



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 526 OF 1992

JULIUS KABUTHA MAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 4932 of 1990 of the Principal Magistrate's Court - Thika - E O Awino, Esq)

JUDGMENT

The appellant Julius Kabutha Mau was charged before the learned Ag Resident Magistrate, Thika on two counts, namely: count 1 – grievous harm contrary to section 234 of the Penal Code; and assault on a female contrary to section 144(1) of the Penal Code. He denied the offence but after trial he was convicted on both counts and sentenced to serve 5 years imprisonment – count 1 and 3 years imprisonment with hard labour in – count 2 the sentences were to run concurrently. His appeal to this Court is against both conviction and sentence.

Briefly the prosecution case was that both the complainant and the appellant were all primary school teachers both they were at materials time stationed in different schools. On the evening of the 1st November, 1990 at about 3 pm the complainant testified that she went to visit a fellow teacher, Julia Wanjiku Mungai (PW2) who was staying some room away from the house on the same plot. They later took supper together at the house of PW2, with one Margaret Muthoni Mwangi who also stays in the same plot. Both PW1 and PW2 later left for house of PW2 for their respective houses at about 11 pm. While PW1 was heading to her room she was called by Pauline Mwikali (PW2) to her room she also stays in the same plot. On entrance to house of Pauline, the complainant found her with the appellant and the appellant's brother Munizi Mwau (PW1) who was a boyfriend for Pauline. The three were drinking some beer and they invited the complainant to join them for drink. According to her testimony she declined to have any drink but according to the evidence of the defence witness she took drinks with them. Whether or not the complainant took any drink in that house is not all that material but it is plain from the evidence that while she was there the appellant started manly approaches to her to be his girl-friend. The complainant then left for her room and the appellant followed her. The appellant made attempts to have sexual intercourse with her but when it became clear to him that the complainant was not willing to have sex with him he forcefully grabbed her and pulled her into her bedroom and started to forcefully remove her dress, skirt knickers amidst her screams. The said cloths got torn in the process. Her torn clothes were produced before the Court during the trial. In the course of the struggle as she resisted sexual intercourse with the appellant he started beating her with his fist all over the body and on the mouth knocking off her two upper teeth (Exh 2). During the incident, her lights were on inside the house.

Julia (PW2) and Margaret (PW3) heard the screams of the complainant in the house. They went to the house where they found the appellant beating her. They pleaded with him to leave her but he continued beating her. PW3 went to call the appellant's brother (DW1) who also lives in the same plot with his girl friend (DW2) and he came and also pleaded with the appellant to leave the complainant. He then left the room and went away locking the gate to the compound from outside.

Both PW2 and PW3 testified that they saw the complainant bleeding profusely from her mouth and that the teeth had been knocked off were lying on the floor. They saw her torn clothes and she told them that the appellant wanted to have sexual intercourse with her by force. On the following day the complainant went reported the incident to PC Richard Kimeu (PW4) of Kandara Police and handed over to him two teeth that had been knocked off together with her underwear sweater and skirt she was issued with a P3 form and later examined by Lucy Mugi Musendo (PW5) who is a clinical officer. She found the complainant with a broken bruised upper lip swollen face, two missing upper tooth site marks on her left cheek and bruise on the right cheek and neck. She assessed the degree of her injury as grievous harm and completed the P3 form (Exh 3). The appellant was later arrested and charged.

The defence of the appellant was that the complainant was his girl friend who had given him a date for a visit to her house. On the material day he testified that they first took drinks with his brother (DW1) and his girl-friend (DW2) before he and the complainant proceeded to his house. There a quarrel erupted between them as the complainant alleged that he had affair with another lady known as Easther Wanjiku Mwangi. The complainant then threatened him and in the course of the struggle she fell

on the edge of the bed and got injured.

The learned trial magistrate in a well set out judgment carefully considered the evidence adduced before her by the various prosecution witnesses together with the appellant and his witnesses. She found as a fact that on the material night the complainant was in the house of Julia (PW2) together with Margaret (PW3) as from 9 pm and that the ladies later took supper together and stayed there upto 11 pm while they were in the house of PW2, the appellant was also in the house of Pauline Mwikali (DW2) who also resides in the same plot with the appellant's brother. They were taking some drinks in the house of Pauline. It was while the complainant was leaving for her house from the house of Julia that Pauline called her to her room. Later to appellant who was then already drunk followed her to her room to demand sexual intercourse with her. She resisted and the appellant unsuccessfully tried to overpower her amidst her screams. In the course of the struggle the appellant tore up her clothes and hit her on several parts of her body and even removed two of her upper teeth.

The appellant does not deny that he wanted to have sexual intercourse with the complainant in that house on the material night. He claims that she was his girl-friend. But this can't be true in view of the physical injuries that were inflicted upon her. The same is further not supported by the evidence of the complainant who for the better part of the night was staying in the house of Julia (PW2) till 11 pm while the appellant who claims to have been the boy-friend was drinking in the nearby room occupied by one of the tenants (DW2). I find as a fact that it was proved on the evidence that the complainant was not a girl-friend of the appellant and the injuries which she sustained on the material night were inflicted upon her by the appellant in an attempt to force her to subject to sexual intercourse with him. This is well supported by the fact that the complainant's knickers, skirt and sweater – all produced in evidence were torn during the incident. If the appellant was a boy-friend to the complainant as he would want the Court to believe that there could have been no need for him to tear off her clothes even if they had disagreed. The facts that these clothes were torn while the appellant was beating the complainant in her own house supports her evidence that he then wanted to have carnal knowledge of her.

Although the appellant complains that his defence was not considered by the learnt trial magistrate, I am satisfied that such evidence was duly considered and highly disbelieved.

Upon my own consideration and evaluation of the recorded evidence, I am satisfied that the conviction of the appellant in respect of the two charges

that were laid against him was proved beyond all reasonable doubts on sound and reliable evidence. I see no merit in his appeal against conviction which I hereby dismiss.

On sentence I think that the sentence of 5 years imprisonment that was imposed on the appellant in respect of count 1 was quite substantial although not undoubtful. I will interfere with the sentence in count 1. I reduce to 3 years imprisonment. I confirm the sentence imposed in count 2. The sentences to run concurrently.

Dated and Delivered at Nairobi this 18th day of January 1994.

S.O.OGUK

JUDGE