REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.469 OF 2010

(An Appeal arising out of the conviction and sentence of T. NGUGI – PM delivered on 18th August 2010 in Makadara CMC. CR. Case No.746 of 2007)

ABDALLA MUTINDA JOEL…….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Abdalla Mutinda Joel was charged with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offence were that on 11th December 2006, at ***[particulars withheld]*** Village in Nairobi, the Appellant, jointly with others not before court, unlawfully had carnal knowledge of I W (the complainant) without her consent. The Appellant was alternatively charged with **indecent assault** of a female contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, jointly with others not before court, the Appellant indecently assaulted the said I W by touching her private parts namely buttocks and breasts. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted on the main charge of gang rape. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the evidence of a sole identifying witness who purportedly identified him in circumstances that were not conducive to positive identification. He took issue with the fact that the trial magistrate failed to consider the totality of the evidence adduced, including the evidence of the doctor, before arriving at the decision finding him guilty of the offence. The Appellant faulted the trial magistrate for finding him guilty when the prosecution had failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He finally aggrieved that he had been sentenced to a custodial sentence that was excessive and harsh in the circumstances.

Prior to the hearing of the appeal, the Appellant filed supplementary grounds of appeal and also written submission in support of his appeal. During the hearing of the appeal, the Appellant reiterated the contents of his written submission. He told the court that prior to being charged, he had been remanded in custody for a period of four (4) months. He took issue with the identification parade that was carried out

by the police where it was alleged that he had been identified by the complainant. On her part, Ms. Nge'tich for the State submitted that the prosecution had proved its case on the charge of **gang rape** to the required standard of proof beyond any reasonable doubt. She stated that the complainant had positively identified the Appellant during the rape ordeal. This was because the complainant knew the Appellant prior to the rape incident. It was the prosecution's case that the complainant duly confirmed the Appellant's identification in an identification parade that was subsequently carried out by the police. She submitted that the medical evidence produced by the doctor did establish that indeed the complainant had been sexually assaulted. She urged the court to disallow the appeal and confirm the conviction and sentence of the Appellant.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge – vs- Republic [1987] KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of gang rape contrary to **Section 10** of the **Sexual Offences Act** to the required standard of proof.

In the present appeal, it was clear that the evidence the prosecution relied on to secure the conviction of the Appellant was that of identification. The complainant testified that on the material night of the sexual assault, she was walking home with some friends. It was about 10.30 p.m. One of the friends testified as PW4. She is E W W. When they reached some place along the road, they were accosted by a gang of about five men. They were overpowered. The complainant was taken to a nearby bush where she was raped in turns by three of the men. The complainant testified that the rape ordeal took between thirty (30) and forty (40) minutes. Meanwhile, PW4 managed to escape. She informed PW3 Z N W who was a security guard in a nearby parking yard. PW3 mobilised people from a nearby bar. They walked towards the direction where PW4 had directed them. When they reached the scene where the complainant was being sexually assaulted, the men ran away. They were able to rescue the complainant, and made a report to the nearby Ruaraka Police Post. The complainant was taken to Nairobi Women Hospital where she was treated and discharged.

The complainant testified that she was able to identify the Appellant because she knew him by his facial appearance prior to the sexual assault. She stated that she used to see the Appellant at Baba Dogo area. She was able to identify the Appellant by the fact that the Appellant's right eye had a deformity. The Appellant also had a scar on his face. The complainant was emphatic that she was able to identify the Appellant as one of her assailants because there was security light emanating from the nearby brewery. It is important that when the prosecution is relying solely on the evidence of identification, especially made in circumstances that are not conducive to positive identification (like the present case), that the description of the assailant be made by the complainant in the first report made to the police.

During the cross examination of the complainant, the Appellant requested that the Occurrence Book (O.B.)of Muthaiga Police Station be produced in evidence so that the court may determine whether the complainant gave the description of her assailant in the first report that she made to the police. This request was declined by the trial court at the time. It insisted that the said O.B. report be produced by the arresting officer later in the trial. As fate would have it, neither the investigating officer nor the arresting officer produced the said O.B. report. In fact the investigating officer did not testify in the case. PW5 PC James Muchira, the arresting officer testified that on 27th December 2006, he arrested the Appellant while he was on patrol in Ruaraka area. He testified that the Appellant was arrested on suspicion that he had committed some offence. It was clear that the Appellant was not arrested for the offence for which he was later charged. In the absence of the first report made to the police by the complainant giving the description of her assailant, it will difficult for this court, on re-evaluating the evidence to reach the conclusion that the complainant positively identified the Appellant as one of her assailants.

The prosecution's reliance on the evidence of identification would have been strengthened, if as stated by the complainant, the parade officer who conducted the identification parade was called to testify. For some inexplicable reason, the prosecution did not deem it necessary to call either the investigating officer

or the parade officer despite being given several chances by the court. The prosecution was therefore forced to close its case before these two critical witnesses were called to testify. The effect of failure by the prosecution to call the parade officer who conducted the identification parade where it was alleged that the complainant identified the Appellant, is that the evidence of identification by the complainant stood uncorroborated.

It was evident in its assessment of the evidence of identification that the trial court did not have in mind the directions issued by the Court of Appeal in **Maitanyi –vs- Republic [1986] KLR 198** at page 200 where it was held:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another –vs- Reg [1953] 20 EACA 166 followed in Roria –vs- Rep. (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> > ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilty, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.""***

In the present appeal, it was clear that the trial court did not warn itself of the danger of relying on the evidence of a single identifying witness to secure the conviction of the Appellant, especially taking into account the fact that the identification was made in circumstances that were not conducive for positive identification. Although the complainant appeared to suggest that she knew the Appellant prior to the sexual assault, in the absence of the description of the assailant made in the first report to the police, it would be difficult for this court to believe the evidence of the complainant. From the foregoing, it is clear that if the police had any cogent evidence of identification, they bungled it when they failed to call the investigating officer and the parade officer to testify before the trial court. The medical evidence adduced by the prosecution was of no help. The complainant was examined on 30th January 2007 more than seven (7) weeks after the date of the alleged offence. In sexual offences, it is imperative that a medical report be produced that is contemporaneous to the date that the sexual assault is alleged to have been committed. The complainant testified that she was attended to at Nairobi Women Hospital immediately after the rape ordeal. The prosecution should have produced the initial medical treatment papers at Nairobi Women Hospital in addition to the P3 form that was produced by the doctor during trial. The failure to produce the initial medical treatment papers made that the medical report produced in evidence in support of the prosecution's case was wholly inadequate.

Further, it was clear from the evidence adduced by the Appellant in his defence that he was arrested for an unrelated offence before he was charged with the present offence. The fact that the Appellant was arrested on 27th December 2006 and arraigned in court for the present offence on 8th February 2007 supports the Appellant's claim that he may have been framed by the police in the present charge. The prosecution did not give an explanation of the whereabouts of the Appellant between the two dates before he was arraigned in court. The presumption by this court is that the Appellant was being illegally held. The prosecution did not therefore establish that the Appellant participated in the gang rape of the complainant to the required standard of proof beyond any reasonable doubt.

Enough said. The upshot of the above reasons is that the appeal lodged by the Appellant has merit. It is hereby allowed. The Appellant's conviction is hereby quashed. The sentence imposed on him is hereby set aside. The Appellant is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF DECEMEBR 2014.

L. KIMARU

JUDGE