



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 254 OF 2005

ROTICH KIPSONGO.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Karanja, J)

dated 13th October, 2005

in

H.C.Cr. A. No. 39 of 2004)

JUDGEMENT OF THE COURT

The appellant, **Rotich Kipsongo** was convicted of rape, contrary to **section 140** of the Penal Code, and sentenced to 20 years imprisonment by David K. Gichuki, Senior Resident Magistrate, Kitale. He was acquitted on the alternative count of indecent assault on females, contrary to **section 144** of the Penal Code. The appellant was the original 3rd accused in the trial Magistrate's Court. His first appeal to the superior court was dismissed by the superior court (**Wanjiru Karanja J.**) on 13th October, 2005. He now appeals to this Court on points of law, citing two main grounds namely, that the case against him was not proved beyond reasonable doubt, and further, that his defence which showed that he was not at the scene of the offence was not considered.

The evidence on which the appellant was convicted was that **BNO**, (PW1), a businesswoman went to a home in Kipsongo area, where burial arrangements and prayers for a deceased person were being conducted. This was on 25th June, 2002, at about 8p.m. She stayed there until about midnight, when she left to go back to her house, which was about 300 metres away. She walked for about 40 metres when she met a man who stopped her. There was very bright moonlight, which enabled her to recognize the man whom she used to see at Kipsongo area in a video showroom. The man was **Edwin Situma Murunga** the original first accused. He was joined by another man almost immediately. The two men led PW1 to Kitale Town, away from her home, and were subsequently joined by a third man. The three hurriedly pulled her towards Kitale Technical College. She resisted and struggled and even bit the third man on his lower lip whereupon the man knocked her on the road, tore her underpants and lay on top of

her. He unbuttoned his trouser and started raping her.

BNO bit him again on his right cheek as he was busy raping her. The man called out to Edwin Situma and sent him to go and call "**Boy**". He complied and returned with two men, one of whom was identified by BNO as **Rotich Kipsongo**, the appellant herein. He assisted the other men in lifting the complainant into the compound of Kitale Technical Institute through a lower gate, where they removed the long coat she was wearing, spread it on the ground, ordered her to lie on it, and started raping her in turns.

The complainant was once again moved by being dragged to a different spot by her attackers, this time, near the research farm of the Kitale Technical Institute, whereupon the appellant this time raped her for a long time, followed once again by the other men.

BNO said she was now cold and injured as she had been beaten during the rape ordeal. Her clothes were torn and she lost consciousness. When she regained it, she did not find the appellant or any of the men who had been raping her. She recalled that there was bright moonlight that night. She could not walk properly, but managed to crawl upto the gate of the Kitale Technical Institute. She reached the house of one Agnes Chebeti (PW3) and knocked on the door, calling for help. Agnes opened the door and BNO told her faintly that she had been raped by the young men who operate the video shows at Kipsongo. Agnes gave her some clothes to wear and invited her into the house, but she declined and insisted on going to die in her house. She started walking but fell down on the way and was assisted by Agnes who was following her. On arrival at her door she discovered that she had no key as it had been stolen from her by her attackers. She also lost some money. It was now dawn and she lay outside her house as Agnes went to report the incident, and returned with the assistant Chief who gave money for hiring a vehicle to take BNO to the hospital, where she was admitted for one day. The matter was finally reported to the Police who issued BNO with a P3 form.

Agnes Chebeti (PW3) re-called the night of 26th June 2006 at about 4.30 a.m., she was asleep in her house when she heard a knock on the front door of her house from a person who identified herself as BNO. She knew her so she lit the lamp and opened the door and saw that BNO was half naked, only wearing a torn skirt. She asked her what had happened, and BNO explained how she had been raped. Agnes gave her clothes to wear, and invited her into the house, but she refused and insisted on going to her house. Agnes went to report the matter to the Chief. It was now dawn. She led the assistant Chief to BNO's house where they found her lying outside the house. The assistant Chief gave Agnes money for hiring a vehicle which took BNO to hospital

Chrisantus Masinde (PW2) is a registered Clinical Officer stationed at Kitale District Hospital. He attended to BNO on 26th June 2002, at about 2p.m. She had a P3 form, and reported that she had been raped by persons known to her. Masinde examined her about 8 hours after the alleged rape and found her with a swelling on her left cheek and a bruise on the back. She complained of pain in the chest, left elbow joint and left hip joint. There were bruises on the right leg inner side. He formed the opinion that the injuries were caused by a blunt object, and assessed them as harm.

On further examination, he found bruises on external genitalia with blood discharge. No specimen was taken to the laboratory. He found that the patient had been raped. There was trauma on the upper genitalia. He admitted her into the ward for observation and treatment, and completed the P3 form which he produced as an exhibit.

Pc. Nelson Wanyonyi (PW4) recorded the statement of BNO on 26th June, 2002. She complained of having been raped by Rotich Kipsongo, the appellant, Joseph Luweru and Edwin Situma Murunga, when she was coming from a funeral ceremony at Kipsongo area.

Inspector Thomas Nyakundi (PW5) recorded a statement under inquiry from the appellant. The offence was rape contrary to **section 140** of the Penal Code and indecent assault on a female contrary to **section 144** of the Penal Code. He communicated with the appellant in English which he appeared to understand as he said he had gone to school upto std 8. He read the allegations to him and applied the Judges Rules. He cautioned the appellant that whatever he may elect to say would be put down in writing and may be

used in evidence. The appellant elected to make a statement voluntarily. IP. Nyakundi said he did not use any threat or promise. The appellant signed the statement and he counter signed it.

However, the appellant retracted the statement in court and a trial within a trial was conducted at which Inspector Thomas Nyakundi (PW5) who recorded the statement gave evidence. The appellant also gave unsworn statement and said that he was forced to give the statement, and was beaten by an officer who was in uniform. At the conclusion of the trial within a trial, the learned Magistrate ruled the statement admissible in evidence and it was admitted and produced as an exhibit by IP. Nyakundi.

In the statement, the appellant admitted having had sexual intercourse with the complainant at the Technical School in Kipsongo area and finally went home at about 5a.m. on 26th June, 2002. He said that he together with his companions Edwin Ochieng and Bani, went to the Chief's Office where they agreed to pay BNO some money, and they were released. He added that he paid Kshs.2000/= to the Chief for onward transmission to BNO but was nevertheless arrested on 18th July 2002, and charged for a case he had settled by paying.

The appellant gave unsworn statement in defence to the charges of rape and indecent assault. He said that on 25th June, 2002, he returned from Eldoret where he had gone for a foot-ball match and went to sleep; but the following day the Chief called him at his office where he found BNO who said he was one of those who raped her. He was released on 17th July 2002, but subsequently arrested by police from Kitale Police Station who transported him to Kitale Police Station and placed him in the cells.

The learned Magistrate after considering the evidence said in part,

“Having considered the entire evidence. I find there is sufficient evidence that the complainant herein was raped on the night of 25.6.2002 and 26.6.2002 at around midnight she knew her assailants before. There was bright moonlight when she was accosted by her assailants ... The 3rd accused home from the evidence of the complainant was 300 metres away from the complainant's home. The 3rd accused, 2nd accused and 1st accused were people known by the complainant. Their identification by the complainant was that of identification by recognition which in law has been found to be more reliable than identification of a mere stranger, as was held by the Court of Appeal in ANJONONI vs REPUBLIC (1980) KLR 59 at P. 60.”

The appellant was dissatisfied with his conviction by trial Magistrate, and appealed to the High Court, who said the following on the issue of the appellant's identification;

“The 3rd accused was the appellant and he was the one who used to live approximately 300 metres from the complainant's home. It is therefore not right for the appellant to say that the complainant contradicted herself on that aspect. There was no contradiction at all. The contradiction is only in the mind of the appellant herein. The complainant said that she was gang raped until the wee hours of the morning.”

The learned Judge further said,

“She explained how this was done but since the rape is not disputed, I need not repeat that evidence here.”

Still on the appellant's identification, the learned Judge said,

“The complainant knew those people. She told the court where they used to work. She gave their description to the area Chief and the Police and that is how they were arrested after the sub-chief tried to cover up matters. She told the court that she knew the appellant well before. She used to see him in their home at Kipsongo area, which was 300 metres from PW1's home. I agree with the learned State Counsel that there was moonlight and the complainant knew her assailants before and she therefore recognized them. As was rightly found by the learned trial

Magistrate, evidence of identification by recognition is more satisfactory and more reliable and assuming (sic) than identification of a mere stranger.”

The learned Judge then concluded that:-

“All in all therefore, I find that the learned trial Magistrate considered all the evidence before him including the appellant’s defence and arrived at a lawful sound conviction. The conviction is proper and well founded in law. I find that the appellant was properly convicted. His appeal lacks merit and I hereby dismiss the same.”

During the hearing of the appeal before us, the appellant who was unrepresented denied having been at the scene of the offence as he was in Eldoret on 25th June, 2002, playing foot-ball. He said that he told the trial Magistrate so, but this was not accepted. About the statement under inquiry recorded from him, he said he found it already prepared but signed it because he was beaten so much. About payment of the Kshs.2,000/= he admitted that his parents paid the money at the Chief’s camp, and left him there.

Mr. Omutelema, learned Senior Principal State Counsel for the State, opposed the appellant’s appeal. He submitted that though this was a case of recognition by a single witness in difficult circumstances, PW1 did not make any mistake, as she stated that there was bright moonlight, and also narrated the evidence in great detail, and said further that she knew the appellant very well. She was specific on the stage at which the appellant joined the gang who raped her. She subsequently gave the names of her attackers to PW4 who confirmed this in court.

Mr. Omutelema submitted further that the trial Magistrate rightly rejected the appellant’s alibi. He also submitted that the extra judicial statement implicated the appellant.

The evidence in this case shows that the offence herein was committed at night, and as was rightly pointed out by Mr. Omutelema, identification of the appellant was by recognition of a single witness, namely BNO, in difficult circumstances. However, both the trial Magistrate and the superior court believed BNO’s evidence that she recognized the appellant with the aid of the bright moonlight, as somebody she had known before and even knew by the nick name “**Boy**”. She gave the name of the appellant to Pc. Wanyonyi (PW4) at the time she recorded her statement.

This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being **KENGA CHEA THOYA Vs REPUBLIC CRIMINAL APPEAL NO. 375 OF 2006** (Unreported) where it said,

“On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see ANJONONI V. REPUBLIC [1980] KLR 59.”

Though identification (recognition) of the appellant was by a single witness, the predecessor of this Court in **ABDULLAH BIN WENDO V R** (1953) 20 EACA 166, confirmed that a fact may be proved by the testimony of a single witness. Again in **RORIA V REPUBLIC** (1967) EACA the Court held;

“While it is legally possible to convict on the uncorroborated evidence of a singled witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so.”

In the present appeal, we are satisfied that the evidence of recognition of the appellant by PW1 was free from any possibility of error. We find that the appellant was rightly convicted and sentenced, and we dismiss his appeal.

Dated and delivered at ELDORET this 26th day of September, 2008

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR