REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 811 OF 1999

GABRIEL KIMUHU KARIUKI …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGMENT

The appellant, Gabriel Kimuhu Kariuki, was charged with the offence of Rape contrary to section 140 of the Penal Code. He was convicted and sentenced to 10 years imprisonment with two strokes of a came. He appeals both against the conviction and sentence.

The brief facts of the prosecution case are as follows: - That PW1, Eunice Wambui Nganga, the complainant in this case, was at her parent's home on 8.9.1998 at 7.00 p.m. when one Wanjiku Nguro called hr to the road about 20 metres away. The complaint walked to the road as requested by Wanjiru Nguro but she was, after reaching the road, held by a group of about six young men who pulled her to a shamba where they raped her in turns for several hours, until she lost consciousness. She however testified that she was able to identity the appellant and another among the attackers. She explained that the reason she was able to identify the appellant was that during the ordeal and when she was screaming due to pain, the appellant had told her that however much she screamed and called her mother for help and even if came, he would still rape her and her mother as well.

Later when the attackers had gone and she regained consciousness, she noticed that her skirt and pants were ton and were left near where she lay. She stood up, collected the clothes and went to the home of one Wanjiru where she spent the night. The following morning she met her mother Mary Wanjiru, PW2 on the road as the latter looked for her. She narrated to her the incident and there after they reported to St. Francis Police Post and later to Gatundu Police Station where the complainant handed over the torn skirt and blouse to the police. The blouse and skirt were produced in court as exhibits. The complainant went for medical examination on 9.9.98 at Gatundu Hospital where PW3, John Maina, a Clinical Officer examined her. He found that she had tenderness and swelling around the neck and on the lower abdomen. She had lacerations around the external genitalia and on the cervix at the six O'clock site.

She exuded a foul smell and a yellow discharge oozed from her vagina. A high Vaginal Swab showed moderate pus cells and live spermatozoa. She also had gram-positive and gram-negative bacteria. PW4, P.C. Jadraph Maina, had at the police station received the report and the skirt and parts from the complainant on 9.9.98, she at the same time filed a report of rape by six attackers.

The complainant had indicated to the police that she could identify two of the attackers. Later the same day, the appellant was arrested by St. Francis police Post Officers who handed him over to Gatundu police station.

In his defence the appellant testified that the complainant was his friend for about 3 months. On 6.8.1998 the two met and went to his house. He left her with the door keys and left the house until

evening when he came back home and found his 500/- he had left in the house, gone. The complainant was missing too and he looked for her until 8.00 p.m. but had to go back to his house. The next morning he went to work and later in the evening on coming back, he once again went to look for her. He sent one Wanjiku to call her form her mother's house and she came. He got hold of her and demanded for his 500/- in respect of which she responded that she had slept with him several times and he had not given her anything and that the 500/- was not even enough as compensation. He then slapped her once, which made her scream. Her mother who heard the scream came with a stick, which she used to hit the appellant once and the complainant seeing it ran away from the scene as a group of people converged at the spot. This made the appellant also ran away for his security. The girl Wanjiku who the appellant had sent to call the complainant was later arrested. The appellant was later also arrested and then charged with this offence.

The trial magistrate considered all the above evidence and accepted it. He accepted that the medical evidence proved that someone definitely had had sexual intercourse with the complainant on the 8.8.1998. The lacerations on her vagina and live spermatozoa according to him, proved this without any reasonable doubt. He concluded that the lacerations around the complainant's genitalia plus tenderness and swelling around the neck and lower abdomen proved that the complainant had resisted the sexual intercourse but it must have been forced on her. He relied on the medical evidence for proof of rape. The fact that there were live spermatozoa proved penetration. The only issue, which the trial magistrate found needed proof, was whether the appellant was among the six attackers. He observed that the incident had occurred at 7.00 p.m. and he concluded from his own experience that he hour was normally not very dark which would make identification difficult. He also observed that the complainant had recognized the appellant's voice during the time he was raping her. He believed the complainant on that aspect too since the complainant had known the appellant before. Touching the issue of Wanjiru Nguro whom the appellant had used to call the complainant, the trial magistrate dismissed her failure to be called as a witness on the ground that she could not have been so called because she was an accomplice to the six people who had raped the complainant. As to the appellant's statement in his defence, the trial magistrate said he did not believe it. He could not see how appellant's so called girl friend, the complainant, could turn against him and report him to the police and later come to count to testify against him. She could not also have had injuries on her private parts the attackers had not raped her. The trial magistrate accordingly rejected the appellant's defence and convicted him of the charge of rape. He sentenced him to 10 years imprisonment with 2 strokes of the cane.

During the prosecution of this appeal, Mr. Mundia for the appellant argued that the complaint's evidence was contradictory and therefore unreliable. He argued that the witness first claimed that she did not know the appellant until the day of rape. She at the same time claimed that she recognized his voce when he talked to her as he raped her. Mr. Mundia further argued that there are several witnesses who should have been called by the prosecution to testify but were not called. They included Mwihaki Kiando who is said to have come to the help of the complainant when the latter screamed; Wanjiku Nguro who called the complainant to come to the road and would state in evidence the circumstances under which she called the complainant and also what happened when she responded. And finally Wanjiru, in whose house the complainant slept that night after the alleged attacker, who could state the complainant's state of mind and could state whether she mentioned the names of her attackers or whether she claimed recognizing any of the attackers. Mundia then pointed out that without all the above witnesses having been called, the complainant's evidence remains an evidence of a single witness and should have been singularly and specially treated by the trial magistrate to arrive at a conviction. He further argued that the knickers and skirt produced in court were of no importance in so far as they had not been subjected to any laboratory test to confirm whether the bloodstains on them were of human origin. That the trial magistrate considered the prosecution evidence in isolation before rejecting the defence which in any case the magistrate did not consider together with the rest of the evidence. He argued further that the identification of the appellant by the complainant was inadequate and unsafe to be relied on. He concluded that the appellant's arrest was based on information given by Wanjiku Nguro who was herself arrested and who should have been called to stand cross-examination.

Mr. Mondah for the Attorney General supported the conviction. He pointed out that: -

(a) The trial magistrate was alive to the principle of basing a conviction on the evidence of a

single witness.

(b) The failure to call Wanjiru Nguro might be regarded adversely, but even if her evidence were excluded, there would still be adequate evidence on the record to convict. (c) The issue on identification is that of recognition and not real identification and therefore the principles governing identification in general do not apply.

(d) That the appellant's defence was an afterthought and was rightly rejected or ignored.

(e) The issue of recognition was not raised by the appellant during cross-examination but was sprung against the prosecution when it was too late to respond and rebut same.

(f) The court considered appellant's defence but deliberately rejected it.

(g) Common intention rule of law does not absolve the appellant who was among the attackers.

(h) PW3 medically examined the complainant and made clear concussions.

Mr. Mondah concluded that there was overwhelming evidence upon which the trial magistrate returned a conviction, which should be regarded as safe. He called for the dismissal of the appeal.

I have carefully considered the evidence on the record and how the trial magistrate handled it to arrive at the conviction. I have also considered the grounds of appeal and the arguments advanced by both Counsels. It is not disputed that he trial magistrate convicted mainly on the evidence of the single witness who also was the complainant. Was her evidence adequate and safe to be relied on to return a conviction? Her evidence is found on page 2 of the typed proceedings she was called to the road from her mother's house by one Wanjiku Nguro whom she knew well. She proceeded to the road. Wanjiku Nguro called her away from her mother and her sisters. We are not told how dark it was, but 7.00 p.m. can be dark and sometimes very dark or even not dark at all depending on the season. She further stated that when she reached the road, Wanjiru Nguro persuaded hr to walk a little further. That is when she was attacked and raped by six men. But not before she had screamed.

The scream brought Mwihaki Kaindo to her rescue, who on seeing what was happening, went to call more other rescuers. Wanjiku Nguro stood there without helping. There were other people who came in answer to the screams but the complainant does not name them. She states she was raped until 10.00 p.m. What happened to Mwihaki Kiando who had gone to get help? What abut Wanjiku Nguro who had called her to the road? Complainant's evidence does not clarify this. After the rape she went and slept in the house of one Wanjiru. On cross-examination, the complainant said that it was not very dark when she was attacked. However this does not help the case since she does not claim that she saw the face of any of the attackers. She claimed to have recognized the accused because of his voice but stated at the same time that the appellant came from the same home area. Then she also stated that she knew the appellant before that date as Kimuhu. Then again she changed the statement and stated that it was Wanjiku Nguro who had told her the complainant's name. And finally she revealed that she had heard the appellant talk to Wanjiku Nguro before the incident and she had come to know his role. The question that arises is whether or not the complainant knew the appellant before the day she stated she was raped? This can be answered positively and negatively. That she did not know him can be concluded form her evidence when she says at page 2 of the typed proceedings thus: -

"You said – 'Even if you scream and (sic) your mother comes. I shall beat and rape both of you so I recognized your voice as you come from our home area."

The above first statement form the complainant is categorical.It confirms that she did not know the appellant until the day she was raped by appellant, among others. The second statement suggests that she could not recognize the appellant by looking at him, probably because it was dark although not too dark. She suggests therefore that she could recognize him by his voice. But how could she recognize him

by the voice when she had just stated that she never knew him before that day? She tried to rationalize this quandary by now suggesting that the appellant came form the same home area and that she knew the name of the appellant as Kimuhu and that he had seen her talk with Wanjiku Nguro. The latter of course suggests that she clearly knew the appellant before but she did not want the court to know so but for what reason we will have to guess. It is my finding therefore, that the complainant knew the appellant well and the appellant knew her well before the material day. This means that she was lying when she told the court that she did not know the appellant or that she merely recognized his voice in the dark as it came out from her evidence.

The second issue I would like to consider is why the prosecution did not call Wanjiku Nguro, Mwihaki Kiando and Wanjiru in whose house the complainant slept. Wanjiku Nguro as earlier stated could give light on the reasons why she went to call the complainant on 8.9.98, who sent her to do so, what happened when complainant positively responded. She was known to complainant and was therefore available as a witness to the prosecution. It is even suggested that she was summoned to the police where she was later released. She must have given her statement to the police.

What did she say? Mwihaki Kaindo came to rescue complainant when the latter screamed. Whey did she not help the complainant.Whey did she not rush and inform the mother of the complainant when the home was as close as suggested? Why did she not come with other people to help? Did she really witness the complainant being raped? Wanjiru in whose home complainant slept was not called as a witness either. She could confirm what the complainant immediately reported or who really were the attackers or whether complainant said she knew or did not know them. However these three very crucial potential witnesses were deliberately or negligently, not called. The legal position in respect to a situation like this is that tone stated in Bukenya and others vs. Uganda (Lutta Ag. V.P.) {1972} E.A. 549 at the bottom of page 550. Commenting on the judgment of Kiwanuka, C.J., the acting Vice President of the Court of Appeal stated: -

> **"….. It is well established that the Director (of prosecutions) has discretion to decide who are material witnesses and whom to call, but this needs to be qualified in three ways. First, t here is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence ap pears essential to the just decision of the case ……. Thirdly, where the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."**

This Court of Appeal of Eastern Africa cases in my view, stats the law of Kenya. It is my holding therefore that although the prosecutor in this case in hand had a discretion to decide which material witnesses to call or not to call he had an obligation to call the three witnesses hereinabove mentioned. But if he did not do so, he should have made them available to the appellant to call them if he so chose to do. On the other hand the trial magistrate had a duty to impress upon he prosecution f such a duty and call the witnesses itself if the prosecution failed to do so. And finally, in this case, it cannot be arguable that the prosecution need not have called the mentioned witnesses because it had called adequate witnesses.

Infact without calling the said witnesses, the prosecution barely any adequate evidence on the record upon which it could to prove its case. Failure to call them therefore was motivated by a greater negative reason like the fact that if he called them, their evidence would tend to be adverse to the prosecution case. I accordingly have to hold that the prosecution failed to call the witnesses mentioned above because their evidence would possibly exonerate the appellant.

I now turn to the issue of single witness, which became an issue during the hearing of this appeal. The way I understand the principle is that a court may convict on the evidence of a single witness provided that he court believes the witnesses' evidence to be true and believable , and provided the court

warns itself of the fact that the evidence is one of a single witness but is nevertheless true and reliable. This, the trial magistrate did at page J3 where he states that he is aware that the identifying evidence is one from a single witness. The only issue that needs to be addressed is whether the evidence of the complainant as canvassed above was one, which can be regarded as truthful or reliable. I have, on my part found it to be contradictory and therefore unreliable.

I will now look at the medical evidence, which the trial court relied upon to establish that here was penetration and that there was sexual intercourse committed on the complainant. John Maina, PW3 examined the complainant on 9.9.98. This was claimed to have been at the request of Gatundu Police Station. Examination of the original P3 however would tend to show that the P3 was issued on 12.9.98 and referred to Thika Medical Officer of Health. Although the details thereon state that the rape was reported to have taken place on 8.9.98, there is no explanation in the evidence how the complainant who was referred to M.O.H. Thika Hospital, ended up being examined by a Clinical Officer at Gatundu Hospital. Nor does the Clinical Officer who filed the P3 on the 15th September, 1998 explain whether there were original treatment or laboratory notes prepared on 8.9.1998 and state the name of the laboratory technician who conducted the tests. This is relevant because, the Clinical Office does not explain how the laboratory tests wee carried out, since his duties as a Clinical Officer are quite different from those of a laboratory technician. Be that as it may, the issue as to how a P3 issued on 12.9.1998 and filled on 15.9.1998, could have contained the contents of tests done on 9.9.98 is not explained. Mr. Mundia also argued that the trial magistrate considered the defence in isolation and rejected it without giving it the consideration it deserved.I have examined the manner in which the defence was treated at page J3, bottom. I have to agree with Mr. Mundia's submission.Perusal of the judgment confirms that the trial magistrate considered the prosecution evidence totally in isolation, ending in fully accepting and believing it as well as relying on it. He then purported to take up appellant's defence and consider it, ending up in rejecting it. In my view, the trial magistrate merely paid lip service to the appellant's defence after he had already accepted the prosecution's case. In doing so, he erred in law.

Mr. Mundia also raised the issue of the complainant's knickers. The trial magistrate did not appear to rely much on the knickers and the skirt, which were said to be blood stained. In my view, production of the same did not advance the prosecution's case. They were not sent to the Government analyst for the testing of the blood type and whether it matched with the complainant's blood.

The issues that Mr. Mondah raised have been considered and answered except the one, that the appellant's defence was an afterthought and that it was sprung against the prosecution. He therefore argued that it was worthless and deserved to be treated with contempt. I have carefully examined the defence. I do not find it an afterthought or worthless. The appellant claimed that he and the complainant knew each other and were indeed friends. They had slept together the day before when she visited him at his home.

They differed only because when he returned home where he had left her, he found that she had disappeared with his 500/-. He went to look for her in the evening of 8.9.1998. He called for her from her mother's house using their common friend, Wanjiku Nguro. Her mother followed her and severely took it up against him when he slapped her. Other people began to converge at the spot and he feared being molested as well and ran away. I have already indicated that the complainant possibly told lies about their relationship with the appellant. The appellant's story could possibly be true. It should to have been dismissed off hand.

For the various reasons canvassed above I hold that the trial magistrate erred in finding that he prosecution had proved its case beyond a reasonable doubt. He misdirected himself on points of law as already pointed out hereinabove. The upshot of all these is that this appeal should succeed. The appeal is hereby allowed. The conviction is quashed and the sentence of 10 years with two strokes of the cane, are hereby set aside. The appellant is ordered set at liberty forthwith, unless lawfully detained in prison. It is so ordered.

Dated and delivered at Nairobi the 1st day of March, 2003.

D.A. ONYANCHA

JUDGE