



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO.438 OF 2001

From original conviction and sentence in Criminal Case  
Number 1077 of 2001 in the District Magistrate' s Court  
at Kigumo by P. M. Mwangulu –D. M. 1)

JOSEPH MWANGI WANGARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D M E N T

Joseph Mwangi Wangari (hereinafter referred to as the Appellant) was convicted by the District Magistrate Kigumo for the offence of Rape Contrary to Section 140 of the Penal Code. He was sentenced to serve 7 years imprisonment with hard labour and to suffer three strokes of the cane.

The particulars of the offence stated that on the 21st day of September 2001 at Manunga Village in Maragua District He had unlawful carnal knowledge of Felister Wanjiku Gathuku without her consent.

The evidence adduced before the trial court was briefly as follows:-

On 21st September 2001, the Complainant Felister Wanjiru Gathuku was working as a maid at the house of Monica Kanja Gichuhi (PW 2). She was alone with the baby in the house when the Accused went to the house. He asked her for a jembe. The Complainant told him that the jembe was on the upper side of the Shamba.

The Accused did not however go away but continued following the Complainant as she went about doing her duties. It was then that the Accused locked the door from inside, held the Complainant by the neck struggled with her, overpowered her, pushed her onto the bed, unbuttoned his trousers, removed her under pants and had sexual intercourse with her after which He walked out of the house and went away.

Later in the afternoon when P. W. 3 went back home after work. The Complainant reported to her what had happened P. W. 3 in turn reported the matter to AP Constable Mackdondo Mwambo (P. W. 2) who referred the Complainant to Kigumo police station where she was issued with a P3 form and referred to Muranga District Hospital where she was examined and her P3 filled by Kaka Mohammed a Clinical Officer attached to the Hospital who found no external injuries on the genitalia or visible discharge. He concluded however that she had been raped because a high vaginal swab taken at Mununga Dispensary revealed that there was infection and Spermatozoa was noted.

The following day P. W. 2 accompanied by CPL Kiburu arrested the Accused and escorted him to Kigumo Police Station where He was handed over to P. C. Omar Babuya (P. W. 4). The accused was subsequently charged.

In his defence the Accused gave unsworn evidence stating that on the material day He was picking tea until 1.00 p.m. when He went for lunch. He came back at 2.00 p.m. and continued picking tea upto 4.00 p.m. after which He sold the tea until 6.30 p.m. The following day He again picked tea upto 12.30 p.m. When He went to deliver the tea He met two people who arrested him. He was beaten up and taken to Kigumo Police Station where He remained unconscious until the next morning. He was later brought to court and was charged with an offence which He knew nothing about.

On the above evidence, the trial Magistrate found that the prosecution had proved the offence against the appellant. He convicted him and sentenced him to seven years imprisonment and three strokes thereby setting the stage for this appeal.

In his grounds of appeal the Appellant has complained inter alia that the trial Magistrate erred by relying on insufficient and contradictory evidence, and failed to appreciate that the Complainant was examined two days after the alleged incident and the results of such examination could not be relied upon to sustain a conviction. Learned State Counsel Mr. Obuo has conceded the appeal.

I have carefully re-considered and re-evaluated the evidence. It is apparent that the offence is alleged to have taken place on 21st September 2001 at about 11.00 a.m. P. W. 5 however testified that He examined the Complainant and filled the P3 form on 25th September 2001 i.e. about four days after the commission of the alleged offence. It is not surprising that P. W. 5 did not notice any injuries or visible discharge. He basically relied on the laboratory examination alleged to have been done at Mununga Dispensary to reach his conclusion that the Complainant was raped. However no evidence was called to show when the tests were done and who took the specimen or who did the laboratory examination.

I find that this evidence was hearsay and generally not conclusive to prove that the Complainant was raped or that she was raped by the Appellant. The trial Magistrate was quite casual in his judgment and failed to analyse and critically consider the evidence. The judgment shows that He merely reached a finding that the Complainant was truthful and that there was corroboration without explaining how He arrived at this finding or identifying the corroborative evidence.

I find that the evidence adduced before the trial court was not sufficient to sustain the charge. This conviction is therefore not safe.

I do therefore allow this appeal quash the conviction and set aside the sentence of seven years and three strokes. The Appellant shall be set free unless otherwise lawfully held.

Delivered, Signed this 15 th January 2004.

H. M. OKWENGU

JUDGE