IN THE COURT OF APPEAL

AT KISUMU

CRIMINAL APPEAL NO. 516 OF 2010

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

BETWEEN

NELSON MAGOMERE AMBETSA ….....….... APPELLANT

AND

REPUBLIC ...…….....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu (Aroni, J.) dated 3rd December, 2010

in

H.C.CR. A. NO. 129 OF 2006 (O.S))

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JUDGMENT OF THE COURT

1. This is a second appeal from the original conviction and sentence of the appellant in the Chief Magistrate's Court at Kisumu, Criminal Case No. 474 of 2007, where the appellant faced two counts. The first one was of rape contrary to ***section 3 (1) (a)*** and ***(b)*** as read with ***section 3 (3)*** of the ***Sexual Offences Act*** and the second one was causing grievous harm contrary to **section 234** of the **Penal Code.** The offences were committed on 3rd September, 2007 against **J D,** the complainant.

2. The appellant was convicted on both counts and sentenced to 15 years' imprisonment on the first count and 3 years' imprisonment on the second one but the sentences were to run concurrently.The first appeal to the High Court was unsuccessful. As a matter of fact the High Court, (Ali-Aroni, J.) found the sentence that had been passed by the trial court was very lenient and without any cross appeal or notice of enhancement of sentence having been served upon the appellant, the High Court enhanced the sentence to life imprisonment.

3. Being dissatisfied with the decision rendered by the High Court, the appellant preferred a second and final appeal to this Court. ***Section 361*** of the ***Criminal Procedure Code*** enjoins this Court on a second appeal to consider only issues of law. Ordinarily, the court will not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on a perversion of the evidence, or if no court would reasonably have come to the conclusion the lower courts did, if it followed the evidence on record. See **M'RIUNGU V**

REPUBLIC [1983] KLR 455.

4. According to the evidence on record, and which was accepted by the two courts below, on the material day at around 9.00p.m., the complainant was walking to nearby shops when she met the appellant, who was known to her as he was a close neighbour. The appellant dragged the complainant into his house, assaulted her and proceeded to rape her. He forcibly detained her there until about 3.00 a.m. when she screamed and neighbours went to her rescue.

5. Neighbours broke into the appellant's house and found the complainant naked on the floor. She had visible injuries on her body. They took her to hospital and having apprehended the appellant, escorted him to a police station.
6. The complainant was medically examined at Nyanza Provincial Hospital and it was established that there was blood in her vaginal canal. She also had various injuries on her body which were recorded in the P3 form that was produced as an exhibit.

7. In his brief defence, the appellant simply denied the charges preferred against him.

8. In his self-drawn memorandum of appeal, the appellant stated that the conviction was against the weight of evidence. He also faulted the learned judge for enhancing the sentence that had been handed down by the trial court.

9. Before this Court, the appellant submitted that there was no evidence that he had inflicted any grievous harm to the complainant. He however said nothing about his conviction and sentence on the charge of rape.

Regarding sentence, the appellant submitted that the High Court erred in law in enhancing the same.

10. **Mr. Ogoti,** Senior Assistant Deputy Public Prosecutor, submitted that there was overwhelming evidence to warrant conviction of the appellant on the two counts. He however did not support enhancement of the sentence, saying that no notice to that effect had been given to the appellant.

11. On our part, having carefully examined the entire record of appeal, we do not entertain any doubt that the appellant was properly convicted on the two counts.Although the complainant was accosted by the appellant at about 9.00p.m. and the evidence is silent as to whether there was any light or not, the complainant knew the appellant. He spoke to her and she must have recognised his voice. When they got into his house he lit a lamp and she must therefore have seen his face. Besides, the two were together for nearly six hours. There was no possibility of mistaken identification, it was indeed recognition of a known person which is more reasuring than identification of a stranger. See **ANJONONI V REPUBLIC [1980] KLR 59.**

12. When the complainant's neighbours heard her screaming and rushed to her rescue, the appellant did not run away. He was found in the house together with the complainant who was stark naked. She had human bite marks on her lips and left cheek and bruises on her face. Her left radius bone was also fractured. There was also evidence that pointed to sexual assault. All the above taken together reveal that it was the appellant who raped the complainant and occassioned her grievous bodily harm. His conviction on the two counts was therefore justified in law.

13. Regarding enhancement of sentence, the appellant was not given an opportunity of being heard before the order was made as required under ***section 364 (2)*** of the ***Criminal Procedure Code.*** We therefore agree with both the appellant and the respondent that in view of the aforesaid omission, the first appellate court erred in enhancing the sentence that was passed by the trial court.

14. For the reasons as stated above, the appeal against conviction is dismissed, but the appeal against enhancement of sentence is allowed with the result that the appellant shall continue to serve the

15 years' imprisonment as ordered by the trial court.

DATED and delivered at Kisumu this 6th day of November, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR