



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL No. 78 OF 2019

COLLINS KIPRONO CHEBET.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from conviction and sentence by H.M. Nyaberi (SPM) in Iten SPMCrC No. 19 of 2018)

JUDGEMENT

1. **COLLINS KIPRONO CHEBET** (*the appellant*) was charged with the offence of rape contrary to section 3 (1) (a) as read with section 3 (3) of the Sexual Offences Act. The prosecution case was that on 4th May 2018 at about 9.30pm in **ELGEYO MARAKWET** County, unlawfully and intentionally committed an act which causes penetration with his genital organ, namely penis into the sexual organ, namely vagina of **LTR**, a woman aged 66 years without her consent. He denied the charge, and after a trial in which 5 witnesses testified in support of the prosecution, and the appellant was the only defence witness, he was convicted and sentenced to serve 10 years' imprisonment.
2. On 04/05/2018, the 66year old **LTR** was inside her house when she heard someone pushing the door which she had secured using a nail. The person entered into the house, and she recognised him as **STEPHEN KIPRONO CHEBET** (identified as the accused). He pulled her from behind, and she fell down. He removed her under-pant, and when she tried to raise an alarm, he grabbed her around the neck and asked why she was screaming. He then inserted his penis into her vagina for about 30 minutes, while holding her tightly, and thus rendering her helpless.
3. When she screamed, **K and S** heard and went to her rescue, pulling the appellant away from her. They apprehended the intruder and escorted him to the police station.
4. On cross examination the complainant explained that although it was dark, she was able to recognize the appellant's voice as he had spoken saying: "**Nimefulia ya kweli, this is the last round**". She also confirmed that night, she was slightly drunk.
5. PK (PW2) a resident of [**Particulars Withheld**] village confirmed that while sleeping inside his house at 10.00pm on the material night, a neighbour by the name **CHELAGAT** whose house was 50 metres from his, called him through his phone, and told him to get out. He got out and heard screams emanating from PW1's house, and as he got nearer her house, he heard someone say: "**hata umefulia ya kweli, hi ndiyo round ya mwisho**".
6. PW2 pushed open the door, and flashed his torch, and saw the appellant whom he named as **COLLINS**, raping PW1 on the floor of the bedroom. PW2 knew the appellant as a neighbour. He shouted at the appellant, asking why he was raping PW1, and the appellant got up and walked out while pulling up his trousers. PW2 followed him while screaming, and his brother **S** came out and helped to apprehend the appellant just near the fence. Other neighbours woke up and joined them and the appellant was then escorted to the police station.
7. He clarified on cross examination that the caller did not say that PW1 was being raped, and infact when he got out, he thought that cows had entered his farm. They were able to catch the appellant because his loose trousers interfered with his quick movement.
8. **SC** (PW3) was woken from his sleep by screams from his step mother one **LTR** (the complainant). He rushed out towards her house and met his younger brother **P** trying to restrain the appellant outside the complainant's house. PW1 informed him that the appellant had raped their step-mother, so he joined in apprehending the appellant.
9. **PC MARTIN MAGONGA (PW3)** confirmed receiving the complainant in the company of the appellant escorted by members of the public to the police station at **CHEPIEMET**. The complainant narrated to him her sexual violation by the appellant. The complainant was issued with a P3 form and escorted to a health facility to undergo medical examination.
10. **ROSE CHEMWENO (PW5)** was the Clinical Officer at **CHEBIEMIT** sub-county hospital who examined **LTR** stated that she presented with a history of being raped by a person known to her. She noted that her skirt and shorts had mud stains, and there was evidence

of penetration although no spermatozoa were detected. She also examined the appellant whose trousers were torn and mud stained. He had bruises between the eyes and on the right hand just below elbow.

11. In his unsworn defence, the appellant said he used a shortcut on his way home on the material date at about 8.00pm, when two young men (**P and S**) pounced on him from a nearby bush. He tried to ask them what the problem was but they took him to their compound, beat him up and insulted him, claiming that he had raped their mother. Members of the public came to the scene and protested their action, which fell on deaf ears. He was eventually taken to the police station and charged.

12. In his submissions to the trial court, the appellant argued that the evidence presented at the trial was exaggerated, and the complainant was in such a state of drunkenness that it was not possible for her to specifically state who raped her. That the medical examination on him found nothing significant. The prosecution submitted that the appellant was caught red-handed.

13. In its findings the trial court pointed out that the complainant gave a detailed account of how the appellant violated her and quoted the words he uttered during the encounter. That the narrative of events demonstrated that the sexual engagement was not consensual, otherwise there would have been no need for her to scream, nor for the appellant to hold her by the neck, rendering her powerless.

14. The trial magistrate noted that the defence introduced issues which were never raised during the cross-examination of the witnesses who went to the complainant's rescue. Further, that although no injuries were found on the complainant's genital organ, there were discharges, and the magistrate pointed out that he had observed her demeanour, and was persuaded that the complainant was telling the truth.

15. Being aggrieved by the outcome, the appellant filed this appeal based on grounds (including supplementary ones) that:

- a) The charge was defective
- b) The evidence did not disclose the offence
- c) There was no proper identification
- d) Some witnesses who adversely mentioned him were not called by the prosecution
- e) His defence was not considered

16. The appellant relied on written submissions wherein he argued that whereas the charge sheet refers to **COLLINS KIPRONO** as the offender, the complainant named him as **SK**, and that this error was fatal to the prosecution case. He cited the case of **YONGO V REPUBLIC [1983] KLR 319**

17. He also contended that the evidence on identification was not conclusive as the incident took place at night, there was no light inside the house and the complainant was slightly drunk. It was also argued that the medical evidence did not disclose the offence, and that from the statement of the complainant, she seemed to suggest that the act was consensual.

18. The appellant also laments that one of the persons named as **G** was not called as a witness, yet she could have shed light on what transpired that night. He urged the court to draw an inference that if **G** had been called as a witness, she would have given evidence averse to the prosecution.

19. In opposing the appeal, Miss Okok on behalf of the DPP submitted that all the ingredients of rape were proved in terms of penetration, which was corroborated with the medical evidence. That the encounter could not have been consensual as the appellant used force, and the complainant screamed for help.

20. As regards identification, it was argued that the appellant was identified through voice identification, and PW2 and PW3 both place the appellant at the scene. That, in fact PW2 found him in the act and identified him with the help of his torch light which he beamed on the appellant, and recognized him as a neighbour. Further, when PW3 appeared at the scene, he found PW2 struggling to restrain the appellant as he attempted to escape.

21. The DPP submitted that the appellant's defence was a mere denial not strong enough to rebut the prosecution case which was well corroborated.

22. This court was urged not to interfere with the sentence taking into account that the complainant was an elderly woman who was traumatized by the incident, and the circumstances warranted the sentence meted.

23. **Ingredients of the offence:** Section 3 of the Sexual Offences Act provides that:

- (1) A person commits the offence termed rape if—
 - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

24. As noted by the trial court, the complainant gave a vivid account as to how the appellant forced her into the sexual act, and this was corroborated by PW2 who caught him in the act, upon beaming his torchlight on the pair. The icing on it is the medical finding which confirmed penetration- it is important to clarify that the mere absence of spermatozoa does not mean that there was no penetration. The trial court duly considered these factors and I find no fault on the finding made on this limb.

25. **Identification:** The incident begun under the cover of darkness, but the complainant recognised [\[H11\]](#) the appellant’s voice when he spoke the words. These words were heard by PW2 who had rushed to the scene. Then there was the torch light which was beamed onto the appellant while he was still inside the house in the throes of his mischief. As pointed out by the DPP, the evidence of PW2 and PW3 placed the appellant at the scene- he tried to leave but did not get far, and there is no evidence to suggest that he disappeared from PW2’s sight at any point. I cannot therefore fault the trial court and I hold that the conviction was safe.

26. **Witnesses:** It is true that one G was mentioned as the one who made a call to PW2 to come out of the house, but she did not testify. The appellant has not suggested what this witness would most likely have said and how that could’ve adversely affected the prosecution case.

27. **Defence:** The appellant’s defence was considered and found to be an afterthought as the issues he raised were never posed to the witnesses. I agree with the sentiments expressed by the trial court in that regard.

28. **Sentence:** Taking into account the age of the complainant, the trauma and embarrassment of her step-son finding her being raped, I am persuaded that the 10year sentence meted was commensurate with the offence. I considered the appellant’s defence, and I confirm the sentence. Consequently, the appeal is dismissed

DELIVERED AND DATED THIS 11TH DAY OF FEBRUARY 2021 AT ELDORET

H. A. OMONDI

JUDGE

[\[H11\]](#)