



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK JJA)

CRIMINAL APPEAL NO. 655 of 2010

BETWEEN

PMK..... APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court at Nyeri (Kasango J.) dated 12th March 2009

in

H.C. CR. A. No. 26 of 2008)

JUDGMENT OF THE COURT

1. PMK was charged that on the 9th day of March 2006 in Nyeri District of the Central Province, he attempted to have carnal knowledge of JMK without her consent contrary to Section 141 of the Penal Code. He also faced an alternative Count I was that on the same day 9th March 2006, in Nyeri District of Central Province, he unlawfully and indecently assaulted JMK by pinning her on the ground and trying to remove her inner wear and touching her private parts contrary to Section 144 (1) of the Penal Code. Alternative Count II was that on the same day 9th March 2006 in Nyeri District of Central Province, he unlawfully assaulted JMK thereby occasioning her actual bodily harm. An alternative Count III was that on the same day and place, he unlawfully assaulted F.N.M hereby occasioning him actual bodily harm.
2. The trial magistrate convicted the appellant on Counts 1 and III and sentenced him to 10 years imprisonment on Count I and a further One year imprisonment on Count III. His appeal to the High Court was dismissed. The learned judge (Kasango J.) held that the lower court's conviction could not be faulted and there was no reason to fault the sentence meted out to the appellant. Aggrieved by the judgment, the appellant lodged an appeal to this Court.
3. In his appeal, the appellant contends that the learned judge erred in law in upholding the trial courts conviction while his fundamental rights under Section 72 (3) (b) of the Constitution had been violated. That the prosecution's case was composed of inconsistencies which could have been resolved in his favour; that crucial records were missing such as the nature of the plea

entered and all the elements and substances of the charge as read out. That the judge did not analyze the prosecution case which was a fabrication; and the burden of proof was shifted to the appellant. During the hearing, the appellant produced written submissions with amended grounds of appeal. In the amended grounds, the appellant contended that the learned judge erred in failing to take into account the defence raised and that identification of the appellant was not free from error.

4. At the hearing, the appellant appeared in person while the Assistant Deputy Director of Prosecution Mr. KAIGAI appeared for the state. The appellant opted to rely entirely on his written submissions. He contends that he was arrested on 9th March 2006 and taken to court on 16th March 2006 after six days in police custody. That he ought to have been taken before court within 24 hours of arrest and this violated his constitutional right under Section 72 (3) (b) and Section 77 of the old Constitution. He relied on the case of **Gerald Macharia – v- R Crim. Appeal No. 102 of 2004** where the learned judges stated that unexplained violation of a constitutional right under Section 72 (3) (b) will normally result in acquittal irrespective of the nature or strength of the evidence which may be adduced in support of the charge. (See also **Albanus Mwasia Mutua - v- R Crim. App. no. 120 of 2004**).
5. The appellant further contends that he did not get a fair and just trial in that the charges were neither read nor explained to him. That he was not given time to prepare and or examine the prosecution witnesses exhaustively. That the injuries sustained by PW 2 and PW 3 had no nexus with the case. That it was wrong for the prosecutor to term the appellant a serial offender in the absence of documentary proof. That the mode of service of the imposed sentences in Count I and III was not specified by the trial magistrate. That the evidence on identification was inadequate since the complainant PW 2 had not identified him as the perpetrator of the crime.
6. Learned counsel Mr. KAIGAI submitted that the case against the appellant was water-tight and was proved beyond reasonable doubt. That PW 2 testified that the appellant, who is her grandson, attempted to rape her. That there was no mistaken identity due to the recognition and the appellant was caught red-handed as he attempted to flee the locus in quo and scene of crime. That from the injuries sustained by PW 2 and PW 3, it was clear that some violence and assault was occasioned by the appellant against the complainants. That PW1, a clinical officer at Karatina District Hospital testified on the extent of injuries sustained by PW1 and PW3.
7. This is a second appeal, by dint of Section 361 of the Criminal Procedure Code, only points of law can be entertained. In the case of **Njoroge -v- R (1982) KLR 388**, this Court held that "on a second appeal, the Court is only concerned with points of law. On such an appeal, the Court is bound by concurrent findings of fact made by the lower courts unless these findings were not based on evidence."
8. The appellant contends that his constitutional rights to be brought before court within 24 hours were violated. This is not a novel point taken in appeal. There are many instances in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessarily entitle the suspect to an acquittal. (See **Domimic Mutie Mwalimu - v- R Crim. Appeal No. 217 of 2005**; and **Evanson K. Chege - v - R Crim. Appeal No. 722 of 2007**). This Court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In **Julius Kamau Mbugua – v- R Criminal Appeal No. 50 of 2008**, this Court stated that:

“a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police

***per se* is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.**

9. In **Julius Kamau Mbugua – v- R**, this Court upheld the proposition that even where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrated that he has suffered a trial related to warrant an acquittal. This ground of appeal has no merit.
10. The appellant contend that he did not have a fair trial as the charges were neither read nor explained to him; that the proceedings were not conducted in a language he understood. In the case of **Degow Dagane Nunow - v- R. Cr. Appeal No. 233 of 2005 (unreported)**, this Court said in part that:

“Of course, there is a right from the beginning of the trial that an interpreter be present in court; that is clearly shown in the record of the magistrate. What is not shown throughout the record is the language which the appellant or the witnesses addressed the magistrate. Section 198 (1) of the Criminal Procedure Code states that whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands”.
11. The case of **Francis Kimani Muthoko & Another - v- R Crim. Appeal No. 331 of 2006 (unreported)** is pertinent. In Francis case, the language chosen by the accused was recorded at the beginning of the trial when the plea was taken and interpreters were availed but the complaint raised was that the language was not shown in subsequent hearing sessions. This court stated:

“We are not persuaded that the complaint about language and interpretation has any merits. At the commencement of the entire proceedings when the plea was taken, it was clearly recorded that interpretation was English/Kiswahili. There was no suggestion at that time that the two appellants could not communicate in Kiswahili; they conducted their defence in person and throughout the record in the subordinate court, there was no suggestion that interpretation from English to Kiswahili and vice versa was a problem. Even before the superior court, that complaint was never raised.”
12. In the present case, we have perused the record of the trial court and observed that the plea was taken on 16th March 2006. On this day, the record shows that an interpreter was available in court and the proceedings were in Kikuyu/Kiswahili/English. On 26th June 2006, when the case came up for hearing the appellant indicated he was not ready to proceed with the hearing. The record shows that an interpreter was available and proceedings were in English/Kikuyu/Kiswahili. When the hearing started on 26th October 2006, the record shows that an interpreter was available and the proceedings were conducted in English/Kiswahili/Kikuyu.
13. The appellant cross-examined PW 1, PW 2, PW 3 and PW 4. At no time did the appellant raise the issue that the proceedings were conducted in a language that he did not understand. We have also examined the grounds of appeal filed in the High Court by the appellant. None of the grounds raise the issue that the proceeding was conducted in a language which the appellant did not understand. In the case before us, the record of the trial magistrate shows that there was an interpreter made available when the appellant took his plea and whenever resumed hearing took place. We are satisfied that the hearing was conducted in a language that was understood by the appellant and this ground of appeal has no merit and cannot succeed.
14. The appellant contends that there was no proper identification; the defence raised was not given due consideration and that the burden of proof was shifted to him. He contends that PW 2 did not

identify him. He submitted that whereas PW 2 testified that *“I told people who arrived that a naked man had attempted to rape me”*; later on, when PW 2 arrived at the scene she quickly assumed that it was the appellant who had attempted to rape her and she stated *“when they arrested you, I came and confirmed it was the man who attacked me and that is when I discovered it was you as there was light”*. That the court was not told the nature and intensity of the light.

15. In the case of **Mwita -v- R (2004) 2 KLR 60, 66**, this Court stated:

“It is trite that in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt. (See Simon Musoke -v- R 1958 EA 715).

16. In **Mwangi - v- R, (2004) 2 KLR 28**, the court said:

“It must be asked, why is the Court of Appeal looking at each circumstances separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”

17. Both the trial court and the learned judge found that the prosecution had identified the appellant as the perpetrator of the crime. The testimony of PW 2 is that the person who pinned her down and attempted to rape her was naked and did not have a shirt; this person ran away when she screamed. PW 3 testified that he met the man running away from PW 2’s main house; when asked to stop, the man refused and beat him up. People came and chased the man who when arrested, turned out to be the appellant who was without a shirt. These circumstances place the appellant at the locus in quo. The appellant's defence was that on the material date, while on his way home and very drunk, he met people who stopped him and ordered him to sit down; that he refused and they beat him up. He denied not having a shirt on him and said that he was wearing a T-shirt and a jacket. The judge evaluated the defence against the testimony of PW 2 and PW 3 and concluded as follows:

“PW 2 was attacked by a man not wearing a shirt at 8.30 pm. When she raised an alarm and PW 3 and others responded, the appellant was apprehended in that very state of undress. The police came and found him without a shirt. The prosecution's evidence on identity of the appellant cannot be faulted. They all described a man without a shirt. I am of the view that the prosecution proved the charges against the appellant beyond reasonable doubt. That evidence is more preferable to the appellant’s defence.”

18. This Court has stated many times before that it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or are based on a misapprehension of evidence or the courts below are shown demonstrably to have acted on wrong principles in making the findings (**See Chemagong – v- R (1984) KLR 611**). The appellant has not demonstrated that the two courts below acted on a misapprehension of evidence. We are satisfied that the learned judge considered and evaluated the defence put forward by the appellant and weighed it against the evidence of the complainants. The judge did not ask the appellant to explain or prove anything; the burden of proof was not shifted to the appellant. The inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis than his guilt. We find that the appellant was properly identified as the perpetrator of the crime.

19. The appellant contend that the learned judge did not analyze the evidence tendered. We have considered this ground. In the judgment, the learned judge stated:

“Since this is a first appeal, I will proceed to exhaustively consider the lower court's evidence. PW 2, 77 year old lady on 9th March 2006 at about 8.30 pm was in her kitchen eating when she heard

noise in the main house. She went to investigate and at first saw nothing. The noise continued at the back of the main house. She went to the back of the house only to find a naked man banging the house. She screamed and began to run to the neighbours house. The man caught up with her, pushed her to the ground, she continued to scream and he pulled down her pants. People begun coming and he panicked and ran. She got up and continued screaming and told the people who arrived that a naked man had attempted to rape her. They gave chase and caught up with him. She went to where the man had been detained and found he was still naked having on him, only trousers. She was then shocked to discover that the man was her grandson.”

20. In relation to the testimony of PW 3, the learned judge observed:

PW 3 heard screams of PW 2 who is her grandmother. As he rushed to her house, he met up with the appellant running. He did not have a shirt on him. He asked him to stop but he refused. He grabbed him and the appellant started beating him. As a result, he injured his hand and leg. Other villagers came and took him away from him.

21. From the above quotes, we are satisfied that the learned judge discharged the duties of the first appellate court in line with the decision in **Okeno-v- R (1972) EA 32** wherein it was stated that an appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination and to the appellate court's own decision on the evidence. The learned judge did not misdirect herself in the fresh evaluation of the evidence and we find no reason to interfere with the conclusions and findings.

22. The other ground of appeal is that the learned judge did not pronounce the mode of service for the sentences imposed. In Count I, the appellant was sentenced to imprisonment for a term of 10 years with a further One year for Count III. It is trite law that concurrent sentences should be awarded for offences committed in one criminal transaction. In the present case, Count I and Count III were all committed during the same criminal act. We hereby clarify that the sentences imposed on the appellant in Count I and Count III shall be served concurrently.

23. Except for the clarification on concurrent sentences, this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 29th day of May, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR