REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 55 OF 2008

PATRICK GITONGA MBIRO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Kigumo

in Criminal Case No. 1703 of 2006 dated 25th day of February 2008 by S. N. Mokua – SRM)

J U D G M E N T

The appellant Patrick Gitonga Mbiro was charged with rape contrary to Section 3(1) of the Sexual Offences Act. The particulars were that on 28th July 2006 at Maragua District he intentionally and unlawfully committed an act which causes penetration with R W G. He also faced count II which should have been an alternative count. It was indecent assault contrary to Section 2(3) of the sexual offences Act in that on the same date, place and district he committed an indecent act with R W G by touching her private parts.

The Complainant testified that on 28th August 2006 at about 8.00 p.m. the appellant came to the kitchen and grabbed her. He removed her pant and clothes and thereafter raped her on a bed in the kitchen. The complainant went on to testify that she knew the appellant as he was an employee in their home. She stated that before the appellant raped her, he touched her breasts and buttocks. She felt pain during the rape ordeal. The appellant ejaculated three times. Though the complainant screamed, no one came to her rescue. As he raped her the appellant covered her mouth. When her mother (PW2) surfaced she immediately informed her of the incident. They together went to Maragua Police Station from whence they were referred to Maragua District Hospital. Under cross-examination by the appellant the complainant, stated that she was alone in the kitchen when the incident took place.

The complainant's mother was P.W.2. She told the court that on the material day she had left home at about 10.00 a.m. She left the appellant and complainant in the homestead. She stated that the complainant informed her when she came back that the appellant had raped her. She checked the complainant's private parts and ascertained that indeed the complainant had been sexually assaulted. She organised with officers from Muthithi police post and had the appellant arrested.

PW3 was a brother in law of PW2 who told the court that on 29th July 2006 whilst at the complainant's home, his brother informed him that the appellant had raped his daughter, the complainant. The complainant confirmed to him what his brother had told him. At about 5 p.m. he accompanied the

complainant to Maragua police station and later to Maragua District Hospital. By this time the appellant had ran away from the complainant's homestead.

PW4 a police officer based at Muthithi Police Post testified that on 28th April 2007 the complainant came to the police post. The officer testified that he noted that the complainant was an imbecile. The complainant was in the company of her mother. He referred them to Maragua Police Station. Subsequently this witness visited the complainant's homestead in the company of other police officers. The appellant on seeing them approach ran away. Later the appellant was arrested by officers from Maragua Police Station.

PW5 Dr. Peter Ngaruiya, MOH Maragua District Hospital, testified that the P3 form in respect of the complainant was filled on 4th August 2006 although the incident had taken place on 28th July 2006. He gave evidence in respect of the P3 form which had been filed by Dr. Mukaido who had then left government employment. According to the P3 form the complainant's labia minora was inflamed and redish. Vaginal swap indicated that there was no spermatozoa and there was no vaginal discharge. He formed an opinion though that rape had likely taken place. The appellant was found to have a case to answer. He offered to make a sworn statement of defence. In his defence he stated that the father of the complainant was his employer working in Ukambani. Sometimes back he took him to Ukambani where apparently he had married another wife. On coming back the complainant's mother asked him to be sleeping in her house. He refused. He went on to state that the complainant's father promised to take him to a driving school, hence did not pay him his dues. One day he asked for permission to go home. On coming back, the complainant's mother demanded that he leaves. He went on to state that PW2 kept abusing him. One day whilst in the shamba, police came and arrested him. The appellant stated that he was not charged for over 1 week that he stayed in the police cells.

At this juncture the trial court having carefully considered and evaluated the evidence and defence tendered by the prosecution and the defence respectively found favour with the prosecution case. Accordingly, the appellant was convicted on the main count and sentenced to 15 years imprisonment. Aggrieved by the conviction and sentence, the appellant launched this appeal. He faults his conviction and sentence aforesaid on grounds that the prosecution case was full of doubts and contradictions, basic ingredients of the offence were not proved, reliance heavily on the evidence of a single witnesses that lacked corroboration and failure by the learned magistrate to consider his defence appropriately.

When the appeal came up for hearing, the appellant tendered written submissions which I have carefully read and considered. Mr. Orinda, learned Senior Principal State Counsel half-heartedly though opposed the appeal. His submissions were captured in 3 sentences thus "..... The evidence was sufficient. Evidence of a single witness Evidence well corroborated by the mother and medical evidence conviction safe...."

Mr. Orinda, did not as much as attempt to respond to the weighty constitutional issue raised by the appellant in his submissions. He raised the issue in this manner "..... I contend that my fundamental and constitutional rights as embodied in section 72(3) (b) of the constitution were violated. The appellant was detained in custody for a whole 9 days whilst he ought to have been either released or presented before court within 24 hours since the charge he was facing was not a capital offence. The burden to explain the delay was on the prosecution and was not upon the accused person to complain to a magistrate about the unlawful detention in custody of the police. ".... Apart from my constitutional rights, your lordship also amounted to violation of my rights under section 77(1) of the constitution which guarantees a fair hearing within a reasonable time. The deprivation by the police of my rights to a (sic) liberty for whole nine (9) days before bringing me to court so that the trial could begin, obviously resulted the trial not being held within a reasonable time. So your lordship, this appeal must succeed on this ground alone....."

Despite this powerful and elaborate submission by th appellant, Mr. Orinda, did not deem it worthwhile to respond to the same. He cannot claim that the issue was sprung on him by the appellant. In his defence during the trial, the appellant alluded to the issue when he stated that he had been held in police cells for 1 week upon arrest without being arraigned in court.

According to the charge sheet filed in court the appellant is said to have been arrested on 4th August 2006 without a warrant of arrest. However it was not until 11th August 2006 that he was brought to court and the charges read out to him and to which he pleaded. In the case of Ann Njogu & 5 others v/s Republic, Miscellaneous Criminal Application No. 551 of 2007, (UR) Justice Mutungi held that 24 hours meant exactly that and any prosecution beyond it for an non-capital offence as was in the instant case is null and void. The learned Judge went on to state that there is no known cure for violation of the accused constitutional rights as guaranteed by Section 72 (3). This court is also aware of the court of appeal decision on the issue in the case of Gerald Macharia Githuku v/s Republic, Criminal appeal No. 119 of 2004 (UR) where it was held that an unexplained delay in charging an accused person in court would lead to an acquittal irrespective of the weight of evidence on record. Then there are also other authorities on the issue to wit, Paul Mwangi Murunga v/s Republic court of appeal, criminal appeal number 35 of 2006 (UR) and Dominic Mwalimu Mutie v/s Republic, court of appeal, criminal appeal number 217 of 2005 (UR).

In determining whether the police had flouted the constitutional rights of the appellant one has to see whether the police provided a plausible explanation for the delay. In the case of Paul Mwangi Murunga (supra) the court observed that as long as the explanation for the delay is reasonable no problem would arise. In the same case however the court went on to observe that the accused person need not raise the constitutional issue. If he does not then the court *suo moto* or *suo spante* can raise it. Finally I wish to revert to the case of Eliud Njeru Nyaga v/s Republic, Court of Appeal Criminal Appeal number 182 of 2006 (UR) where the court held that it would be unreasonable to hold that every delay amounts to a constitutional breach. What is important is whether the police have offered the explanation for the delay and whether that explanation is plausible and reasonable. Should the court come to the conclusion that the explanation offered by the police is unreasonable and not plausible then the accused person would be entitled to an acquittal irrespective of the weight of evidence that may be on record or in the possession of the prosecution for such trial would be a nullity and unconstitutional.

The appellant herein was not arraigned in court within 24 hours. Indeed he was brought to court after 6 days. This was unconstitutional. The police offered no or no reasonable explanation for the delay. It can therefore safely be assumed that the police had no explanation to offer for the delay. The trial court too, it would appear failed to secure and protect the appellant's constitutional rights with regard to this fair trial provisions of the constitution. It failed to extract from the prosecution the reasons behind the late arraignment of the appellant in court much as the appellant pointed out the issue in his defence.

In the end, I have come to the inescapable conclusion that the appellant's prosecution in the trial court was undertaken in violation of his constitutional rights. He was not brought to court within 24 hours as required by our supreme law of the land, the constitution. The prosecution offered no explanation, plausible or otherwise for the delay of 6 or so days. The trial court failed in its duties of securing the constitutional rights of the appellant. The trial of the appellant was thus defective and a nullity. Much as the evidence on record is weighty and points irresistibly at the appellant having committed the offence, on the authorities already cited the appellant is nonetheless entitled to walk scot-free. Accordingly I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 3rd day of June 2009

M. S. A. MAKHANDIA

JUDGE