REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 7 of 2011

MARIECH NATEMON NAKIMON……APPELLANT

=VERSUS=

REPUBLIC……...RESPONDENT

(An appeal from original conviction and sentence in Nyahururu criminal case No.1829 of 2010 by Hon. T. Matheka PM Nyahururu law courts dated 21st July, 2011).

JUDGMENT

The appellant, with others (Munareng Panga Napira, Kwenye Kokoi Lemokemer and Katol Chemrongit Kodo) were initially charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The appellant also faced a separate charge of rape contrary to **Section 3(1) (b)** as read with **Section 3(3)** of the **Sexual Offences Act** No. 3 of 2006.

Upon trial, the appellant was acquitted of robbery with violence but convicted and sentenced to ten years for rape.

Aggrieved by the conviction and sentence the appellant filed this appeal on five grounds which can be condensed into three as follows-

1. That the conviction was against the weight of the evidence;

2. That his defence was not considered; and

3. That the charge was defective.

Through his written submissions, the appellant contends that the charge was defective; that he was not properly identified as the assailant; and that the evidence adduced was insufficient to prove the charge. He further contends that the evidence was not corroborated and that he was framed up.

Learned counsel for the respondent opposed the appeal. He submitted that both P.W.2 and P.W.5 were able to identify the appellant; that the witnesses spent considerable time with the appellant; and that the witnesses were able to recognize the appellant with the aid of torch and lantern light and also from his voice.

I have considered the appellant's submissions alongside those of the learned counsel for the respondent. This being a first appeal, it is the duty of this court to re-evaluate the evidence presented at the trial in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify. See **Okeno** V. **Republic** (1972) EA 32.

Out of the eleven (11) prosecution witnesses, 6 gave evidence that was relevant to the charge of rape.

The complainant (P.W.6) testified that on that awful night she was at her parents house when the attackers struck. After forcibly entering her parent's house the attackers demanded for money from her mother (P.W.5). When they failed to get any money at her parents' house, the attackers ordered her (the complainant) to take them to P.W.2's house (her grandmother's house). At P.W.2's house the attackers stole the little money and food that P.W.2 had.

Before they left P.W.2's house, the appellant, who was armed with a gun, came to the room where the complainant was and raped her. The complainant maintained that with the help of lantern light she was able to identify the appellant.

Even though P.W.2 did not witness the rape she saw the appellant go to where the complainant was and shortly thereafter heard her crying for help. Like the complainant, P.W.2 was categorical that she was able to identify the appellant with the help of torch light.

P.W.3, S.W.M and P.W.5, A.W, narrated the events of that night which culminated in the abduction of the complainant (their daughter who had come visiting). Like P.W.2 and the complainant, they confirmed that with the help of torch and lantern light and their previous acquaintance with the voice of the appellant they were also able to identify, in fact recognize the appellant who was a neighbour, as one of the attackers.

P.W.7, Yakish Eyapan, a clinical officer examined the complainant after the incident and formed the opinion that the complainant was raped. P.W.9, P.C Onesmus K. Maithya investigated the offence and caused the appellant to be arrested and charged.

In his defence the appellant denied having committed the offence and stated that there was a grudge between him and the complainant over land dispute.

From the evidence there is no doubt that the complainant and her family members were attacked that night. The questions for determination are:-

1. Whether during that attack the complainant was raped and if so;

2. Whether the appellant was properly identified as the person who raped her.

Under Section 3 of the Sexual Offences Act, a person commits the offence termed rape if –

(a)he or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;

(b) the other person does not consent to the penetration; or

(c)the consent is obtained by force or by means of threats or intimidation of any kind.

In **Republic** V. **Oyier** (1985) KLR 353 the Court of Appeal held-

"1. The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2 To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3 Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

In the instant case it is alleged that the appellant ordered the complainant to remove her pants and after she resisted he threatened her with death.

The complainant's testified as follows-

"...the armed one came back. Cucu shouted to them '*please don't touch her. She is pregnant*'. I was pregnant. The armed one came. He demanded for money. I said I had no money. He demanded for money. He said he would kill me. They shut the door. He asked me who else lived there. I said my step mother. They asked whether she worked I said no.

He ordered me to remove my pants. I kept quiet. I began to cry. He ordered me to remove it quickly. I began to call cucu loudly. He warned me not to call her or he would kill me. He pointed the gun at me. He led me to the bedroom. He ordered me to remove my pants. He raped me. He kept the gun on my side. There was a lantern. He finished. He ordered me not to leave. He left me there. They left."

Even though P.W.2 did not witness the rape, when the appellant went where the complainant was she suspected that he was up to something and started pleading with him not to touch her as she was pregnant. Shortly, thereafter she heard the complainant shouting for help. After the attackers left the complainant immediately told her that the armed robber had raped her. The clinical officer also formed the opinion upon examining the complainant that she had been raped.

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In accordance with the proviso to **Section 124** of the **Evidence Act**, **Chapter 80 Laws of Kenya**, the trial magistrate believed the complainant and accordingly convicted the appellant.

On my part, I find from this evidence that the complainant was indeed raped.

Turning to the second question, P.W.2, P.W.3 and P.W.5 gave testimony to the effect that with the help of torch light and light from lantern; and from their previous acquaintance with the appellant's voice, they were able to identify, in fact recognize, the appellant as one of the persons who attacked them that night.

P.W.2 who was at the scene of the crime saw the appellant go towards where the complainant

was and shortly heard the complainant shout for help. The complainant maintained that she too was able, using light from the lantern, to identify the appellant as the person who raped her.

In **Anjononi & Others** V. **Republic** (1976 - 80) 1 KLR, the Court of Appeal observed:

"…… recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

In **Mbelle** V. **Republic**, [1984] KLR 626 on voice identification, the Court of Appeal held:

"In dealing with evidence of identification by voice, the court should ensure that:

a) The voice was that of the accused.

b) The witness was familiar with the voice and recognized it

c) The condition obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

From the totality of that evidence, I have no doubt that the appellant was properly identified as the person who raped the complainant. From the appellant's own defence, there is no doubt that he was known to the complainant and her family. Given the time he spent with the complainant, from her parent's house to her grandmother's house and the proximity during the rape, I find that the appellant was properly recognized.

Although there was evidence to the effect that the appellant's goats had once trespassed into the complainant's parents' *shamba*, there was no evidence of any grudge whatsoever between the appellant and the complainant or even the complainant's parents.

For the foregoing reasons this appeal has no merit and is dismissed.

Dated and Signed at Nakuru this 11th day of February, 2013.

W. OUKO

JUDGE

Dated, Signed and Delivered at Nakuru this 15th day of February, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE