Case Number:	Criminal Appeal 252 of 2005
Date Delivered:	21 Sep 2007
Case Class:	Criminal
Court:	Court of Appeal at Eldoret
Case Action:	Judgment
Judge:	Samuel Elikana Ondari Bosire, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	Francis Makokha Masindano v Republic[2007] eKLR
Advocates:	-
Case Summary:	...
Court Division:	Criminal
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	H.C.CR.A. NO. 61 OF 2004
Case Outcome:	Appeal Dismissed
History County:	Trans Nzoia
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 252 OF 2005

BETWEEN

FRANCIS MAKOKHA MASINDANO……….…………..APPELLANT

AND

REPUBLIC……………………………….......................…RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Kitale (W. Karanja, J) dated 25th April, 2005

in

H.C.CR.A. NO. 61 OF 2004)

****

JUDGMENT OF THE COURT

The appellant, *FRANCIS MASINDANO MAKOKHA* was the second accused, in a case before the Senior Principal Magistrate at Kitale, in which he and a co-accused, *JACKTONE WANYONYI*, (1st Accused) whose appeal is not before us, were jointly charged with the offence of attempt to procure abortion contrary to *Section 158* of the Penal Code. The appellant's co-accused faced a second count of assault causing actual bodily harm contrary to *Section 251* of the Penal Code.

The trial was commenced by *Mrs. S.M. Shitubi*, a Senior Resident Magistrate. She heard the prosecution case, but for some unexplained reason she ceased to exercise jurisdiction over the case. Another Magistrate, *H.I. Ong'udi,* Senior Principal Magistrate, took over the trial, heard the defence case after complying with the provisions of *Section 200* of the Criminal Procedure Code and thereafter gave judgment. She found both accused guilty of the first count and sentenced both accused to an imprisonment term of 7 years. She acquitted the 1st accused of the assault count. The appellant and his co-accused were aggrieved and consequently appealed against their respective conviction and sentence to the superior court.

The background facts are short and straight forward. *Christine Wanjala Simiyu (PW2)* was as at 1st February, 2002, a pupil at Namanjalala Primary School, in Standard 8. In February, 2002, she realized she was pregnant. In her evidence she stated that she had had sexual intercourse with the 1st accused, who was her mathematics teacher and friend, for at least two occasions. By then she was about 17 years of age. According to her the 1st accused was responsible for her pregnancy and so she informed

him about it. The 1st accused advised her to wait for communication from him, which he allegedly did through an unsigned note to one of her neighbours called *Edward Barasa (PW5).* PW5 gave her bus fare with instructions to meet the 1st accused at B.P Petrol Station, presumably, at Kitale, which she did. She there met the 1st accused who led her to Blue Lodge, Laini Moja, where he had apparently rented a room. The 1st accused locked her inside the said room and went away saying he would be back, which he did. In the meantime while the 1st accused was away PW2 peeped out through a window and saw the appellant enter another room with the 1st accused.

PW2 testified that she had not met the appellant before, but that because it was day time she was able to observe him as he accompanied the 1st accused to that other room. Later the appellant came to her room, inquired from her about the age of her pregnancy before he told her that the 1st accused had asked him to terminate the pregnancy. He left briefly and returned with a wire, which he said he would use in the exercise. Despite her objection and resistance, the appellant allegedly held her and threw her on a bed which was there in that room, and forcibly inserted the wire three times into her vagina. The foetus did not however come out. He warned her not to tell anybody else what had happened, but when she returned home she told her mother about it. The matter was reported at Kitale Police Station. PW2 was referred to Kitale District Hospital.

Chrisentus Masinde (PW1) a clinical officer, attended PW2 at the hospital. He checked her, but did not notice any external injuries. He however, noted tenderness on the lower abdomen. The sequence of events at the hospital is not clear. PW2 testified that she was admitted at the hospital for one night and during that admission, the pregnancy aborted. The hospital record showed that she was admitted on 4th February, 2002 and discharged the next day. In her evidence, however she stated that she was admitted on 2nd February, 2002, and the pregnancy aborted on 3rd February, 2002. Her mother, *Everlyne Nafula (PW3),* however testified that PW2 was admitted in hospital for two days. Nothing much turns on those discrepancies because PW1 confirmed the abortion.

During the trial an issue was raised as to whether indeed 1st accused sent a message to PW2 requiring her to meet him at B.P. Petrol Station. PW5 testified and confirmed that indeed he had received a note from the 1st accused as alleged by PW2, which note he tendered in evidence. The 1st accused however, denied he wrote the note despite evidence from *Jamin Wasike (PW4),* who testified that at the appellant's request he gave him a piece of paper on which to address a message to his son, Edward. PW4 produced the exercise book from which he tore the paper. The witness also testified that 1st accused gave him Ksh.20/= to pass over to Edward. This evidence corroborated the evidence of both PW2 and PW5 regarding the message sent to PW2 to meet the 1st accused.

It is also noteworthy that *Immanuel Kenga (PW7),* an Assistant Commissioner of Police who is a document examiner, confirmed that the writings on the aforesaid note marched the 1st accused's known writing although the 1st accused, in his view, had tried to disguise his writing on the specimen writing he was asked to avail to the police.

Much of the facts as narrated above touch on the 1st accused not the appellant. We have included those facts purposely because one of the appellant's complaints is that he was not the person PW2 said she met and who inserted a wire into her vagina to facilitate an abortion. The trial court considered these facts and came to the conclusion that the 1st accused had indeed made PW2 pregnant, took steps to assist her procure an abortion of the pregnancy, and for that purpose caused PW2 to travel to Blue Lodge where she met a person, whom she identified as the appellant, who by use of a wire caused her pregnancy to abort. The trial Magistrate disbelieved both the 1st accused and the appellant when they denied in their respective defences that they met PW2 at a lodge. She believed PW2 when she stated in her evidence that she met the appellant and that she was sure he is the one who inserted a wire into her

vaginal cavity purposely to secure an abortion.

The conviction of the appellant was based on the sole testimony of PW2. No other witness testified that he saw him with PW2. The trial Magistrate recognized this and correctly held that the appellant's case depended wholly on identification by a single witness. She cited the old case of *ABDALLA BIN WENDO V. R. [1953} 20 EACA, 166*, in support of the legal preposition that a fact may be proved by the testimony of a single witness. She concluded that conditions favouring a correct identification existed in the lodge and considering that the appellant remained with PW2 for more than just a moment, she was satisfied that PW2's identification of the appellant was free from error.

Wanjiru Karanja, Ag. J (as she then was) heard the appellant's first appeal. She re-evaluated the evidence as she was required to do on a first appeal; dealt with certain contradictory pieces of evidence and then came to the conclusion that determination of the appellant's case depended on whether PW2's identification of him was correct. Indeed in his appeal before us the appellant's main complaint is with regard to the correctness of PW2's identification of him. As rightly pointed out by the superior court, *section 143* of the Evidence Act, is quite clear that there is no particular number of witnesses required to prove a fact unless a particular provision of the law so specifies.

We have considered the evidence as relevant to the issue of identification. The appellant was pointed out by a worker at Blue Lodge for purposes of arrest. That worker was not called as a witness. The appellant raises this as one of his complaints against his conviction. It would have been more prudent to call that worker as a witness to complete the chain of events. However, the failure to call that worker of itself without more does not entitle us to draw an adverse inference that had he been called, he would have testified adversely to the prosecution case. The case of *BUKENYA & OTHERS VS. UGANDA [1972] EA 549,* cited by the appellant is clear that such inference may only be drawn if the evidence the prosecution adduces in support of their case is barely sufficient.

In this case, PW2 positively identified the appellant. They met in broad daylight and stayed together for long. She had the opportunity to observe him. He was close to her. When he first came into the room where PW2 was he talked to her. They were facing each other. He left and came back a second time carrying a wire. They talked. This is not the kind of case in which an identification parade was essential as conditions favouring a correct identification were not difficult. Clearly, PW2 had an opportunity of observing the appellant.

It is also quite clear that the main issue in the appellant's case is whether or not PW2 could be believed. The trial court and the first appellate court believed her. The trial court was best placed to rule on the question of credibility of witnesses. It had the opportunity of seeing and hearing witnesses testify. We did not have the same advantage. We can only interfere on such finding in clear cases where on the basis of the evidence on record, we come to the conclusion that there was no proper basis for believing a particular witness, which is lacking in this case.

In the result, we have no basis for interfering with the decision of both the trial and first appellate courts on conviction.

The superior court considered a sentence of 7 years imprisonment to be on the higher side and reduced it to 4½ years imprisonment. That court had the jurisdiction to do so, and we find no proper basis in law for interfering. We accordingly affirm it as well.

In the result, the appellant's appeal fails and it is accordingly dismissed.

DATED and DELIVERED at ELDORET this 21st day of September, 2007.

S. E. O. BOSIRE

……………………………

JUDGE OF APPEAL

E. M. GITHINJI

……………………………

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……………………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer