REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.259 OF 2001

(Being an appeal against Conviction and Sentence in Criminal Case No. 105 of 2001 by the Resident Magistrate's Court at Mombasa, K. Muneeni – R.M.)

E.M.N.....APPELLANT

- VERSUS -

REPUBLIC ……RESPONDENT

J U D G E M E N T

The Appellant was charged and convicted for the offence of Rape Contrary to Section 140 of the Penal Code and at the end of the trial he was sentenced to 7 years imprisonment together with 5 strokes of the cane. He has preferred an appeal raising 7 grounds. Grounds 1 to 6 touch on the evidence while the 7th one is on the sentence. He presented his written submissions to the court and elaborated on them briefly.

The facts of the case before the trial court are briefly that on the 19th December, 1999, the Complainant J.K who was witness PW1, was on her way to fetch water at around 10.00 a.m. when he met the appellant. He fell her down, gagged her mouth using her lesso and told her not to scream otherwise he would kill her. He then removed his underpants and proceeded to remove hers and had sex with her while holding her by the neck. She then screamed and he ran away. She carried her pants and reported the matter to her husband and identified her attacker as the appellant who is also her relative. Her husband K.K(PW2) was at his Shamba at around 3.00 p.m. on the same day when his wife, PW1 reported the incident to him. She showed him the underpants which was torn and they proceeded to report the matter to the sub-chief and then the chief who in turn referred them to the police at Kaloleni. The appellant was however not arrested immediately as he disappeared from home.

N.M.C (PW3) a village elder confirmed the matter had been reported to him by PW1 and PW2 and he Summoned the appellant but he refused to answer to the summons. In his evidence he said this was not the first he had received reports that the appellant had raped his relative. He then arrested the appellant and he was taken to Kaloleni police station. PC. RICHARD KAMAU PW4, confirmed he had earlier received a report from the complainant, PW1 that she had been raped and was issued with a P3 Form. He, PW4 produced the said P3 Form as part of the evidence after the appellant confirmed he had no objection. In his unsworn defence, the appellant said on material day he reported on duty at 11.00 a.m. and that he had seen PW1 return home from fetching water. The Day after he heard rumours that he had raped PW1 and decided to leave home until the day of his arrest.

In his grounds of appeal, he attacked the evidence on the ground that it was not corroborated and that the evidence as a whole was inconsistent. He said failure to have him examined by the Doctor and for the

Doctor to have produced the P3 Form was irregular. From the evidence, it is clear, he was asked whether he had any objection to the production of the P3 Form by PW4, and he had none. The issue of the time she reported the matter to her husband is not of great consequence as she says it was immediately while her husband gave the time as 3.00 p.m. and so are other minor discrepancies such as her age.

The Complainant had no doubt as to who had raped her, and it was during the day, and when she reported to her husband and the chief, she said it was the appellant. The courts before had held that evidence in all cases of sexual offences had to be corroborated. However this has now been overturned by the decision in JOHN MWASHIGADI MUKUNGU –VS- R. CR.A. 277/2002 (UR) MSA, in which the Court has now held that the said requirement is unconstitutional and matters of sexual offences involving women and girls no longer require to be corroborated by independent evidence.

The State Counsel submitted that the evidence adduced was adequate to arrive at a safe conviction. I have analysed the evidence and the judgement of the trial Court and there is no doubt the complainant was raped at broad day light. She saw her assailant who proceeded to fell her down, gouged her and had sexually assaulted her. She carried her torn pants which he had forcefully removed and reported to her husband and showed them to him and together they reported to the Chief and the police and she gave the name of the appellant. He is a relative and no evidence of any possibility of any mistaken identity was adduced. In cross-examination, PW1 was very firm that they met and as they by passed each other he held and wrestled her to the ground. She said she had left him home as she left to draw water and that she had noticed he had been following her on other days and had threatened her by saying “You will see”. PW3, a village elder confirmed receiving the report from PW1’s husband. He said it was not the first time he had received reports that appellant had raped a member of his family but the other cases were settled. In cross-examination, he told appellant he had indeed received the reports about his previous sexual attacks on his brother’s wife and daughter.

In his judgement, the trial magistrate did take into consideration the evidence and the issue of corroboration and he arrived at the conclusion that PW1’s evidence was corroborated by the pants she carried and showed it to her husband. Chief and police and her reporting to her husband. He also found there was no mistaken identity.

I have analysed the said evidence and find no reason interfere with the said finding.

As for the Sentence, the appellant did not appear remorseful as in his mitigation he asked for a chance to reform. I agree with the trial court that the act was indeed beastly and traumatizing. The appellant according to PW3, had been reported to him for committing similar acts twice before but the cases were settled and never reached the police. Perhaps the appellant found this as an easy way of getting away each time. The Sentence of 7 years and 5 strokes is not excessive and it shall remain.

The appeal is accordingly dismissed in its entirety.

Dated and Delivered at Mombasa this 2nd day May, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE