REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MACHAKOS
APPELLATE SIDE

Criminal Appeal 144 of 2003
(From Original Conviction(s) and Sentence(s) in Criminal Case No 20 of 2003 of the Senior Resident Magistrate's Court at Kangundo N.N. Njagi (Esq.) on 3/4/03)

CHARLES KYALO NZUKI …… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

J U D G E M E N T

The appellant Charles Kyalo Muia Nzuki was charged with the offence of Rape Contrary to Section 140 of the Penal Code in Criminal Case 20/03 before Senior Resident Magistrate's Court Kangundo. After a full trial he was convicted of that offence and sentenced to 20 years imprisonment and 10 strokes of the cane. He is dissatisfied with the conviction and sentence.

In the lower court the prosecution called a total of 5 witnesses while the appellant gave a sworn statement in his defence. Briefly, the prosecution case was that PW 1, R.K., was going to her grandfather's home on /1/03 at about 7.00 p.m when she alighted from a matatu. She met the appellant on the way who asked about her cousin Muasya. They went together up to her grand father's home where the appellant slept on the sofa set and left the next morning. He returned to PW 1's grandfather's home on 8/1/03 at night claiming to have left his driving licence and other documents in that house. Since it was late he slept on the sofa set. PW 1 slept in a room whose door could not lock. While asleep PW 1 felt somebody strangling her, removed her pants and he started to rape her. She screamed and her grand mother and father PW 3 and 2 went to her rescue. PW 2 and 3 said that on hearing their grand daughter scream PW 2 armed himself with a panga and went to her room to find two people in bed. PW 3 lit a lamp and they found it was appellant who was naked with no inner wear and trouser and it is PW 2 who later handed over appellant's trouser to police, arrested the appellant, blew the whistle and members of public went to his aid. PW 3 corroborated PW1's account of how the appellant came to sleep in the sitting room on that night in the guise of coming came back to look for his documents which he had allegedly left behind the day before and since it was late he could not go back home. She also corroborated PW2's evidence regarding which state they found the appellant. PW 1 was examined by PW 5 who found her bleeding from her genitalia, her clothes were blood stained, a torn vagina and the labia majora was also torn. He also found some spermatozoa and pus cells and he concluded that the complainant had taken part in a sexual activity. The complainant's torn underwear and blood stained sheets were produced in evidence.

In his defence the appellant said that he went to the home of PW 2, was given a place to sleep and at 9.00 p.m PW 2 went to him with a panga alleging that he had raped the complainant.

In his Memorandum of Appeal, the appellant raised two main grounds which are that the evidence adduced by the prosecution was not sufficient to sustain a conviction and that the sentence of 20 years imprisonment and 10 strokes of the cane is harsh and excessive. In court the appellant submitted that he was never examined to confirm whether he was the rapist; that the blood found on the bed sheet was never analyzed to find out whether it was PW2's blood and that his defence which was on oath was never challenged. In his submissions Mr O'Mirera for the state contended that the evidence on record was overwhelming as against the appellant as the appellant was caught in the act by PW2 and 3 who corroborated the complainant's evidence. That there was ample medical evidence to prove that the

complainant was raped and that the defence was inconsistent and there was no reason for the prosecution to challenge it by way of cross examination. He further submitted that there having been evidence of PW1, 2 and 3 there was no need for medical evidence and there was, therefore, no error in him not being examined by a doctor.

This being an appellate court of 1st instance, I have a duty to review the evidence on record which I have done. There is ample evidence and the appellant does not deny that, he was in PW2's house on the night of 8/1/03 when the alleged incident occurred. Heslept in the sitting room. PW 1 and 3 told court when the appellant had spent the night in their house, the appellant had no explanation as to why he found himself at that home on that night.

There is also evidence from PW1 and 2 that the door to PW1's room could not lock and indeed on hearing screams by PW1, PW 2 and 3 ran there and found the appellant in the act of raping the complainant. He was still naked and PW 2 managed to subdue him. There is no evidence that anybody else came to that house that night. Besides the court believed the evidence of PW 1, 2 and 3 as to what transpired. Their evidence was corroborated by the findings of PW 5 that the complainant had been raped. She was indeed injured and bled. I am satisfied that the evidence against the appellant is overwhelming. He was caught in the act. It seems that the appellant had this intention and that is why he went back to PW 2's home on that night of 8/1/03. With the evidence on record it was not necessary to have him examined by a doctor or the blood stains on the sheet to be analysed. PW 1 was seen by the doctor on the same day of the alleged offence.

As for the appellant's defence, he related how he was arrested. He never actually denied the offence. There was nothing for the prosecution to challenge nor was there much in the form of a defence for the court to consider. I find the conviction was sound and safe. I confirm the same.

As regards the sentence of 20 years, it is true that the offence is serious. The appellant abused the hospitality of PW 2 though to my mind it seems he had planned it and that is why he was in that house that night. However, the appellant was found to be a first offender and in my view a sentence of 14 years would have been fair. I accordingly set aside the sentence of 20 years imprisonment and 10 strokes of the cane and substitute it with 14 years imprisonment. The appeal on conviction is dismissed and appeal on sentence is allowed to the extent that the appellant will now serve 14 years imprisonment.

Dated at Machakos this 26th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE