REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 456 of 2007

RICHARD NDERITU KARIUKI …….... APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit, J.) dated 13th July, 2005

in

H.C.C.R.A. NO. 255 OF 2004)

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JUDGMENT OF THE COURT

Richard Nderitu Kariuki, the appellant hereinafter, was tried before a Senior Resident Magistrate at Kibera (Ms. Mwai) on a charge of rape contrary to *section 140* of the Penal Code and an alternative count of indecent assault contrary to *section 144* of the Code. The particulars of the charge of rape were that on *21st* day of *April, 2003* at Kawangware within Nairobi, the appellant had unlawful carnal knowledge of *[G.M]* without her consent. The particulars of the alternative charge were that on the same day at the same place, the appellant unlawfully and indecently assaulted [G.M] by touching her private parts, namely her vagina. The magistrate convicted the appellant on the main charge of rape and sentenced him thereon to five years imprisonment. The appellant appealed to the High Court against his conviction and sentence and by its judgment dated and delivered on *13th July, 2005*, the High Court (Lesiit, J.) not only dismissed the appellant's appeal against conviction but also enhanced the sentence from five years to ten years imprisonment. The appellant now appeals to this Court against the dismissal of his appeal and the enhancement of the sentence by the High Court.

Mr. Ondieki, learned counsel for the appellant, argued various points of law in support of the appeal. This being a second appeal, the Court's jurisdiction is confined only to issues of law. One of the points of law argued by Mr. Ondieki was with regard to the nature of the evidence which could have been called but was not called by the prosecution.

We think there is substance in this complaint. The matter between the appellant and the complainant, [G.M], started during day-time and ran almost throughout the night. The evidence shows clearly that the appellant and [G.M] knew each other well; the appellant in his sworn statement of defence said [G.M] was his friend. On the day the appellant was said to have raped [G.M], another lady called Muthoni was said to have been the intermediary between the appellant and [GM]. That day, Muthoni took [GM] to the shop of the appellant as it was said the appellant had some message for [G.M]. The prosecution failed to call Muthoni to testify as to the matter for which the appellant had wanted [G.M]. No explanation was offered for failure to call her though Mr. Kivihya, the Senior State Counsel, told us that the appellant suffered no prejudice from the failure to call Muthoni.

Next the appellant was supposed to have raped [G.M] in some lodging room and there was a watchman outside that lodging room. [G.M] said she screamed as the appellant was raping her and from the evidence, it appears it was that watchman who, upon hearing the screams of [G.M], ran to the nearby chief's office and reported to ***Irish Omondi (P.W.2.)*** who said he worked there "*in the vigilante group*". Omondi said he went to the room in which the watchman had "*locked them there*", i.e. the appellant and [G.M]. Once again, the prosecution did not call that watchman and no

explanation at all was offered for the failure to call him so that he would explain what he had heard going on in the room where the appellant and [G.M] were and why he had locked them in the room as Omondi alleged. What the watchman was alleged to have told Omondi was hearsay and Omondi could not himself swear as to the truth of what the watchman told him.

It appears that on the very same day, [G.M] went to Kenyatta National Hospital to be examined. No explanation was given by the prosecution as to who had examined [G.M] at Kenyatta National Hospital and no hospital notes indicating the kind of treatment offered there were produced.

Dr. Zephania Kamau (P.W.5.), the police surgeon at Nairobi Area Police Headquarters examined [G.M] on *2nd September, 2003,* some four months after the incident. Nothing much could be expected from such examination.

We point out these short-comings in the prosecution's case because the appellant's defence was that [G.M] was his friend but had turned to black-mailing him over his failure to give her *Shs.70,000/=*. That may or may not have been true. But in a criminal prosecution, an accused person is not to be convicted because his or her case is weak. A conviction must be based on the strength of the prosecution evidence. In this case the prosecution's evidence left such yawning gaps and none of the two courts below ever referred to them, let alone dealing with them. The conviction of the appellant was unsafe and we cannot allow it to stand. Accordingly, we allow the appeal, quash the conviction, set aside the sentence of ten years imprisonment and order that the appellant be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 25th day of September, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR