REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

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Criminal Appeal 255 of 2004

(From original conviction (s) and Sentence(s) in Criminal case No. 3569 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Mwai – S.R.M.)

RICHARD KARIUKI NDERITU…….……………..………..….APPELLANT

VERSUS

REPUBLIC………………..……………………………........RESPONDENT

J U D G M E N T

The Appellant was convicted for the offence of **RAPE** contrary to **Section 140** of the **Penal Code**. He was sentenced to serve five years imprisonment. Being dissatisfied with the conviction and sentence he lodged the appeal. When the appeal came up for hearing, the Respondent warned the Appellant that the State would be asking for the enhancement of the sentence if the appeal was heard. Despite the warning, the Appellant chose to proceed with the appeal.

The brief facts of the prosecution case was that on the 21st April 2003 at Kawangware Choice Bar where the Appellant had rented a room for the Complainant, the Appellant assaulted and also raped the Complainant. The Complainant started screaming. At about 6.00 a.m., the watchman of the lodging place sent PW4 to call police at the nearby Chief's Camp which PW4 did. When PW4 went to the camp, he found PW2 and PW3 members of the local vigilante group and youth wing respectively. Both went to the bar. At the lodging place, they found the Appellant and Complainant and they took both to the Chief's camp. Both PW2 and PW3 confirmed seeing the Complainant with torn trouser pants and blouse, identified as exhibit 1 and 2, forcing them to escort her to a shop where she bought clothing material to wear. Eventually the Complainant went to Kenyatta Hospital and was treated. Swabs taken from her were found to contain no spermatozoa but had pus cells which were evidence of sexually transmitted disease within the period of the alleged offence. The Appellant was then charged with the offence.

The Appellant on his defence admitted being with the Complainant on the day of his arrest. He however said that the Complainant had been his girlfriend for six months. That when a disagreement occurred, they parted and he got another girlfriend. That on the day before the incident the Complainant had asked him for money but when he said he did not have, the Complainant threatened that he would end up giving her more. That the Complainant lured him to Kawangware allegedly to help her carry her things to Githurai. That on reaching there, the Complainant led him to PW2 and PW3 who arrested him.

The Appellant has raised several issues in his petition of appeal which can be summarised into two. One that the evidence of the prosecution was insufficient to base a conviction. Two, that the sentence of five years was harsh and excessive.

In his written and oral submission the Appellant argued that since it is the Complainant's evidence

that she screamed at the time of the alleged rape, then the evidence to prove that she screamed from people in adjoining rooms ought to have been called. The Appellant also submitted that the learned trial magistrate should have made an adverse inference against the prosecution case for having failed to call witnesses such as the watch man at the lodging who is said to have heard screams and sent PW4 for the arresting members of public.

MRS. KAGIRI, learned counsel for the State opposed the appeal. The learned counsel submitted that even though the watchman was not called as a witness, the inference cannot be made. **MRS. KAGIRI** further submitted that the Complainant's evidence that she had been assaulted was corroborated in two ways. First in the evidence of PW2 and PW3 who said that on going to the lodging they found the Complainant and the Appellant. The two said that the Complainant's blouse and trouser pants were torn and that they took her to a shop to buy a cloth with which the Complainant covered herself. Secondly, PW2 and PW3 did not testify of hearing the Complainant claim any money from the Appellant contrary to what the Appellant had claimed in his defence.

The Complainant's evidence that she was raped did not receive direct corroboration. I must put the record straight that the Complainant's evidence did not need any corroboration. If the Court was satisfied that the Complainant was telling the truth, the Court could convict on her evidence alone. That not withstanding, I find that the presence of pus cells in the vaginal swab taken at the hospital and which Dr. Kamau who examined her later confirmed, all show that the Complainant had had sexual intercourse at the time she said that the Appellant raped her. That evidence of the presence of pus cells around the time of alleged offence should be taken in conjunction with three other pieces of evidence. One, that some screams were heard by an employee at the lodging the same morning and who sent the lodging supervisor, PW4, to call the authorities. Even though PW4 claims he heard nothing, he took an action by calling PW2 and PW3 to the scene. PW4 could not have called them if there was no reasonable cause to do so. Secondly, what PW2 and PW3 said they saw on going to the scene. Both said that they found the Complainant crying and having torn clothes. She alleged to have been raped. Thirdly, the fact that the torn clothes were exhibits in the case. Lastly the medical confirmation that she had sex around the time that she claimed that the offence was committed.

It is also instructive that the Complainant also reported the matter to the police the same day and on getting a P3 form, she immediately visited the hospital for treatment. All these factors go to show that the Complainant was aggrieved, that she had her privacy and body violated and therefore her prompt and decisive action to go to the authorities with her Complaint confirms that she was not a person witch-hunting for purposes of getting money from the Appellant as he claimed in this defence and petition and grounds of appeal.

The Appellant has argued further that an adverse inference should have been made on failure to call evidence. The watchman was not called. An adverse inference can only be made where the prosecution called evidence that is hardly able to prove their case. See **BUKENYA & OTHERS vs. REPUBLIC.**

In this case, the prosecution called sufficient evidence to prove their had been a commotion in the room in which the Appellant and Complainant were found. That evidence was what the watchman could have talked about had he been called. Failure to call him would not justify an adverse inference to be made in the circumstances.

The Appellant challenged the lack of evidence to show who infected the Complainant with the sexually transmitted disease. Whereas that was good if it was done, the Complainant was not in control of the police investigation. The police should also have had an examination of the Appellant to show if he had the disease or not. However, presence or absence of the disease is not material perse in determining a case of **RAPE**. Whether or not there was penetration of the Complainant was the most important factor.

The Appellant submitted that the trial court did not give him time to call the witnesses he wanted. Counsel for the State submitted that the Appellant was given a chance to call witnesses but that he brought only one who did not assist him in his defence case.

I have confirmed from the trial Court record that indeed the Appellant was on bond during the pendency of his appeal. He was given one and a half months to call his witnesses and he did call albeit only one. The Appellant's challenge that no opportunity was accorded to him to call witnesses cannot therefore be true.

On the issue of evidence, I did peruse the learned trial magistrate's record. It was very good and the Magistrate carefully and meticulously analysed the evidence adduced before the Court. At the conclusion, the learned trial magistrate found the Complainant truthful and creditworthy. I find that the learned magistrate's analysis of the evidence before her, her observation as to the demeanour of all the witnesses and her conclusion cannot be faulted. I find that the conviction was well sustainable from the evidence before the Court and that it was safe.

I find no merit on the appeal against the conviction. On the sentence the Appellant alleges it was excessive and harsh. MRS. **KAGIRI** submitted that it was too lenient and should be enhanced. I considered that the offence calls for life imprisonment. The sentence of five years in the circumstances of this case are in my view manifestly lenient and unjustifiable. Accordingly I will enhance the sentence by setting aside the sentence of five years and substituting same with a sentence of 10 years imprisonment with hard labour from the date of sentence.

This appeal is dismissed in its entirety.

Dated at Nairobi this 13th day of July 2005.

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LESIIT, J.

JUDGE