makura submitted that since the Appellant was a first offender and offence was not aggravated that same should have been allowed.

I have considered the appeal against sentence.

The offence committed against the complainant was aggravated given the fact it was committed at her

home, with her hands and legs tied and in the cause of a robbery in the complainant's home.

There can be no other evidence of serious aggravation than the one which took place in this case. Trying of the complainant's hands and legs to disable her as hands were inserted all over her was a serious aggravation and violation of her decency. And to do it repeatedly aggravated further the offence. And to do it in the course of commission of other serious offences, while armed with a gun is even more evidence of serious aggravation. In the circumstances I do not find the sentence excessive or harsh. I decline to interfere with it.

The upshot of this appeal is that it fails in its entirety and stands dismissed.

DATED AT NAIROBI THIS 13TH DAY OF DECEMBER, 2006.

J. LESIIT

JUDGE

Read signed and delivered in the presence of:

Appellant

Mrs Gakobo for State

Ann – Court Clerk

J. LESIIT

JUDGE