



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL APPEAL NO.1 OF 2019**

**WILLY CHERUIYOT KIPNGETICH.....APPELLANT**

**- V E R S U S -**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Original conviction and sentence by Hon. Karani (RM) at Kericho in Kericho CMCC No.20 of 2018 delivered on 4/1/2019)*

**J U D G M E N T**

1. The Appellant in this case, **WILLY CHERUIYOT KIPNGETICH** was charged and convicted with the offences of rape contrary to Section 10 of the Sexual Offences Act and Grievous Harm contrary to Section 234 of the Penal Code respectively in Kericho CMCC No.20 of 2018 delivered on 4/1/2019.
2. The particulars of the charges were that the Appellant together with one **BERNARD CHERUIYOT MUTAI** had Carnal Knowledge of D.C. without her consent on 814/2018 at about 2300 hours at [particulars withheld] Centre, **SERETUT** Location in **KERICHO WEST** Sub-County in **KERICHO COUNTY**.
3. The prosecution evidence in brief is that the Appellant and his Co-accused went to the Complainant's house on the material day at 11 p.m. and forcefully kicked and broke the door and entered the one roomed mabati house where the Complainant was sleeping on a bed and her son on the floor.
4. The Complainant knew the two men very well as he used to work with them as tea pluckers. The Complainant said the Appellant was armed with a Jembe handle while the Co-accused had a Panga.
5. The Appellant assaulted the Complainant's son and dragged him out of the house. The two men raped the Complainant in turns and assaulted her causing her grievous harm.
6. The two denied committing the offences in their statements of defence. The trial court found them guilty of gang rape and the lesser charge of assault and sentenced them to 20 years imprisonment on the charge of gang rape and 5 years imprisonment on the charge of Assault. The sentences were to run concurrently.
7. The Applicant who is aggrieved with the convictions and sentences has appealed to this court on the following grounds:-
  - (i) ***THAT the Learned Trial Magistrate erred in law and in fact in convicting and sentencing the Appellant yet the Prosecution evidence was not corroborated.***
  - (ii) ***THAT the Learned Trial Magistrate erred in law and in fact by convicting the Appellant yet the Clinical Officer did not link him to the Complainant.***
  - (iii) ***THAT the Learned Trial magistrate erred in law and in fact by rejecting the Appellant's firm defence which was not shaken by the Prosecution.***
8. The parties filed written submissions dated 27<sup>th</sup> and 28<sup>th</sup> July, 2020 respectively which I have duly considered.
9. . The first duty of the Appellate court is to re-evaluate the evidence before the trial court and arrive at its own independent conclusion

bearing in mind that the trial court had an opportunity to see the witnesses.

10. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

11. Rape is defined under Section 3 of Sexual Offences Act. For the rape to be established the following elements must be proved: -

(i) The intentional and unlawful penetration of the genital organ of a person by another.

(ii) The absence of consent.

(iii) Where consent is obtained by force or by means of threat or by intimidation of any kind.

12. Under Section 42 of the Act consent is obtained if the person agrees by choice and has the freedom and capacity to make that choice.

13. The issues for determination in this appeal are as follows:-

**(i) Whether the prosecution proved the charges against the Appellant.**

**(ii) Whether the Complainant’s evidence was corroborated.**

**(iii) Whether the medical evidence linked the Applicant to the Complainant.**

**(iv) Whether the defence evidence was disregarded by the Court.**

14. On the issue as to whether the Complainant’s evidence was corroborated, I find that the testimony of PW.2 (the complainant’s son and PW.3 (a neighbor corroborated that of the complainant. The complainant’s son was asleep on the floor of their little house when the two men broke into the house and gang raped and assaulted the Complainant.

15. PW.1 (the complainant), PW.2 (the Complainant’s Son) and PW.3 (a neighbor) said they were familiar with the Appellant and his Co-accused. The Appellant and his Co-accused chased PW.3 who took away the Complainant’s son. The following morning, they returned to the house and found the complainant had been injured.

16. On the issue as to whether the medical evidence linked the Appellant to the Complainant, I find that the medical evidence confirmed that the complainant had indeed been assaulted and raped. The medical evidence further corroborated the testimony of the complainant on the issue of the gang rape and assault.

17. I also find that the court gave consideration to the defence evidence and found it as afterthought and full of contradictions and further that it did not in any way shake the prosecution evidence.

18. The trial court said the Appellant stated that he was with the Co-accused at a bar where they drank until 8.30 p.m. and then they went to watch football in a place where they passed through a corridor where the Complainant was staying.

19. I find that the prosecution proved their case to the required standard. There is evidence that the complainant was gang raped and assaulted and the Appellant and his Co-accused were positively identified as the people who committed the offences.

20. There is a medical evidence that confirmed the rape and assault and I find that the convictions and sentences herein are safe.

21. The Appeal herein lacks in merit and the same is dismissed and both the convictions and sentences are upheld.

Orders to issue accordingly.

**Dated, Delivered and signed at Kericho this 18<sup>th</sup> day of September, 2020.**

**A.N. ONGERI**

**JUDGE**