REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 231 OF 2008

JULIUS IRUNGU WANU…....……APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

(Appeal from a conviction and sentence of the High Court at Nyeri (Kasango, J.) dated 18th October, 2008

in

H.C. CR. A. 183 OF 2006)

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JUDGMENT OF THE COURT

The appellant ***Julius IrunguWanu*** was charged with offences of attempted murder and rape of the complainant ***MWM*** before Senior Principal Magistrate's Court at Murang'a. After trial the learned Magistrate convicted him on both counts and sentenced him to serve 20(twenty) years of imprisonment on each count and the sentence to run concurrently.

The appellant was aggrieved and filed an appeal before the High Court at Nyeri, were upheld. The appeal was dismissed and the conviction and the sentence. This second appeal thereafter was filed and the appellant has filed the following grounds of Appeal

1.That the 1st appellant court erred in points of law in upholding the trial record conviction ignoring section 72 (3) and (b) of the Constitution was breached (sic) before reasonably calculating that a space of more than six (6) clear days in absent of any reason given by the prosecution remains a total violation of the afore section of law.

2.That the 1st appellant court judge erred in points of law in upholding the trial court conviction without observing that the first doctor who did examine the complainant was summoned to corroborate the use of violence.

3.That the 1st appellant court judge erred in points of law in upholding the trial court conviction before observing that the space take before I was arrested was an indication my arrest was an afterthought.

4.That the 1st appellant (sic) failed in not observing that I am a person of good character whilst section 56 evidence Act possess merely to persons of good character in criminal cases.

5.That I pray for a copy of proceedings.

6.I pray for the success of this appeal

The appellant appeared in person and ***Mr. J. Kaigai,*** the learned Principal State Counsel appeared for the state.The appellant relied on his grounds of appeal and written submissions. The submissions mainly repeats the evidence of the complainant (PW1) and the arresting officer (PW7) and his cross examination of those two witnesses. We may reiterate his points raised during cross examination of PW1 as in our opinion those are his points of submissions.

"1.The complainant said she was attacked close where she left the accused when she was heading to her neighbour.

2. She agree(sic) the scene was on the road side.

3. She also agreed the road was busy.

4. She said the accused hit her very badly and she lost consciousness.

5. She did not scream as her blow rendered her unconscious.

6. You are the only person who I know you raped me."

Mr.Kaigai, in his response, submitted that both conviction and sentence were properly arrived at, that facts of this case are simple and straightforward, that both the courts below took the issues raised with caution and arrived at similar conclusions. Mr.Kaigai further submitted that the testimony of the complainant has been corroborated by those of her daughter and a neighbour (PW2 and PW3 respectively). As soon as the complainant gained consciousness she named the appellant as her assailant who was well known to her. The evidence showed that she had ample time to recognize the appellant and thus there is no chance of occurrence of a mistaken identity.

In response to the submissions on the P3 form, Mr.Kaigai submitted that the complainant was admitted to Nairobi Women's Hospital where she was treated, and after completion of the treatment the P3 form was filled in.

The constitutional issue on six days' delay was raised before the first appellate Court and the learned appellate Judge, after due consideration, found the delay not to be unreasonable.

Both courts below found the sole evidence of the complainant was as she identified the appellant by way of recognition as the assailant who committed the offences against her. Mr.Kaigairelied on ***Section 143*** of the ***Evidence Act*** which stipulates that in the absence of any provision of law to the contrary, no particular number of witnesses shall be required for the proof of any fact.

Finally, on the issue of sentence it was submitted that looking at the serious injuries sustained and nature of the offences, the sentence is neither harsh nor excessive. We were asked to dismiss the appeal both against conviction as well as against the sentence.

We have carefully considered the record of this appeal with the submissions made.

This being the second appeal, we are required only to consider points of law and further we are bound by the concurrent findings of fact made by the lower courts unless those findings were not passed on evidence. (See ***Njoroge –vs- Republic [1982]KLR 388)***

Regarding the issue of reliance on the evidence of a sole identifying witness, the appellant was convicted of the offence of rape and when dealing with offences of sexual nature, it is important to bring to bear the provision of the Evidence Act Section 124 especially the proviso thereto which makes the following provisions:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."

The learned trial magistrate was satisfied that the complainant was a truthful witness. She identified the appellant through recognition and the incident occurred at 6.30 pm before darkness.

Thusthe challenged identification of the appellant was on recognition and both courts below having come to the concurrent findings on this fact, we cannot intervene in that finding which was based on evidence.

On the issue of the violation of ***Section 72(3) (b)*** of the Constitution(repealed), the learned appellate Judge had this to say:

"The appellant did raise an issue that his constitutional rights were violated because he was arrested on 13th October, 2005 and was kept in custody until the day he was produced before court on 18th October, 2005. I have had the benefit of checking the calendar and found that 13th October was a Thursday. It is not clear at what time the appellant was arrested on that day. It is therefore not clear whether the 24 hours would have expired in the day or in the night on Friday. The appellant was produced before court on Tuesday the 18th of October. If there was delay in my view, the delay would be probably only have been the Monday 17th October. Section 72 (3) (b) of the Constitution provides that a party should presented before court for a non-capital offence within 24 hours of arrest. In my view, the production offence within 24 hours of arrest. In my view the production of the appellant in court on 18th October, did not breach that provision."

We concur with above observations. The appellant cited in his last ground***Sec.56*** of the ***Evidence Act***, which provides that in criminal proceedings the fact that the accused is of good character is admissible.

We do concedethat the prosecution afterthe appellant'sconviction asked the court to treat him as a first offender and that the learned trial magistrate took this factor of mitigation into account and having done so considered the seriousness of the offences before him and passed the sentence which was accepted by the first appellate courtwhich was not enhanced. Hence pursuant to the provisions of ***Sec.361(1) (b)*** of ***Criminal Procedure Code*** the Court of Appeal does not have jurisdiction to disturb this sentence.In the premises, we shallrefuse to disturb the sentence imposed.

With the above observations made, we do reject all the grounds of appeal raised by the appellant and order that the appeal be and is hereby dismissed.

This Judgment is delivered pursuant to Rule 33 (2) of the Court of Appeal Rules. Hon. O'kubasu has not signed this Judgment.

Dated and delivered at Nyeri this 5thday of July, 2012.

M K KOOME

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JUDGE OF APPEAL

K H RAWAL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR