IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI, PCA, M'IN OTI & MURGOR, JJ.A.

CRIMINAL APPEAL NO. 542 OF 2010

BETWEEN

FRANCIS PINYA ……. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Nairobi (Khaminwa & Warsame, JJ) dated 9th July, 2010 in

H.C.CR.A. NO. 701 OF 2006

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JUDGMENT OF THE COURT

The appellant, *FRANCIS PINYA*, was charged before the Chief Magistrate's Court, Kibera, jointly with *Patrick Wanjala Opicho* and *Robert Ndirangu*, with robbery with violence contrary to *section 296(2) of the Penal Code*. The particulars of the offence were that on 21st February, 2005 at Uthiru, Nairobi, they jointly with another not before the court, robbed *S O* (PW1) of a Nokia Mobile Phone and KShs.980/- all valued at KShs.6,980/- and at or immediately before or immediately after the time of the said robbery used personal violence on her.

The three also faced a second count of rape contrary to *section 140 of the Penal Code*, whose particulars were that on the same date and at the same place as relates to the first count, jointly with another not before the court, they unlawfully had carnal knowledge of S O without her consent. An alternative count charged them with jointly and indecently assaulting the said S O by touching her private parts, namely her vagina, on 25th February, 2005 at Uthiru, Nairobi.

The basic facts of this appeal are that on 21st February, 2005 at about 5 am, PW1 was walking home after working the night shift at her place of work. Shortly she was accosted by four men, among them the appellant, who were armed with a pistol, knives and clubs. They proceeded to rob her of the property specified in the charge sheet and raped her in turns. Whilst the others used condoms, the appellant did not and merely wipe himself with a handkerchief after the act of rape. To avert further harm to her, PW1 acted friendly towards her assailants, pretended that she was single, and gave them a number on which to call her, should they wish to meet her in future. The number she gave was her husband's and it was the appellant who saved the same in his phone.

Upon getting home, she informed her husband of the ordeal and reported the matter at Kabete Police Station at 7.00 am. On her way to the police station, she passed by the scene of the rape and recovered the handkerchief with which the appellant had wiped himself. She handed the same together with her underpants to the police.

The next day, the appellant fell for the ruse and called PW1 on her husband's telephone. He requested to meet her at Uthiru bus stage later in the day. The police were notified of the planned meeting for purposes of laying an ambush. At the agreed venue, PW1 saw the appellant retrieve his phone and dial a number. Her phone immediately rang but the appellant disconnected the call. She walked up to him and started talking with him. Shortly thereafter, the police arrived and arrested the appellant, who subsequently gave information leading to the arrest of his co-accused.

The prosecution called seven witnesses, who included PW1 and an analyst from the Government chemist, while the accused persons gave unsworn statements and called no witnesses. On 21st November, 2006, the trial magistrate convicted the accused persons as charged and on 24th November, 2006, sentenced each of them to death for the count of robbery with violence and ten [10] years imprisonment for the count on rape.

Aggrieved by the decision, the three appealed to the High Court challenging the convictions and sentences. Their appeals were consolidated and on 9th July, 2010, the High Court allowed the appeals by the 2nd and 3rd accused on the grounds that they had not been properly identified and set them free. The court, however, confirmed the conviction and sentence of the appellant.

Aggrieved further by the decision of the High Court (Khaminwa, J and Warsame, J, as he then was), the appellant preferred the present appeal in which he put forth seven grounds of appeal. At the hearing of the appeal however, Mr Ogesa Onalo, learned counsel for the appellant, abandoned all the grounds of appeal, save the following two:

> *1. The first appellate court erred in law by failing to analyse and re-evaluate the evidence and draw their own conclusion as duty bound to do and as a result it failed to observe that:*
>
> > *(a) the initial report to the police made by PW1 related to rape, not robbery;*
> >
> > *(b) the blood test evidence was inadmissible because the analyst did not give the specific blood group that would have linked the appellant to the commission of the offences.*
>
> *2. The two courts below erred in law by failing to adequately* ***consider the appellant?s defence which was cogen****t and plausible enough to displace the prosecution case.*

On the first ground of appeal, Mr Onalo did not address the complaint regarding the initial report to the police, focusing instead on whether the High Court had properly re-evaluated the evidence as relates to circumstantial evidence and the appellant's blood group. He submitted that had the High Court properly re- evaluated the evidence upon which the appellant was convicted, it would have found that the same was circumstantial evidence of the weakest kind; not cogent and credible enough to form the basis of an irresistible inference that the offences were committed by the appellant to the exclusion of any other person. Counsel argued that the link between the appellant and the offences was the telephone call that the appellant had made to PW1. He contended that there was no evidence that the call in question had been made by the appellant because the records of the calls made from his phone were never produced. Counsel further argued that the appellant's phone number was not disclosed and that his phone was not produced as an exhibit.

On the blood test evidence, counsel submitted that PW4, Albert Kathuri Mwaniki, the government analyst had testified that the appellant's blood group was ***„O?*** without indicating whether it was *O-Positive* or *O-Negative.* In counsel's view, that meant that PW1 could have been raped by a person with blood group O- Positive or O-Negative.

Mr Onalo further argues that the handkerchief in question had not been linked to the appellant and that the condoms which had been allegedly used by his co accused had not been recovered or tested. Counsel attacked the evidence of PW1 as lacking credibility because when she was examined on 1st March, 2005, no vaginal injuries were noted.

Lastly, Mr Onalo submitted that the trial court and the first appellate court had failed to consider at all or adequately the appellant's defence as they were duty bound to do. In counsel's view, the courts below considered the prosecution case without paying equal regard to the appellant's defence. To that extent, therefore, counsel submitted, the evaluation of the evidence amounted to an error of law.

On her part, Ms Jacinta Nyamosi, the Assistant Director of Public Prosecutions opposed the appeal, submitting that there was sufficient circumstantial evidence to connect the appellant to the offences. She contended that the appellant had earlier on spoken to PW1 on the phone to set up the *"date"* where he was arrested and that at the agreed venue, PW1 had seen the appellant dialling on his phone after which her phone had rang. In counsel's view, it was not necessary to produce the records of use of the appellant's phone, as the evidence in its totality firmly connected the appellant to the offence.

Counsel submitted that the evidence of the government analyst (PW4) collected from PW1's underpants, the handkerchief and the blood and saliva samples collected from the appellant firmly and conclusively linked the appellant to the offence and when taken together with the evidence of the phone call, rendered the conviction safe. Counsel concluded by submitting that it was not unusual that vaginal injuries were not noted on the appellant since she was examined more than one week after the rape. On the adequacy of the evaluation of the defence, counsel contended that the evaluation was adequate and that when the defence was considered in light of the evidence adduced by the prosecution, there was no basis for interfering with the conviction and the sentence.

We would agree with the appellant that if the only evidence produced by the prosecution was evidence of the phone call, an irresistible inference that the appellant was guilty of the offences charged could not have been validly made. In *ABANGA ALIAS ONYANGO VS REPUBLIC*, *Criminal Appeal No 32 of 1990 (unreported)* this Court stated as follows regarding circumstantial evidence:

> ***"It is settled law that when a case rests entirely on*** *circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the* ***crime was committed by the accused and none else."***

(See also *R. VS KIPKERING ARAP KOSKE & ANOTHER*, *(1949) EACA 135).*

We find that the High Court was alive to its duty as the first appellate court to re-evaluate the evidence afresh in order to determine whether the appellant was properly convicted. The court expressly referred to this responsibility at page 4 of the judgment before proceeding to analyse the evidence in detail. At page 10 of the judgment the High Court noted that the evidence against the appellant was circumstantial and that is such a situation, the inference of guilt could only be drawn where the facts said to incriminate the accused were incapable of any other rational explanation except the guilt of the accused and were wholly inconsistent with his innocence.

We are satisfied that the appellant was properly convicted on the basis of the circumstantial evidence that was adduced. PW1 testified that the appellant had called her on her husband's cell phone number, the same number that she had given her assailants. The appellant told her that he wished to meet her again because he had found her, in her words *"very sweet"* during the rape encounter. This is the same assailant that PW1 testified had raped her without the use of a condom. At the agreed venue, she saw the appellant dial on his phone and immediately her husband's phone rang. He disconnected the call as she was about to answer. She then walked over to him and they started talking before the appellant was ultimately arrested.

The evidence of the government analyst (PW4) corroborated that of PW1 in material particulars. His evidence was that he had examined PW1's underpants, the handkerchief that the appellant was said to have used to wipe himself after the rape and samples of the appellant's saliva and blood. After analysis, he found that PW1's underpants and the handkerchief were stained with semen of group ***"O"*** secreta and degenerated spermatozoa. In addition, he found the appellant's saliva and blood to be of group ***"O".*** He formed the opinion that PW1 had taken part in sexual activity with a group ***"O"*** person who could be the appellant. In our view, cumulatively the evidence adduced points unerringly towards the guilt of the accused and there is no escape from the conclusion that the crime was committed by the appellant.

We are unable to fault the evidence of PW4 relating to his finding that the appellant's blood group was ***"O"*** rather than ***"O-Positive"*** or ***"O-Negative"***. As *Richard Leofric Jackson* points out in *CROSS CRIMINAL INVESTIGATION, 5th Edition, 2010, Universal Law Publishing, New Delhi, Chapter 5*, once it is established in a criminal investigation that the blood in issue is from a human being, the normal practice is to assign it to one or other of the four *main* groups into which human blood is subdivided, namely A, B, AB and O. Depending on whether the Rhesus (Rh) protein is present or absent, the blood group is further classified into *Positive* or *Negative*. In our view, the further classification of these blood groups into ***"Positive"*** or ***"Negative"*** is more for purposes of blood donation and transfusion, and lack of classification of blood on the basis of its Rhesus character does not necessarily negate identification based on the four main blood groups. Depending on the facts of the case, identification of a suspect may be confirmed on the basis of the four main blood groups alone.

On the facts of this case, even without going into the *positive* or *negative* classifications of the blood, the evidence of the appellant's blood group, taken together with the other evidence adduced by the prosecution, in particular, the rape without use of a condom, the telephone call to the appellant on her husband's phone number (which she had given to her attackers), the discussion on the phone about PW1's *"sweetness"* during the rape, the handkerchief and the results it yielded upon analysis, as well PW4's conclusion that PW1 had been involved with sexual activity with a person of the blood group to which the appellant belonged, leaves no doubt in our minds that the appellant was properly convicted as charged.

Before we leave this issue, we would also like to refer to some pertinent observation by *Richard Leofric Jackson* in the work cited above regarding the specimens that were tested and analysed by PW4:

> ***"Dried semen is relatively indestructible and often can*** *be identified years afterwards if circumstances are suitable. Spermatozoa are also very resistant to bacterial decay. In the case of a dead woman, spermatozoa can be identified in the body for a very long time - in the Christie case they were found four - and-a-****half months after death."***

On the second ground of appeal, namely the failure by the first appellate court to re-consider and re-evaluate the appellant's defence, it is patently clear that the court did not directly address the appellant's defence. That defence was that on the day of his arrest, he was at Uthiru Junction when he met with PW1 whom he did not know. PW1 asked him for bus fare to work and he gave her KShs.50/-. Immediately thereafter he was arrested by the police.

The trial court considered this defence and found it unconvincing. The first appellate court, after considering all the evidence concluded as follows:

> ***"We think the evidence tendered by PW1, PW2, PW4*** *and PW5 is quite inconsistent with the innocence of the 1st appellant. The circumstantial evidence as given by PW1, PW2, PW4 and PW5 properly considered established a case against the 1st appellant with the degree of certainty which would justify a finding that the charge was proved beyond reasonable doubt and that the conviction was safe. On the basis of these two lines of evidence we are satisfied beyond reasonable doubt that the 1st appellant was indeed one of the four people who robbed and raped the complainant and there can be therefore no merit in his defence and appeal as alleged****…We think the prosecution proved*** *its case against the 1st appellant beyond reasonable doubt and that there is no misdirection or error committed by the trial court in convicting him.****"*** (Emphasis added).

We are satisfied that in the re-evaluation and reconsideration of the entire evidence, the first appellate court had the appellant's defence in mind which it found to be unbelievable, when considered against the rest of the evidence that was adduced.

We have ultimately come to the conclusion that the appellant's appeal is devoid of merit and the same is accordingly dismissed.

Dated and delivered at Nairobi this 14th day of March, 2014.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

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