IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 9 OF 2015

BETWEEN

ELIJAH KAIGWA NYAMBURA……...…… APPELLANT

AND

REPUBLIC ….....RESPONDENT

*(Being an appeal from conviction and sentence of the High Court of Kenya at Nairobi (**Ogola & Kamau, JJ**.) dated 18th December, 2013*

in

H.C. Cr. A. NO. 335 OF 2009)

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JUDGMENT OF THE COURT

The appellant was convicted by **Senior Principal Magistrate, Kiambu** of one count of robbery with violence contrary to **section 296(2)** of the **Penal Code** and one count of **rape** contrary to **section 3(1) (a)** of **Sexual offences Act**. He was sentenced to death in respect of the first count of robbery with violence and the sentence in respect of the offence of rape was left in abeyance. His appeal to the High Court against conviction and sentence was dismissed hence this second appeal.

On 19th April 2009 at about 1.00 p.m. **M W W** (**complainant**), a High School student aged 19 years travelled from Dagorreti Corner in Nairobi to Githurai 44 to visit her brother who lived at a place called Ngorongo. She was carrying a bag containing her clothes and had Shs. 1500 in her pockets.

After alighting from a vehicle at Githurai 44 stage, she walked for a short distance along a foot path in the bush when she realized that she was lost. Previously, she had gone to her brother's house in the company of her brother once before. Thereupon, the appellant appeared and asked the complainant whether she was lost. She explained where she was going and the appellant said he was going to Ngorongo and asked her to follow him. The appellant walked ahead while the complainant followed him. As they were walking along a footpath in the bush, she realized the appellant was cheating her and told the appellant so. Thereupon, appellant removed a knife, strangled her and pulled her to the bush while demanding money. The appellant tried to run away but the appellant pulled her, threw her down, removed the money and raped her. Thereafter, the appellant left the complainant into the bush and ran away.

As the complainant was walking away she saw three girls to whom she reported the incident. The three girls showed her the route to Ngorongo. On arrival at her brother's home she reported the incident to her brother – **E K K** ***(*****PW2**) (**Elijah**). The complainant and her brother reported to

CPL. Julius Isoe (**PW7**) at Njathaine Police station on the same day. The complainant was referred to Nairobi Women's hospital.

On the same day, (19th April 2009) at about 6.00 p.m., **P K G** (**PW3**) (**Patrick**) met the appellant along a street at Ngorongo. The appellant offered to buy a beer for him and others in his company. While in the bar the appellant boasted that he was lucky because he had raped and robbed a girl. On the following day Patrick went to the quarry where the appellant and others including the complainant's brother used to work. At the quarry, Patrick recounted what the appellant had told them on the previous night at the bar within the earshot of the complainant's brother. The complainant's brother reported to police again. On 25th April, 2009, the complainant's brother saw the appellant whom he knew before and called the police who arrested the appellant. On 28th April 2009 **IP Peter Nzioka** of Kiamumbi Police Station conducted an identification parade to which the complainant identified the appellant.

The appellant in his unsworn statement on defence stated that he was arrested for an offence that he knew nothing about, that he used to work at the quarry with complainant's brother and Patrick and that they had disagreed at the quarry.

The trial magistrate made a finding that the complainant properly identified the appellant and that the evidence of identification was corroborated by the evidence of E K K and P K; that the complainant was robbed and raped by the appellant and that the defence of the appellant was a mere afterthought.

In his appeal to the High Court, the appellant faulted the trial magistrate, amongst other things, mainly for relying on the evidence of a single indentifying witness, failing to give the appellant witness statements; failing to allow the re-call of witnesses for further cross-examination and for dismissing his plausible defence.

At the hearing of the appeal in the High Court, **Ngalukya** the learned State Counsel stated:

> ***"I will not be opposing the appeal. There is doubt whether the appellant was given a fair trial. Defence page 12 and proceedings. The appellant had requested to re-call PW1, PW2 and PW3. The appellant was not given an opportunity to cross-examine PW3. Except for the above, the evidence adduced was sufficient to sustain a conviction. I urge the court to consider if a retrial can be ordered. I believe the witnesses are still available."***

The High Court first dealt with the issue of witness statements and re-call of witnesses for further cross examination at length thus:

> ***"……. We have looked at the proceedings of trial court. On 15th May 2009 when the hearing began the appellant was given opportunity to cross-examine PW1 which the appellant did at length. The appellant also cross-examined PW2. However, for PW3 the appellant was given a chance to cross-examine him, but the appellant stated that he did not have any questions for the witness. This was the same position with PW4. On 12th June 2009 the appellant applied to the court for statements of the witnesses. He also applied to recall PW1, PW2 and PW3 for further cross-examination. No reasons were provided by the appellant for this request. The application was opposed by the prosecution who submitted that the accused had been given ample time to cross-examine the witness, and that the present application was a delaying tactic. The trial magistrate upheld this submission and stated that the appellant had sufficient time to cross-examine the witnesses. His application to recall PW1, PW2 and PW3 was rejected, and the State now things that there could have been a miscarriage of justice.***
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> ***In our considered view, however, there was no such miscarriage of justice. The trial court was***

right to dismiss the application to recall the said witnesses. Firstly, the appellant did not lay any ground for the said application. No reasons were given why the application was necessary or why the previous cross-examination was inadequate. We are satisfied, that the appellant was given ample time to cross-examine the said witnesses which he did for PW1 and PW2. For PW3 the appellant stated he had no questions for the witness. The dismissal of his application to recall theses witnesses was not a miscarriage of justice. The application was not grounded on any reasons or justifiable facts, or on a desire to clarify any previous issues. It was an application which any prudent court could not grant."

The High Court nevertheless considered the merits of that ground of appeal and made a finding that there was no miscarriage of justice.

The High Court further evaluated the entire evidence and concluded that appellant's guilt was proved beyond any reasonable doubt.

There are two main grounds of appeal. Firstly, the appellant states that the appellate judges erred in law when they relied on the evidence of visual identification by a single witness which was not free from error. Secondly, the appellant faults the first appellate court for failing to appreciate that his constitutional right to fair trial was violated by failure to provide him with witness statements and also by rejecting his application for re-call of witnesses for cross-examination.

As regards the evidence of identification, **Mr. Githinji Thiongo,** learned counsel for the appellant submitted, amongst other things, that the description of the appellant by complainant was not sufficient; that complainant did not identify the appellant at the time of arrest; that it is the complainant's brother who identified the appellant; that the identification of the appellant at the identification parade was not sufficient and that the appellant's defence that complainant consented to sexual intercourse was plausible.

Ms. Murungi, the learned counsel the respondent opposed the appeal and submitted, amongst other things, that the appellant was positively identified by the complainant.

In this case, the two courts below made a finding that the complainant was robbed and raped on the material day.

The two courts below also made a finding that the offences were committed at about 1.00 p.m., in broad daylight and that the complainant and the appellant were together for about 30 minutes and that complainant positively identified him at the scene and later at the identification parade.

The two courts below believed the evidence of Patrick that the appellant on the same day revealed to him and others in the bar that he had robbed and raped a girl.

Lastly, the two courts considered the fact that the appellant in cross examining the complainant, put forward the defence that the complainant consented to the sexual intercourse. Although the appellant did not ultimately raise such a defence in his unsworn statement, the correctness of the record of the trial has not been impugned. The inference drawn by the two courts below is only faulted in ground 3 of the supplementary memorandum of appeal on the ground that the courts ignored the fact that such cross-examination created doubt on whether consent was granted. Indeed, the appellant's counsel submitted before us that the defence of consent was a plausible explanation and that the courts below erred in finding that there was no consent, thereby affirming the appellant's case as put to the complainant at the trial that she consented to the sexual intercourse. The complainant denied at the trial the assertions of facts put to her by the appellant that she consented to sexual intercourse and the two courts believed her evidence.

On consideration of the evidence, we are satisfied that the concurrent findings of fact were supported by ample evidence and the appeal on that ground has no merit.

As regards the violation of the appellant's rights to fair trial, the High Court has correctly stated the

record of the trial. It is true that after four crucial witnesses had given evidence, the appellant applied for statements and the re-call of three of the four witnesses for further cross-examination. The application was opposed by the prosecution on the ground that the application was a delaying tactic. The court rejected the application.

Firstly, in 2009 when the trial was conducted, the repealed 1963 Constitution did not provide for provision of witness statements to an accused person in a criminal trial. Similarly, the Criminal Procedure Code (**CPC**) does not have such a provision. The **Constitution of Kenya 2010**, now provides in **Article 50(2) (j)** that an accused person has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

However, the courts have always, by virtue of section 153 of the Evidence Act afforded an accused person access to witness statement at the trial on request and a right to cross examine witness on their statements.

Secondly, the CPC has no specific provision granting an accused person a right for re-call and re-cross examination of witnesses. Section 150 of CPC which appellant claims was breached provides:

> ***"A court may at any stage of trial or other proceedings under this code, summon or recall any person as a witness or examine any person in attendance though not summonsed as a witness, or recall and examine a person already examined and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to a just decision of the case.***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witnesses."***

It is plain that the section read together with the proviso gives a trial court exclusively, and, acting on its own motion, a discretion to do all those things mentioned in the section, if it appears to it essential to the just decision of the case. The section does not however preclude the court from exercising the powers conferred on it on an application by an accused person.

It follows from the foregoing that at the time the trial was held, the appellant could only be provided with witness statements or be allowed to re-call and re-examine the witnesses at the discretion of the court and not as a matter of right.

The application for statements and for re-call and further cross-examination of witnesses was made nearly one and half months after the plea and nearly a month after the witnesses had testified.

This is not a case where the appellant was denied a chance to cross-examine witnesses. Rather, it is a case where the appellant fully participated in the trial, cross-examined the two crucial witnesses and given an opportunity, elected not to cross-examine the two other witnesses. After the trial resumed, he cross-examined the four other witnesses called by the prosecution.

The High Court reviewed the exercise of discretion by the trial court and made a finding that the appellant's application was not grounded on any reasons or justifiable facts or on any desire to clarify any issues and that there was no miscarriage of justice. In the circumstances of this case, we are satisfied that the High Court reached the correct decision.

Even assuming that the trial court did not exercise its direction judicially and committed an error or irregularity in the trial, by virtue of Section 382 of the CPC, the conviction could not be reversed or altered by the High Court on an account of such error or irregularity unless it had occasioned a failure of justice. The High Court was satisfied that the dismissal of the application did not occasion any failure of

justice.

Our consideration of the point should be guided by section 361(5) of the CPC, which provides:

> ***"On any appeal brought under this section, the Court of Appeal may, notwithstanding that it may be of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred."***

Had we found that the High Court made an erroneous finding in respect of the application for statements and re-call of witnesses for cross-examination, we would have, nevertheless, dismissed the appeal on that point as we are satisfied that no substantial miscarriage of justice was occasioned to the appellant.

For the foregoing reasons, the appeal has no merit. Accordingly, the appeal is dismissed.

This judgment is delivered in accordance with rule 32(2) of this Court's Rules, **Kantai JA** having declined to sign.

Dated and delivered at Nairobi this 29th day of July, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR