REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 36 of 2008

SOLOMON KAHI MWANGA …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

[From original conviction and sentence in Criminal Case number 2006 of 2006 of the Chief Magistrate's Court at Nyando]

JUDGMENT

The appellant, Solomon Kahi Mwanga, appeared before the Senior Resident Magistrate at Nyando charged with the offence of rape contrary to Section 3 (1) of the Sexual Offence Act, in that on the 31st October 2006 at Chemelil location Nyando District Nyanza Province, unlawfully had carnal knowledge of E. M. C**.** without her consent.

Alternatively, the appellant is charged with indecent assault of a female contrary to Section 11(1) of the Sexual Offence Act, in that on the 31st October 2006 at Chemelil location Nyando District Nyanza Province unlawfully and indecently assaulted E. M. C**.** by touching her private parts.

The appellant pleaded not guilty to both counts but after trial, was found guilty and convicted of the main count and sentenced to serve twenty (20) years imprisonment.

The trial magistrate went on to impose a sentence of discharge under Section 35 of the Penal Code in respect of the alternative count which she considered to be a second main count. This was erroneous as the alternative count became in-applicable following the conviction on the main count of rape.

Be that as it may, the appellant is dissatisfied with the conviction and sentence hence the present appeal made on the basis of the grounds contained in the memorandum of appeal filed herein on 21st April 2008 which are essentially a complaint of non-consideration by the trial magistrate that the evidence against the appellant was purely circumstantial on account of identification and that the trial magistrate ignored the issue raised with regard to Section 77(2) (b) and (f) of the Constitution of Kenya.

At the hearing of the appeal, the appellant appeared in person and chose to respond to the submissions by the respondent.

M/s Oundo, learned Senior State Counsel, appeared for the respondent and started by saying that the appellant was arrested on 4th November 2006 and arraigned in court on 7th November 2006. He was therefore held in police custody for an extra one day which was not prejudicial nor inordinate delay.

The learned State Counsel noted that the foregoing issue was not raised in the trial and therefore the prosecution was not given sufficient time to explain the delay.

It is apparent in his appeal that the appellant is not complaining about the violation of his constitutional rights under Section 72 of the Constitution but rather under Section 77 of the same.

Both provisions are contained in Chapter 5 of the Constitution which relates to protection of fundamental rights and freedom of an individual.

Whereas Section 72 deals with protection of right to personal liberty, Section 77 deals with provisions to secure protection of law.

What is in issue herein is Section 77 (2) (b) and (f) of the Constitution which addresses the issue of language. Although the appellant said that he was held in police custody for seven days he cannot be heard on this issue simply because it does not form part of his grounds of appeal.

The Constitutional issues aside, the learned State Counsel contended that the evidence against the appellant was sufficient. She said that the complainant (PW1) was subjected to the rape ordeal for three hours during which time she was able to identify the appellant. The complainant narrated the ordeal to some people before reporting to the police. She thereafter proceeded to hospital after a P3 form was issued. The P3 form confirmed that she had been raped. Learned State Counsel proceeded to state that PW2 had earlier seen the appellant follow the complainant. He led the people to the house of the appellant who fled but was arrested by PW4.

The learned State Counsel contended that the appellant's conduct of running away showed that he was not innocent.

In response to the learned State Counsel, the appellant said that at the trial, the complainant said that she did not identify the rapist. He also said that PW2 was his former workmate and had threatened to deal with him. He further said that the investigating officer found the complainant at the scene and took her to hospital and that the P3 form was not produced by a doctor.

So much for the arguments, the role of this court at this point is to re-examine and re-evaluate the evidence with a view to arriving at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See Okeno =vs= Rep[1972] EA 32 and Achira =vs= Rep [2003] KLR 707).

The prosecution case was founded on the following evidence:-

The complainant E. M. (PW1) is a casual work at a farm known as Simba and on the material date at about 5:00 p.m. she was going to her house when she met the appellant next to a road within the Simba farm. She also saw a cyclist who refused to give her a lift as she had requested. She continued with her journey while the appellant was behind following. He reached her, grabbed her neck and pulled her towards a sugar cane plantation. He was at the same time strangling her. She screamed and he drew out a knife and threatened to stab her. At the sugar cane plantation he removed her underpants and raped her for about three hours. He left her alone after tying her face with a headscarf. She thereafter

walked to Simba camp where she found some people among them Administration Police Officers (APs). She told them what had be-fallen her and was taken to Muhoroni hospital where she was treated and later learnt that the appellant had been arrested.

On the same material date at about 5:00 p.m., another casual worker at the said Simba farm Asha Otieno Sara (PW2) was going to his home when she met both the complainant and the appellant on the way. He by-passed them even after the complainant had asked him for a lift on his bicycle. He declined to give a lift saying that he was not a bicycle taxi (boda –boda) operator. He had previously known the appellant by his nickname of “Kai”. He later told a group of people who had raised a commotion over the complainant that he knew where the appellant lived. He took the people to the house of the appellant on the following day and he was apprehended after making an attempt to escape.

A farmer Lumbas Kipruto Nelejie Dick (PW3) was in a group of people digging a trench when the complainant by passed them on that material date at about 6:00 p.m. At about 7:00 p.m. they heard screams and on enquiry were told that a woman was screaming inside the sugarcane plantation. It was alleged that the complainant was missing when PW2 appeared at the scene and told them that he had seen the complainant with a man whose name was mentioned. On the following day, they were directed by PW2 to the house of the appellant. They managed to apprehend the appellant notwithstanding his attempt to escape.

Cpl. Stephen Mirok (PW4) of Chemelil Police was on beat patrol on the material date at 10:00 p.m. when he heard wails and shouts from Simba Estate. He proceeded there accompanied by an A. P. called Rono. They found a group of people and three other A.Ps at the scene. The complainant was also at the scene. She alleged that she had been sexually assaulted by a person known to her. She was then escorted to Chemelil Health Centre where she was treated and referred to Muhoroni hospital.

On the following day, Cpl Muroki (PW4) arrested and charged the appellant after he had been brought to the local police post by members of the Public.

The material P3 form (PEX1) was produced in court by a Clinical officer Fredrick Apinda (PW5) on behalf of his colleague one Onditi who filled the same but could not be traced. The P3 form confirmed that the complainant was indeed sexually assaulted.

In his defence, the appellant made unsworn statement and said that he stays at Elan Estate in Chemelil and hails from Nandi – South District. He was at the said Estate on the 1st November 2006 when he realized that many people were at his door. They took him to a vehicle on the road and driven to the police station on allegation of raping someone. He stayed at the police station for seven days waiting to see the complainant but all in vain. He was taken to court and the charges read to him. He denies the offence and contends that he was just implicated.

From all the foregoing, it is evident that the fact that the complainant (PW1) was raped is not disputed.

Indeed, other than the complainant’s own testimony, the medical examination report (P3 form) (PEX 1) confirmed that the offence was committed against the complainant on the material 31st October 2006.

The dispute arising relates to the identification of the appellant as being the rapist. The defence raised is a total denial and a contention that the appellant was implicated without good cause by people who found and apprehended him at his house.

However, the complainant said that the rape ordeal went on for about three hours and that she told the police that she had identified the culprit who was the appellant.

Cpl. Muroki (PW4) confirmed that the complainant told him that she was sexually assaulted by a person known to her.

Asha Otieno Sara (PW2) did not witness the incident. However, his testimony that he had earlier seen the complainant and the appellant together would in a way lend credence to the complainant's evidence that the appellant was the culprit. He (PW2) had previously known the appellant and led to his arrest a day after the offence.

Both Asha (PW2) and Lumbas (PW3) indicated that the appellant made an attempt to escape just prior to his apprehension.

Why would he attempt to escape unless he had a guilty consciousness inside him" This conduct provided indirect evidence of his culpability. The trial magistrate properly considered the evidence in its totality and made a finding that the prosecution proved its case beyond reasonable doubt. This court would agree and uphold the conviction by the trial court.

Turning to the provisions of Section 77 (2) (b) and (f) of the Constitution of Kenya, this court finds nothing to show that the same were violated by the trial court.

The record of the trial court shows that the plea was taken in Kiswahili language or translated into the same.

Kiswahili is one of the languages prescribed for usage in the magistrate courts. There is no indication that the appellant did not understand the language or that he was not provided with necessary interpretation where the witnesses used the Luo language.

Indeed, the appellant argued this appeal in the Kiswahili language.

His complaint that Section 77 (2) (b) and (f) of the Constitution was violated by the trial court thereby rendering the trial a nullity is untenable.

As regards the sentence of 20 years imprisonment, Section 3 (3) of the Sexual Offences Act No. 3 of 2006 provides for a minimum sentence of 10 years imprisonment and a maximum sentence of life imprisonment.

Considering that the appellant was a first offender, the sentence imposed by the trial court was rather harsh and excessive. Consequently, the same is reduced to 10 years (ten) imprisonment. Otherwise, the appeal is dismissed.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 10th day of December 2008

J. R. KARANJA

JUDGE

JRK/aao