



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 7 OF 2008

ALEX WAFULAAPPELLANT

AND

REPUBLICRESPONDENT

***(An appeal from a judgment of the High Court of Kenya at Kitale
(Ochieng, J.) dated 29th day of January, 2008***

in

H.C.CR.A. NO. 75 OF 2008)

JUDGMENT OF THE COURT

On 15th October, 2005, at about 7 p.m., 40 year old **JW** (PW1), was walking home alone after visiting her sick father in Chesamis, Kitale. Her home is in W. Farm in Kitale and the road she followed went across a river. On her way back she carried a bag of “sukuma wiki” vegetables. As she reached the river crossing, she was grabbed on the neck by someone. She struggled to release herself but the person told her that he would kill her if she did not do what he wanted. He pushed her down and pulled her into a ditch in the riverbed which had muddy water. The assailant tore JW pants completely and opened his trouser zip. He fell on top of **JW** and she realized that the assailant wanted to rape her. He scratched and twisted her neck and she screamed out loud. Another lady who was also walking home behind **JW** that evening arrived at the scene and saw what was happening. She was **Agnes Nanjala Wekesa** (PW2), a neighbour who was returning home after a visit to her daughter’s home. A young man then emerged from the ditch and ran away.

In the course of the struggle, **JW** had recognized the youngman as her neighbour who lived close to Wehonia forest. She knew his name for a long time as **Alex Wafula**. A for her part did not recognize the youngman as it was dark. She assisted **JW** to collect her bag and escorted her home before proceeding to her own home nearby. The matter was reported to the village elder then to **Cpl. Martin Kipkemoi** (PW3) of Sikhendu Police Station. **Cpl. Kipkemoi** issued a P3 form for medical examination of **JW**. The examination was carried out by **Reuben Bunyasi** (PW5) a clinical officer in Kitale District Hospital who confirmed the injuries. Cpl. Kipkemoi then sought the assistance of vigilantes after failing to trace Alex Wafula at his residence as directed

by **JW**. The vigilantes, led by **Patrick Wanjala Wepukhulu** (PW4) eventually managed to arrest Alex Wafula on 2nd November, 2005 after a chase when he tried to escape. Alex Wafula was then rearrested by Cpl. Kipkemoi and was charged with the offence of attempted rape contrary to **section 141** of the Penal Code or in the alternative indecent assault on a female contrary to **section 144 (1)** of the Penal Code.

Alex Wafula is the appellant before us. He was tried before Kitale Resident Magistrate, H.M. Wandere and was convicted for the offence of attempted rape. No finding was made on the alternative charge. Upon his conviction he was sentenced to serve 20 years in prison. His appeal against conviction and sentence was dismissed by the superior court (Ochieng J), hence this second and last appeal.

The appellant was unrepresented before us, as he was in the two courts below. His main ground of appeal is centred on his identification by the complainant **JW** who was the sole witness in that respect. The appellant submitted that the offence was committed at night and therefore the conditions were not conducive to positive identification. He also submitted that **JW** did not know her assailant. If she knew she would have immediately told A, who came to her rescue, but she did not. The only other witness who was alleged to have witnessed the incident, one **Sirengo**, was not called as a witness. The arrest of the appellant was thus on mistaken identity and on that ground alone his appeal should succeed.

The issue of identification is, of course, one of law and therefore within the jurisdiction of this Court to consider. It also arose before the two courts below. They were both acutely aware that the prosecution case rested on the credibility of the complainant, **JW**. On such credibility, the best judge was the trial magistrate who had the advantage of seeing and hearing her testify. The learned magistrate had this to say:

“Accused has not put in any defence. He opted to remain silent and did not call any witness. This offence is alleged to have occurred at about 7 p.m. The complainant told the court that it had rained and so it was dark but as the accused held her by the neck he talked to her saying if she refused to allow him to do what he wanted, he would kill her. The complainant therefore was able to know who her attacker was. She said on cross-examination she knew him by both his names Alex Wafula and had known him for a long time that (sic) accused stays close to Wehonia forest. I am satisfied that the complainant is a truthful witness.”

Some corroboration for that finding, if any was necessary, was found in the conduct of the appellant who had been escaping from the police for about one week and also ran away and had to be chased and arrested by the vigilante group led by **Patrick Wepukhulu** (PW4). It was not the conduct of an innocent person. The superior court revisited the issue of identification in reassessing the evidence on record and delivered itself thus: -

“First, there is no doubt that the incident took place at about 7.00 p.m. on a dark night.

The attack was not expected by PW1. Therefore, it must have taken her by surprise. However, the attack did not last only a split second, as would have been the case, say when a pick-pocket accomplished his task and then vanished.

Here, the assailant held PW1 by the neck. The two then struggled, as the assailant told PW1 that he would kill her, unless she allowed him to do what he wanted.

The two continued struggling, and then the assailant pushed PW1 down, causing her to fall.

Next, the assailant pulled PW1 into the river, where he tore her pants. As the assailant did so, he again told her he would kill her if she did not allow him to have his way with

her. He then tore her pants, pulled PW1 down and tore her pants completely. Even though PW1 did not specify the amount of time that all those events took, I am satisfied that it was more than a fleeting moment.

Secondly, although it was dark, it must be noted that the complainant and the assailant were physically as close as can be. The assailant was literally holding the complainant. Then, after he had pushed her down, the assailant fell onto PW1.

Given the fact that PW1 had known the appellant; as they were neighbours, I am persuaded that the close proximity and the duration that the two spent during the incident, was sufficient for recognition of the appellant.”

We think on our own assessment that the issue of identification was resolved by the two courts below on sound basis and we have no reason to depart from those findings. **JW** was a truthful witness and it is in evidence that she gave the name of her assailant to the provincial administration and the police at the earliest opportunity. She told the police where the appellant's house was. The appellant said nothing in his defence, and he did not have to, to cast any doubts on the evidence of **JW**. The two courts below were therefore entitled to believe her unreservedly. That ground of appeal fails.

The other issue of law raised by the appellant related to alleged breach of his right to a fair trial under **section 72 (3)** of the Constitution. It was an issue raised for the first time before the superior court. The learned Judge found that after the appellant's arrest on 2nd November, 2005, he was not taken to court until 7th November, 2005, some four days out of the allowable period. The court also made a lengthy analysis of the authorities available to it on the issue including: **David Waiganjo Wainaina v Republic, Cr. A. No. 113/05**; **Albanus Mwasia Mutua v. Republic Cr. A. Republic (2006) eKLR**; **Gerald Macharia Guthuku v Republic Cr. A. 119/04**, **Ann Njogu & 5 others v Republic NBI Misc. Cr. app. 551/07**; and **Morris Ngacha Njuguna & 3 others vs. Republic Cr. app. No. 232/06**. It also examined the particular circumstances which are peculiar to that particular region of the country where the offence was committed and found that the appellant had ambushed the state counsel in raising the issue orally in his submissions, as the delay may well have been explicable. He cited this court's view in the **Morris Njuguna case** (supra) where the Court stated: -

“If the 2nd appellant felt his rights under the constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the constitution to enable the relevant court investigate the issue. As the matter stands now, the issue having not been raised in the two courts below, we can only base our decision on the material before us. The material is inadequate and on that basis, it cannot be said that the 2nd appellant's rights under section 72 (3) of the constitution were breached.”

The learned Judge finally took the view that the failure to bring the appellant to court within the prescribed time only entitles the appellant to compensation for breach of his rights and is provided for under **section 72 (6)** of the Constitution.

While we do not differ with the learned Judge on the provisions of **section 72 (6)** of the Constitution, we think the consequences of breach of the constitutional right to personal liberty, where established, are now too well established in the various authorities which have dealt with the issue, to be overthrown by side-wind. Each case will stand or fall on its peculiar facts and circumstances and the issue in this case is whether the breach was established. We think in the circumstances of this case the learned Judge was right that the issue was not ventilated timeously and effectively and we would reiterate what this Court stated in the **Morris Njuguna case** (supra). That ground of appeal also fails.

Finally, the appellant challenged his sentence as harsh and excessive. Ordinarily that would

be an issue outside the jurisdiction of this Court since severity of sentence is a question of fact by dint of **section 361 (1) (a)** of the Criminal Procedure Code. It seems, to us however, that the two courts below were unduly influenced by the provisions of the **Sexual Offences Act 2006** in considering the sentence and on this score the lawfulness of the sentence is called to question and may be considered under **subsection (1) (b)** of **section 361** Criminal Procedure Code.

The offence in this matter was committed on 15th October, 2005. The punishment for attempted rape is no different from rape as they both carry a maximum sentence of life imprisonment with hard labour. But unlike the **Sexual Offences Act** which became operational on 21st July, 2006 and provides for minimum sentences with the objective of “*preventing and protecting all persons from harm from unlawful sexual acts,*” the term of imprisonment prescribed for rape is “*not less than 10 years but which may be enhanced to imprisonment for life*”. For attempted rape, it is “*a term which shall not be less than 5 years but which may be enhanced to imprisonment for life*”. The minimum sentences for defilement under **section 8** are even more drastic.

But those provisions do not apply in this case. The appellant was “*liable to imprisonment for life with hard labour*” and therefore the discretion of the court to consider alternative punishment is not taken away depending on the circumstances of the offence and the antecedents of the accused person. We considered similar issues in two other judgments delivered today and we came to the conclusion that the sentences must be reduced. – See **Fred Michael Bwayo v R. Cr. A. 130/07** and **Lazaro Kundu Simiyu v. R. Cr. A. 8/07**.

In the circumstances we set aside the sentence of 20 years imprisonment and substitute therefor a sentence of 15 years from the date of conviction of the appellant by the trial court. To that extent only shall we interfere in the matter. The appeal is otherwise dismissed.

Dated and delivered at Edoret this 29th day of May, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR