REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 3 OF 2010

ANDREW NYONGESA SIMIYU …… APPELLANT VERSUS

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

{BEING AN APPEAL ARISING FROM THE ORIGINAL CONVICTION AND SENTENCE OF D. M. OCHENJA - PM IN CRIMINAL CASE NO. 251 OF 2008 DELIVERED ON 29TH JANUARY, 2010 AT KITALE.}

J U D G M E N T

The appellant, **Andrew Nyongesa Simiyu,** appeared before the Principal Magistrate at Kitale charged with rape contrary to Section 3 of the Sexual Offences Act, in that on the 5th May 2007 at [particulars withhehld] Trans-Nzoia District, unlawfully caused his male genital organ to penetrate the female genital organ of M M without her consent. There was an alternative count of indecent act with an adult contrary to Section 11 (6) of the Sexual Offences Act, in that on the 5th November, 2007 at [particulars withheld] Village, the appellant touched the private parts of M M. The appellant also faced a second count of being in possession of a narcotic drug (i.e. Cannabis sativa) contrary to Section 3 (1) read with Section 3 (2) of the Narcotic Drugs and Psychotropic Substance Control Act. It was alleged that on the 11th February, 2008 at Nyayo Police Patrol base Trans-Nzoia District, the appellant was found in possession of 25 gms (5 rolls) of Cannabis-Sativa.

After denying all the counts, the appellant was tried, convicted on the main count of rape and sentenced to serve ten (10) years imprisonment. He was however, acquitted on the second count of possession of narcotic drugs.

Being aggrieved with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds contained in his petition of appeal filed herein on 4th February 2010.

At the hearing of the appeal, the appellant appeared in person and relied on his written submissions in support of his case. The Learned Prosecution Counsel, **Mr. Chelashaw,** opposed the appeal on behalf of the state/respondent. In his submissions, the Learned Prosecution Counsel stated that the appellant was properly convicted as the case against him was proved beyond reasonable doubt. That, the complainant was an old woman aged 65 years who was able to clearly identify the appellant during the offence which occurred at 7.00pm. That the complainant noticed that the person responsible for tormenting her was the appellant, her neighbour.

The Learned Prosecution Counsel Stated further that the medical report (P3 form) confirmed that the complainant was raped and that under Section 124 of the Evidence Act, the trial Court was empowered to convict the appellant even in the absence of corroboration. That the contradictions which may have occurred in the evidence adduced by the prosecution did not affect the case.

The Learned Prosecution Counsel therefore called for the dismissal of this appeal.

The role of this Court as the first appellate Court is to re-consider the evidence and arrive at its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing all the witnesses.

Briefly, the prosecution case was that on the material day, the complainant **M M (Pw 1)**, left her place of work at about 8.00pm and on the way home while crossing a river, she was held from her rear by a person who gripped her mouth and threatened to strangle her neck if she dared scream. The person removed her underpants, knocked her down and dragged her into nearby bushes where he raped her while saying that he had admired her for a long time. It was during the struggle with him that she noticed that he was Andrew, her neighbour's son. She called him by his name of Andrew and asked him what he was doing yet he was a child and she was aged 65 years, old enough to be his grandmother. He however, continued raping her until she was rescued by E (Pw 2). **E M (Pw 2),** was on his way home when he heard a woman screaming. He decided to enquire and proceeded to where the screams emanated. He had a spotlight and on peeping at some bushes saw the complainant being raped by Andrew who escaped on seeing him (Pw 2).

E noted that the complainant who was his aunt was injured. He assisted her to her home. At a later stage he spotted Andrew playing football at a field. He apprehended him with help from members of the public and handed him over to the Police at Wamuini Patrol Base where he allegedly escaped but was later apprehended and taken to Kitale Police Station.

Andrew was identified as the appellant herein by both the complainant (Pw 1) and E (Pw 2). **Kirwa Labat (Pw 3),** a Clinical Officer at Kitale District Hospital examined the complainant and completed the necessary P3 form which indicated that she had been injured and raped.

P. C. William Marwa (Pw 4), investigated the case and thereafter preferred the present charge against the appellant.

In his defence, the appellant denied the offence and stated that on the 9th February, 2008, he was on his way home when he met two people with a lady. They appeared drunk. He asked them why they were misbehaving but he was arrested and handed over to the Police. He was later charged with the present offence.

From the foregoing evidence by both the prosecution and the defence, it was clear that the fact that the complainant was indeed raped was not disputed. She indicated that she was waylaid on her way home and raped by a person who held and threatened to strangle her even after an attempt to raise alarm by screaming. The person forcefully dragged her into a bushy area where he eventually raped her. The unlawful act was confirmed by the medical examination of the complainant after the fact.

The basic issue which arose for determination was whether the appellant was positively identified as the offender. His defence was a denial and an indication that he was implicated for merely asking a drunken group of two men and a lady why they were misbehaving.

However, in the face of the evidence adduced by the complainant (Pw 1) as corroborated by that of E (Pw 2), it was evidently clear that the appellant's defence was completely unsustainable. The two witnesses identified him by recognition. They knew him by his name of Andrew and that he was a neighbour. Although the offence occurred in the hours of darkness, there was moonlight which enabled the complainant see and recognize him. She also talked to him but he failed to heed her plea and went ahead to rape her despite the fact that she was old enough to be his grandmother.

E (Pw 2) had a torch or spotlight which enabled him to also see and recognize the appellant. He flashed the torch towards the appellant and recognized him. As it were, he (Pw 2) caught the appellant in ***"Flagrante delicto"*** i.e. caught in the act.

It was without doubt that the appellant was positively identified as the person who assaulted and raped

the complainant. His conviction by the Learned Trial Magistrate was sound and proper. The ten (10) year imprisonment sentence imposed on him was lawful but rather too lenient considering the circumstances of the offence and the age of the complainant "*vis-a-vis*" that of the appellant.

In the end result, this appeal is without merit and is hereby dismissed.

Delivered and signed this 2nd day of October, 2013)

J. R. KARANJA

JUDGE