**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

Criminal Appeal 427 of 2010

**KENNETH MAWIRA BUSAKA……..……. 1st APPELLANT**

**FREDRICK OTIENO ODHIAMBO…….…….2nd APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal From original conviction and sentence in criminal case Number 1333 of 2006 in the Chief Magistrate's Court at Makadara – Mr. T Ngugi (PM) on 11th June 2010)*

**JUDGMENT**

**1.** The appellants **Kenneth Mawira Busaka** and **Fredrick Otieno Odhiambo** were tried and convicted for the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3** of **2006.** They were thereafter sentenced to serve life imprisonment.

**2.** The particulars were that the 1st appellant, on 25th February 2006 at Mathare Valley in Nairobi within Nairobi area in association with the 2nd Appellant, had carnal knowledge of G.W.N. without her consent. This charge had the alternative count, that the same persons named in the foregoing particulars, on the said date and at the said place, intentionally and unlawfully committed indecent act with G.W.N. by touching her private parts.

**3.** The appellants immediately filed an appeal in which they advanced grounds that can be summed up as follows; That:

i. The appellants raised an identical first ground of appeal in which they stated that the purported visual identification by recognition was made under hectic prevailing circumstances and no description was given to the police.

ii. The learned trial magistrate was overly impressed with mode of arrest of the appellant yet no evidence was tendered by the persons who arrested them.

iii. The charges were not adequately proved against the appellant.

iv. The learned trial magistrate did not specify under which point of law she convicted and sentenced the appellant, and that the case was not fairly conducted and that the defence was rejected without due consideration.

v. That charge was defective.

**4.** The Learned state counsel Mr. Mulati opposed the appeal on behalf of the respondent, urging that he supported both conviction and sentence because the prosecution had proved their case beyond reasonable doubt.

**5.** That the evidence of **PW2** the Government analyst and two medical witnesses **PW5** and **PW6** corroborated the complainant's evidence. In his submissions the learned state counsel urged that **PW1** the complainant, gave a graphical account of how the two appellants accosted her and raped her in turns on 25th February 2006 at 6.30 a.m. There was a high voltage security light at the time which enabled her to clearly see each of them. **PW1** also had prior knowledge of her assailants a fact she had made known to her husband **PW3**.

**6.** The duty of the first appellate court is to scrutinize and re-evaluate the evidence on record to make its own findings and draw my own conclusions. I reminded myself of **Kiilu and Anor v Republic [2005] 1 KLR pg 174**, in which the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."***

Only after discharging the mandate set out above therefore, can I decide whether the magistrate's findings should be supported. In doing so, I will make an allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, which I did not.

**7.** The prosecution evidence was that **PW1**, the complainant was on his way to hospital at Mathare on 25th February 2006 between 5.30 a.m. and 6.30 a.m with her, brother, when she met two boys one of whom she knew by name as "**Mawira**".

**8.** She testified that he regularly passed by the road near her place, and that the other lad in his company was his friend who frequented her restaurant. They were near the bridge and were armed with a panga. They demanded for money and chased away her brother. They then took her to Mathare valley where they raped her in turns before releasing her some thirty minutes later. She reported the ordeal at Pangani Police Station after which she went to Nairobi Women's Hospital where she was treated and discharged.

**9.** Mr. J.M., **PW3** testified that the 1st and 2nd Appellants were known to his wife. The 1st Appellant's mother had a business near the complainant's business and was known to her. He testified that the 2nd Appellant was a friend of the 1st Appellant who used to come to their restaurant. That he resisted overtures from the 1st Appellant and his mother to settle this dispute out of court and instead aided in his arrest by the police.

**10. PW5** Doctor Muhombe testified that upon examination she found blood stained discharge coming from **PW1**'s cervix, and noted superficial lacerations on the vaginal wall. She took a Swab but noted that there were no spermatozoa. She gave her standard treatment to prevent HIV and STI, prepared her report dated 27th January 2006, signed it, and produced it as Exhibit 4 together with **PW1**'s hospital card which was Exhibit 3.

**11. PW6,** Doctor Kamau a police surgeon examined **PW1** on 26th February 2006 and found no physical injuries vaginal bleeding or discharge. He however noted a bruise on the left side of the vaginal opening. He completed the P3 form which he produced in evidence as Exhibit 5, and took blood specimen and saliva from appellants, which were then forwarded to **PW2** the Government analyst to examine.

**12. PW2**, Mr. Albert Kathuli Mwaniki, Government analyst attached to the Government chemist in Nairobi, analysed two clothing items and formed the opinion in his report dated 22nd March 2007, that **PW1** had taken part in sexual activity with a group A secreta who could have been the 1st Appellant. This was for the reason that the under pants and biker belonging to the complainant had been stained with

semen from a group A secreta and also contained degenerated spermatozoa. This corresponded with the saliva sample of Kenneth Mawira the 1st appellant, which was found to belong to a group A secreta.

**13.** I however, noted that **PW2** did not form a medical opinion on the nexus between the 2nd appellant and the complainant. His only conclusion was that the 2nd Appellant's blood group was found to belong to group B as did this secretion. However it must be remembered that under **3(1) Sexual Offences Act** No. **3 of 2006**

**"A person commits the offence termed rape if-**

**(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**

**(b) the other person does not consent to the penetration; or**

**(c) the consent is obtained by force or by means of threat or intimidation of any kind."**

The offence of rape is therefore, not predicated on there being found semen or spermatozoa on the victim. Indeed it is not dependent on the emission of seed by the assailant.

**14.** In principle, there was no contradiction in the evidence of the two medical witnesses as Dr. Kamau who testified as **PW6** examined **PW1** on 26th February 2006 while Dr. Muhombe who testified as **PW5** examined her a day later on 27th February 2006. The blood stained discharge on 27th January 2006 may not have been present by the time Dr. Kamau examined her a day earlier. This piece of evidence does not add to nor detract from the prosecution's case.

**15.** The rest of the medical evidence however, was in tandem. Dr. Kamau called the injury the genitalia a bruise while Dr. Muhombe called it laceration but the end result is that both refer to the same thing, an injury to the walls of **PW1**'s gentalia.

**16.** I have considered the evidence on record and find that the evidence of identification by the Complainant was sufficient to prove the prosecution case. The circumstances of identification were that, the time of the offence was after 5.30 a. m. when there was already day light. **PW1**, however, added that there was high voltage electricity light where she was first abducted which enabled her to identify her abductors. The ordeal itself lasted some 30 minutes according to the estimation of **PW1**. She was not blindfolded nor were her assailants camouflaged in any way. They were only two assailants who took turns having their way with her.

**17.** The Appellants were known to her prior to this assault. **PW1** therefore, positively identified them, at the scene as people she already knew, but in her own evidence she could not divulge this fact to them as she feared they might kill her if they knew that she had recognized them.

**18.** The appellants in their defence gave unsworn testimony and called no witnesses. The 1st Appellant denied committing the offence and blamed **PW1** and **PW3** for implicating him in a crime he did not commit. The 2nd Appellant also denied committing the offence and blamed the Mungiki who arrested him for failure to pay toll on the road. He testified that he did not understand why the charges he was facing, were preferred against him.

**19.** I considered this evidence alongside the evidence of all the other witnesses who testified in the case. The record shows that the trial court too considered the evidence of the appellants and discredited them as mere denials which did not hold any water.

**20.** I warned myself of the dangers posed in relying on the evidence of one witness to convict the appellant, in line with the Court of Appeal decision in **Ogeto v Republic [2004] 2KLR**, in which the Hon. Judges of Appeal, Omolo, Githinji and Onyango Otieno, JJA held, *inter alia*, that:

***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

Sexual offences are by nature secretive and will rarely be committed in the presence of witnesses. There is however no legal requirement for independent evidence to corroborate the evidence of a victim.

**21. Section 124** of the **Evidence Act** requires that where in a criminal case involving sexual offence, the only evidence available is that of the alleged victim of the offence, the court shall receive the evidence of the victim and may proceed to convict the accused if it is satisfied that the complainant is telling the truth. The law only requires that the reason for believing that the complainant is telling the truth be recorded in the proceedings.

**22.** The trial court in the instant case, recorded the reasons for believing the complainant as follows:

***"From the evidence before me, I find the evidence of the complainant credible and reliable, and had no reason to frame up the accused persons. Her evidence was well supported and corroborated by the report of the Government analyst and the report from Nairobi Women's hospital and the evidence of PW3 her husband".***

The learned trial magistrate also duly considered the defence and addressed herself thus:

**"The conduct of the accused persons from the evidence on record also points to the guilt. Accused persons defences (sic) is a mere denial, it has no merit and does not even address the issue before me on the material day and is dismissed."**

**23.** After a careful analysis of the record, my own findings and conclusions are in accord with those of the learned trial magistrate that the complainant was raped and that the perpetrators are the appellants herein.

**24.** The learned trial magistrate found that **PWI** was a believable witness and accepted her evidence. I have re-assessed the evidence and found no reason to arrive at a contrary conclusion from that of the learned trial magistrate

**25.** In their earlier grounds of appeal, the appellants urged that their constitutional rights were violated under **Section 72(3)(b)** of the **Constitution** (repealed), rendering the charge fatally defective. On this I find that even if it were true that their rights had been violated this would not nullify the proceedings at hand as their remedy lies elsewhere.

**26.** The appellants had also said that their rights were violated under **Section 77(2)** of the **Constitution** (repealed). I have revaluated the evidence on record and find that the delay in the trial was occasioned by the absence of the appellants in court during trial and in their exercise of their right to have the matter start de novo.

**27.** For the foregoing reasons I find that the Appellants' appeals are lacking in merit. I therefore dismiss both appeals, uphold the conviction and affirm the sentences imposed by the learned trial magistrate in respect of each appellant

It so ordered.

**SIGNED DATED** and **DELIVERED** in open court this ***4th*** **day** of ***October*** **2012.**

**L. A. ACHODE**
**JUDGE**