



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: KWACH, TUNOI & SHAH, JJ.A.)**

**CRIMINAL APPEAL NO. 5 OF 1996**

**BETWEEN**

**PETER KIHARA MOOKO.....APPELLANT**

**JOHN THIONGO CHEGE.....APPELLANT**

**SAMWEL KIRIA WAINOGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal from judgment of the High Court of Kenya at Nakuru (Mr. Justice D. M. Rimita) dated 24<sup>th</sup> March, ,

IN

H.C.CR.A. NO. 265 OF 1994)

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**JUDGMENT OF THE COURT**

The three appellants, Peter Mooko (Mooko), Samwel Wainoga (Wainoga) and John Chege (Chege) were convicted by the Senior Resident Magistrate, Nakuru, on 20<sup>th</sup> June, 1994, on one count of rape contrary to section 140 of the Penal Code. The charge against them alleged that on 20<sup>th</sup> August, 1993 at about 6.30 p.m. at Lare Scheme, Njoro, in Nakuru District of the Rift Valley Province they jointly had unlawful carnal knowledge of Alice Wairimu (the complainant) without her consent. They were each sentenced to 7 years' imprisonment with hard labour and 12 strokes of the cane.

The appellants has also faced an alternative charge of indecent assault and stealing but they were acquitted of theses charges. The appellants appealed to the superior court against conviction and sentences but their appeals were dismissed. They have now brought this second appeal to the Court. We deal first with the Mooko's appeal. He has strenuously denied having been involved in the commission of the offence. This was no doubt a distressing case of gang rape. The complainant's evidence, which was accepted by the trial magistrate and the Judge, was that Mooko was the first to have sexual intercourse with her while she was held on the ground by Wainoga and Chege. She told the court that at the time of the attack it was not dark and she was able to see her assailants clearly and identify them by their manner

of dress and physical appearance. She had never met her attackers before and had not consented to sexual intercourse with any of them.

Mooko was also identified by John Mwangi (P.W.4) who was in the company of the complainant when she was attacked. Mwangi was punched by the attackers and his bicycle taken from him. According to him Mooko held the complainant and he pleaded with them not to go with her. As he was running away he looked back and saw Mooko mounting the complainant as she was being held on the ground by the other two.

Mooko was examined by Dr. Sinoya Nyikuri (P.W.2) on 6<sup>th</sup> September, 1993. He found no wounds or laceration on his penis. There was no venereal infection or bacterial growth. He was of the opinion that Mooko had had sexual contact although there was no bacteria in the urethra.

Mooko made a statement under caution to Chief Inspector Phillip Chemiron of Njoro Police Station on 23<sup>rd</sup> August, 1993, in which he admitted having had sexual intercourse with the complainant but with her consent. He said that when he had finished having sex with the complainant, he was attacked by his two partners and he ran away, leaving them raping the complainant. Although he repudiated this confession, it was admitted after a trial within a trial. We have no doubt at all that what Mooko said in the statement regarding his own participation in the crime was true. As the confession was repudiated, we have to look for corroborative evidence for it. That corroboration is to be found in the evidence of Dr. Nyikuri (P.W.2), the complainant and the John Mwangi (P.W.4). The evidence against Mooko is conclusive and we are satisfied that he was properly convicted. His appeal accordingly fails and is dismissed.

We now proceed to consider the appeal by Chege. Like Mooko, Chege also denied any involvement in the attack and claimed to have seen the complainant for the first time in court. The complainant said Chege held her by the throat and was the one who was caught still having sex with her when John Mwangi returned to the scene a little later to rescue her. On seeing John Mwangi, Chege started pulling the complainant by her breast telling her she would go wherever he went. He then produced a panga and threatened to kill Mwangi. He tried to cut Mwangi with the panga but lost grip and Mwangi picked up the panga, threw it at Chege and cut his right arm and the back of his head. He fled. He was subsequently found by the magistrate to have scars at these particular points. When Chege escaped from the scene he left behind his trouser which was recovered at the scene and identified as belonging to Chege by John Tuwei Chebii (P.W.5), a Kanu youth winger.

Apart from the evidence of identification by the complainant and John Mwangi, the veracity of which cannot be doubted, there is also the evidence of Dr. Nyikuri. He found traces of cocci and pus cells on Chege's penis and established that he had had sexual intercourse. When the complainant was examined she was found to have been infected with STD. Since no traces of STD were found on Mooko and Wainoga but only on Chege and the complainant, the only logical inference is that the complainant contracted the infection from Chege. If the complainant was the carrier then all the three appellants would, in the ordinary course of events, have been infected, having also had sex with the complainant. The evidence against Chege notwithstanding his protestations, is watertight. He was left carrying the can as it were. His appeal accordingly fails and is dismissed.

With regard to Wainoga, there is really no evidence to connect him with the attack on the complainant. The complainant claimed to have identified Wainoga at the police station, but as no identification parade was held at all, no reliance can be placed on this aspect of the complainant's evidence. Wainoga gave evidence on oath and set up alibi. He was not cross-examined and his alibi was not therefore dislodged. His denial of any involvement in the attack on the complainant must be accepted. It may well be that he took part but we cannot be certain, and that is what the benefit of doubt is all about. We accordingly allow his appeal, quash his conviction, set aside the sentence and order his immediate release unless he is otherwise lawfully held.

Dated at Nakuru this 1<sup>st</sup> day of March, 1996.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL