REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

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Criminal Appeal 248 of 2004
(From original conviction and sentence in Criminal Case No. 47 of 2002 of the Chief Magistrate's Court at NAKURU – S. M. MUKETI, SRM)

JOEL CHEGE MAINA……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT

The appellant was charged with rape contrary to Section 140 of the Penal Code. The particulars of the offence were that on 3rd January 2002 at Bondeni Centre, Nakuru, he had unlawful carnal knowledge of A.W.T. without her consent. He was tried, convicted and sentenced to serve 10 years imprisonment plus 4 strokes of the cane. He was aggrieved by the said conviction and sentence and he appealed against the same.

The facts of the case were that the complainant, **PW2,** was a form four leaver and was staying with her parents in an area known as Mwariki. On 3rd, January 2002 she escorted her cousin to Lake View area, Eldoret Stage where there is a kiosk and some matatu touts stay there. Her cousin boarded a vehicle and at about 5 p.m. she was caught by some people who made her to lie on a seat in a vehicle and they bound her. She said she was made to alight at some place between shops and was taken to a house and left there with the appellant. She screamed but the appellant pulled her onto a bed, removed her clothes and raped her. She said the appellant had a knife on a table and threatened to kill her if she screamed. After the rape ordeal the appellant opened the door and let her out. She boarded a vehicle and went home and found that her mother had gone to work. The mother, PW1, was a nurse and was going for night duty. The complainant did not tell anybody about the incident but she slept and went to church the following day and reported what had happened to her and was taken to a nearby clinic. A nurse examined her and her mother was called. Later she was taken to a police station and was issued with a P3 form. In the evening she took the police to the house wherein she had been raped and found two people and she identified the appellant as the rapist. She said she did not know him before the said incident.

In cross-examination, she said she could not identify the other people who had held her. She said that there were no other people outside the house where she was taken to. The complainant's mother PW1, said that on 3rd January, 2002 at about 4 p.m. she woke up and found that her daughter was not there and learnt that she had escorted her cousin. PW1 went to work and went back to her house the following day at 9.00 a.m. and did not find her daughter in the house. Later she got a call from Kings Medical Clinic and was requested to go there which she did. She found her daughter there. She did not ask her daughter what the problem was but she asked about the nurse who had called her. PW1 then learnt that her daughter had been raped. They went to Bondeni Police Station and to the Provincial General Hospital. The complainant then took them to the house where she was allegedly raped and she identified the appellant who was arrested.

PW3 was a police officer who arrested the appellant upon identification by PW2. PW4 was a medical Doctor attached to the Provincial General Hospital, Nakuru. He testified that on 4th January, 2002 the complainant went to the Hospital and alleged to have been raped by a person known to her. He testified that her innerwear was blood stained and she had bruises on the middle part of the thighs. When he examined the external genitalia he found bruises on the labia. The labia majora was inflamed and the hymen was broken and there was bleeding from the end. That was evidence that there had been penetration. He filled the P3 form which he produced in court. In cross-examination by the appellant he stated that spermatozoa would usually be there for 24 hours and if the appellant had been taken to the Doctor he would have examined him and perhaps determined whether there was any medical evidence linking him to the offence.

The appellant was placed on his defence and he stated that he was a conductor of a *Nissan matatu* and that on 4th January, 2002 after they closed their work they went to Eros and gave the owner of the matatu the day's collections. As he stood outside waiting for a vehicle to take him to Pangani he saw a woman and two police officers. He was questioned and handcuffed and taken to the police station. He said that he identified the lady as having complained to have lost her luggage (presumably in the matatu which he used to operate) and that she had threatened to teach him a lesson. He denied any knowledge of the said offence.

In the judgment, the trial magistrate stated that she was aware of the danger of convicting on the evidence of only one identifying witness but observed that in rape there was close proximity between the victim and the assailant and it was therefore easy for the victim to identify her assailant. The trial court therefore held that the appellant had been properly identified.

Mr. Kayai for the appellant chose to argue all the grounds of appeal together in a summary form. He submitted that the appellant was convicted on the evidence of only one witness, PW2 yet her evidence was shaky, confused and uncorroborated. He further submitted that if it was true the appellant was arrested in the company of his friend after having been identified by the complainant, that other person should have been called as a prosecution witness. He also pointed out that the complainant never shouted to attract peoples' attention when she was made to alight from the matatu before she was allegedly forced to enter the house where the alleged offence was committed. Even after her release, she never screamed or reported to Bondeni Police Station that was just within the vicinity.

In my view, this matter was very poorly investigated and prosecuted before the trial court. Firstly, there were several people who should have been called to testify but were never summoned. Apart from the young man who was said to have been with the appellant at the time of his arrest, the complainant's cousin who was said to have been escorted by PW2 should have been summoned and so was the secretary who spoke to the complainant when she went to the church. The nurse at King's Hospital who first attended to her and called her mother, PW1, should also have been called to testify. These were the first people to meet the complainant the day after her ordeal and their evidence would have been very valuable. No explanation was given as to why they were not summoned to testify.

It was also important to adduce evidence as to the time when the complainant left their house and when she returned. On 3rd January, 2002 when her mother PW1, was leaving home at about 6.30 p.m. the complainant had left the house and on the following day, when PW1 returned from work at 9.00 a.m., the complainant was not in the house. Surely there was somebody in that house who knew the time when PW2 left and returned to their house. The offence was alleged to have been committed between 5.00 p.m. and 6.30 p.m. on the 3rd of January, 2002 yet nothing was said as to what happened between the time the complainant returned home and the time she went to church apart from the fact that she went to bed. What time did she get back home? Whom did she find there? Did she talk to the person regarding anything? Did she change her clothes? Did she take a shower? What time did she wake up? What time did she call the church secretary? What time did she go to the church? These are some of the relevant questions which the prosecution ought to have dealt with.

The medical evidence that was tendered before the trial court was also wanting. The medical examination report commonly known as P3 indicated that the offence was alleged to have been committed on 3rd

January, 2002 at 4.00 p.m. according to the report made by the complainant to the police. However, in her testimony before the court, she stated that the offence was committed around 5.00 p.m. In the part of the P3 that is completed by the police officer requesting for the medical examination on the section for brief details of alleged offence it was stated:-

> ***"Alleges to have been raped by a person unknown to her".***

That is also the report that she gave to PW3. But when she went to see the Doctor, PW4 on the same day she stated that she had been raped by a person known to her and the Doctor recorded on the P3 as follows:-

> ***"Alleges to have been raped by one she knows".***

So, did she know her assailant or she did not? The P3 also showed that the complainant had changed clothes but the innerwear had bloodstains. It was not clear whether the complainant had changed the other clothes but still wore the under pant or whether the same was merely shown to the Doctor when it was not on her body. Neither the complainant's evidence nor the Doctor's evidence clarified that issue. The under pant was also not produced before the trial court yet it would have been an important exhibit. The P3 form also indicated that no spermatozoa was detected although in his crossexamination by the appellant he stated that usually spermatozoa remains in the woman's body for 24 hours. The appellant was not examined by any Doctor at all and there was no medical evidence to connect him to the said offence.

There are doubts as to whether the complainant knew her assailant. She told the police officer, PW3 that she did not know him and she did not also make any effort to describe the person. She said she had been held by three men and when they took her to the house where she was assaulted in, she was left with one person. She said she was not able to identify the other people or even the driver of the matatu in which she was driven. She also stated in cross examination that the house was dark. In the circumstances, a mistake of identification cannot be ruled out.

The conviction of the appellant seems to have been based on visual identification of a single witness with no other evidence to corroborate that of the complainant. It is unsafe to convict in such circumstances as was held by the Court of Appeal in ***SHADRACK MUTETI MAWEU VS REPUBLIC*** Criminal Appeal No. 67 of 2000 at Mombasa (unreported).

In ***THUO VS REPUBLIC*** [1988] K.L.R. 763, the Court of Appeal referred to the well known decision in ***CHILA VS REPUBLIC*** [1967] E.A. 722 where it was held:-

> ***"The Judge should warn the assessors (if any) and himself of the danger of acting on the 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 the appellate court is satisfied that there was no failure of justice."***

Given the nature of the case that was before the trial court and the circumstances under which the alleged offence was committed and the absence of corroborative evidence the conviction of the appellant was unsafe.

I allow the appeal, quash the conviction and set aside the sentence that had been imposed by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED & DELIVERED at Nakuru this 21st day of June, 2005

D. MUSINGA

JUDGE

21/6/2005