



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 20 OF 2018**

**BETWEEN**

**SIMON BARAZA WAMALWA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from original conviction and sentence dated by Hon. P. Y. Kulecho, Resident Magistrate in Kapenguria PMC Criminal (SO) case no. 11 of 2018)**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant herein, Simon Baraza Wamalwa was arraigned before the Principal Magistrate's court at Kapenguria on one count of **rape contrary to section 3(1)(a)(c) and 3(3) of the Sexual offences Act, No. 3 of 2006**, the particulars thereof being that on the 19<sup>th</sup> day of February 2018 in West Pokot County, he intentionally and unlawfully caused his penis to penetrate the vagina of ICA by use of threats.
2. The appellant also faced an alternative count of committing an **indecent act with an adult contrary to section 11A of the Sexual Offences Act, no. 3 of 2006**. It was alleged that he committed the said offence on 19<sup>th</sup> day of February in West Pokot by intentionally touching the buttocks, breasts and sexual organ of ICA, with his genital organ against her will. The appellant pleaded not guilty to the charges.
3. The prosecution called 6 witnesses in support of its case against the appellant. At the close of their testimonies, the appellant was put on his defence. The appellant opted to give sworn evidence but called no witnesses in his defence.
4. Upon careful analysis of all the evidence on record, the learned trial magistrate was satisfied that the prosecution had proved its case beyond any reasonable doubt and the appellant's defence did not displace the prosecution evidence linking the appellant to the charges. The trial court thus found the appellant guilty as charged, convicted him and sentenced him to 10 years imprisonment.

**The appeal**

5. The appellant felt aggrieved by the entire judgment of the trial court and filed this appeal on grounds:-

- i. THAT the trial court erred in law and fact by convicting and sentencing the appellant on a defective charge sheet.**
- ii. THAT the learned trial magistrate erred in law and fact in basing the appellant's conviction and sentence on evidence that is riddled with contradictions, discrepancies and inconsistencies.**
- iii. THAT the learned trial magistrate erred in law and fact by failing to observe that the appellant was the victim of mistaken identity.**
- iv. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the veracity, accuracy and credibility of PW1 was questionable.**

**v. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution evidence lacked corroboration to warrant conviction of the appellant.**

6. It is the appellant's prayer that the appeal be allowed, conviction quashed and sentence set aside.

7. Noting that this is a first appeal, this court is under a duty to reconsider and evaluate the whole evidence afresh with a view to reaching its own conclusions in the matter, the only caution being that it does not have the opportunity of seeing and hearing the witnesses. See *Kinyanjui versus Republic [2004] 2 KLR 364* in which the Court of appeal held, *inter alia*, that **"on a first appeal in criminal cases, the High Court, as the first appellate court, is mandated to look at the evidence adduced before the trial magistrate afresh, re-evaluate and re-examine that evidence and reach its own independent conclusions."** The first appellate court has **"to consider the grounds of appeal put forward by the appellant in reaching its judgment,"** and has to further remember **"the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore could not be expected to make any finding as to the demeanor of the said witnesses."** It is against this background and principle that I now proceed to set out the evidence that was adduced before the trial court.

**The Prosecution Case**

8. From the evidence of the 6 prosecution witnesses, the prosecution case is as follows: - On 19.2.2018 at around midnight, the complainant herein, PW1, was escorting a pregnant lady by the name S to Kapenguria County Referral Hospital using the motor cycle of one David. After S had delivered, PW1 asked David to take her to Makutano so she could buy some food for the new mother. On the way back to the hospital, PW1 and David stopped at Ng'ombe Moja area in order to have the motor cycle fixed. As the motor cycle was being fixed, some three people suddenly emerged aboard a motor cycle. They at once assaulted David while alleging they were police officers on patrol. The trio sought to know what the pair was doing together rout at night. The three held David hostage and put him on their motorbike as they also made PW1 board their motorbike. PW1 and David were driven to Makutano Police Post and locked up in different cells. After a brief moment of detention, PW1 was set free by the police officer on the OB desk and asked her to go away.

9. On her way out, PW1 met one of the three **"officers"** who had driven them to the police post from Ngombe Moja area. The said **"officer"** had a motorbike and PW1 pleaded with him to take her to the hospital so she could attend to S. He agreed to do so, but after a short distance, the **"officer"** turned and headed towards Kitale instead of taking PW1 to Kapenguria Hospital. When PW1 sought to know where they were heading to, the **"officer"** accelerated, telling her to either jump off the motor bike or shut up. On getting to Kwa Chief Stage, PW1 was asked to disembark. He then led her to some place which was off the road. Resistance by PW1 was met with hard slaps.

10. PW1 was eventually led to a place which had building stones, pushed hard until she fell down. He grabbed her neck tore off PW1's clothes unzipped his trouser and then raped her. The **"officer"** did not remove his clothes, he only unzipped the trouser. Once he was through he left but not before warning PW1 against screaming. He threatened to hit her with stones from the heap of stones where he had raped her.

11. After one hour of confusion, PW1 got up and walked towards Makutano. She decided to pass through the Makutano Police post and just as she was entering the post, she met two of her brothers –in law who had come to the post to find out why she was so long in going back home. PW1 reported the incident to the police before going to the hospital where she was examined and treated. She was admitted for one day because of the injuries she had suffered. After being discharged, PW1 went to Kapenguria Police Station and recorded her statement. She was also issued with a P3 form.

12. Two weeks after the incident, PW1 was asked to attend an identification parade at the Kapenguria Police Station. She managed to identify the appellant as the person who had molested her on the material night. PW1 testified that she was able to see the appellant clearly under the security lights on the roadside and that she also saw him well as she struggled with him before he raped her.

13. During cross examination, PW1 testified that there was light at the police post and that the appellant had no hood on his head. She also testified that by the time she got to Makutano Police Post after she had been raped, it was around 4.00am. PW1 also clarified that from Ngombe Moja area to the Makutano Police Post, the appellant, who was wearing a reflective jacket, rode on David's motor bike with PW1 as the pillion passenger.

14. PW2 was number 96376 Police Constable Ibrahim Aden of Kapenguria Police Station. He testified that at about 3.00am on 19.2.2018, three motorcyclists, the appellant and PW1 arrived at Makutano Police Post where he (PW2) was on duty. The motor cyclists reported that they had caught PW1 and one Geoffrey Kiptoo in sexual intimacy and that PW1 had informed them that Geoffrey Kiptoo had raped her. Geoffrey Kiptoo was booked in the cells as PW1 was allowed to go and seek medical attention. At around 6.00am, Geoffrey Kiptoo was escorted to the police station. During cross examination, PW2 testified that on the material night the appellant went to the police post in the company of two other men, Geoffrey Kiptoo and PW1. PW2 also testified that the appellant was the one who had reported that PW1 had been raped by Geoffrey Kiptoo.

15. Number 113750 PC Kenneth Matiba from Kapenguria Police Station was PW4. He testified that he was together with PW2 at Makutano Police Post at around 3.00am on 19.2.2018 when David Wamalwa Baraza, Mohammed Ali Sadif and Andrew Nyairo took one Geoffrey Kiptoo and PW1 to the police post. PW1 looked confused and under the influence of alcohol. That the three men reported that they had found PW1 and Geoffrey Kiptoo in an act of sexual intimacy. That upon interrogation, Geoffrey Kiptoo had confessed to the fact.

16. PW1's husband, RR, PW3 stated that at around 11.00pm, he booked a motor bike rider by the name Davy to take his brother's wife S who was in labour to hospital. S was accompanied by PW1. At around 2.00am, Davy called PW3 and informed him that he and Irene had been arrested as they made their way from Makutano to the hospital. PW3 went to Kapenguria where he met Davy who told him that he (Davy) had been released and further that he did not know the whereabouts of PW1.

17. Some moments later, PW1 arrived at the police post from the Kitale direction. PW1 was crying and her hair was in shambles. PW1 reported that a person who had arrested her had raped her. PW3 took PW1 to the Makutano Police Post and on enquiry, the officers at the

police post assured PW3 that they knew the police who had brought Davy and PW1 to the police Post. The police later visited the scene and recovered a stone which the appellant had allegedly threatened to use to hit PW1 if she did not consent to having sex with him.

18. During cross examination, PW3 told the court that Davy was his brother and that though he was arrested, PW1 identified the appellant as the person who had raped her. PW3 also confirmed that there was proper lighting at the police post.

19. Dr. Josephat Kiprotich Ksang of Kapenguria County Referral Hospital testified as PW5. He is the one who examined PW1. PW1 had already been examined and treated for Leishamiasis and transfused with six pints of blood. She was found to have soft tissue injuries on the face, front part of the neck and a bruise on the lower lip as well as a loose tooth. PW1 also had soft tissue injuries on the right side of the chest, bruises on the left arm, swollen and painful. PW1 also had a human bite mark on the upper arm. There were injuries on the right thigh. PW5 testified that the probable weapon which caused those injuries was blunt.

20. PW5 further testified that upon examination of the female genitalia, no fresh injuries were noted and further that the hymen had already been perforated. PW1 had a whitish discharge but without bleeding. On laboratory tests, she was found to be pregnant. The urine test revealed no positive findings. High vaginal swab showed epithelial cells. There was no spermatozoa. There were no tears or bleeding in the vaginal area. PW1 had bruises on the left elbow. She had had her last consensual sex on 17.2.2018.

21. PW5 told the court that by the time of examination, PW1 had not changed her dusty and torn clothes. The P3 form and the PRC report were produced as Pexhibits 1 and 2 respectively.

22. The last witness for the prosecution, number 233458, PW6, was CIP Daniel Kairu who is the OCS, Kapenguria Police Station. He conducted an ID parade on 6.3.2018 at the request of PC Peter Mureithi, the investigating officer in this case. The appellant who was a suspect in the matter gave his consent for the parade to be conducted. He was duly informed of his right to legal representation during the parade. The appellant was also made aware of the reason for the parade. The parade comprised of 9 people who were similar in age and height as the appellant. The appellant chose a position between no. 3 and 4 of the 9 people. When PW1 went to the parade, she identified the appellant by touching him on the shoulder. The appellant expressed his satisfaction with the way the parade had been conducted and appended his signature to it. The identification parade form was produced as Pexhibit 3.

23. During cross examination, PW6 told the appellant that Aden and Matiba were not police officers nor did they form part of the identification parade. PW6 also testified that there are no police officers on the Makutano Road Block during the night.

24. The prosecution did not call the investigating officer and so closed its case after PW6 testified.

### **The Defence Case**

25. The appellant gave sworn evidence. He denied the charges and told the court that the suspect in the case was one Geoffrey Kiptoo whose name was given to the police, but he was later released. He testified that on 19.2.2019 he was on duty at Makutano at about 2.00am and was required to take some boda bodas who had been involved in an accident to Kapenguria Referral Hospital. On the way back, he saw Geoffrey Kiptoo, a rider of motor bike KMED 840C Haojue make silver in colour. He was found holding PW1 by the neck. He was arrested by the appellant and his two colleagues and taken to Makutano Police Post where PC Aden and PC Matiba were on duty. After interrogation, the suspect was locked up in the cells. It was later he learnt he was being suspected of having raped PW1. When he later went to the police station he told them that it was Geoffrey Kiptoo whom he had found raping PW1. By that time Geoffrey Kiptoo was in custody and the appellant even saw him. The appellant stated he cannot comprehend why he was charged, let alone being arrested.

### **Submissions**

26. The appellant filed and relied on his written submissions. The appellant placed reliance on a number of authorities in support of his grounds of opposition. To support his argument that the charge sheet was defective to the point of not being curable ***under section 382(1) of the Criminal Procedure Code***, he placed reliance on ***Njuguna versus Republic [2003] I EA 206***. Regarding inconsistencies and contradictions in the prosecution case, the appellant submitted that PW1 spoke of having been taken by “**the cyclist David or Ibrahim Kiptoo Dennis.**” the appellant pointed out other contradictions in PW1’s testimony and also between PW1’s testimony and that of her husband, PW3. The appellant also submitted that there were numerous contradictions as to whether David was PW1’s brother in-law or motor cyclist. Relying on the case of ***Karisa Kilong versus Republic [2009] eKLR***, the appellant submitted that the evidence was too inconclusive and contradictory to form the basis of a conviction. Reliance was also placed on ***Ndungu Kimani versus Republic [1979]KLR 282*** where the Court of Appeal held that “**a witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person or raise a suspicion about her trustworthiness or say anything which indicates that she is doubtful....**”

27. It was the appellant’s contention that PW1 had created sufficient doubt in the mind of the court that she was neither straightforward nor trustworthy. The appellant also questioned why the investigating officer was not called to testify in the case.

28. The appeal was opposed by counsel for the respondent on grounds that there was no doubt whatsoever about the identity of the appellant as the perpetrator of the crime. Counsel also submitted that the identification parade conducted by PW6 put to rest the issue of identification of the appellant.

29. In reply, the appellant submitted that there was evidence from the OB that Geoffrey Kiptoo was the one who had been arrested and booked in as the one who was suspected to have raped PW1, and further that Geoffrey Kiptoo’s release from police custody remained a mystery to him.

### **Issues, Analysis and Determination**

30. The main issue for determination is whether the prosecution proved its case against the appellant beyond any reasonable doubt. In answering this question, this court must satisfy itself that the appellant was properly identified as the person who committed this offence against PW1.

31. I have carefully analyzed and evaluated the evidence on record afresh. While there is no major dispute as to whether or not the offence of rape was committed, there is considerable doubt in my mind as to whether the appellant was the culprit. There is evidence on record that one Geoffrey Kiptoo was put in cells at Makutano Police Post on suspicion that he had raped PW1. PW1 was also put in the cells, though she was later released to go and seek medical help. How Geoffrey Kiptoo left the cells at the police post still remains a mystery. I have considered PW1's evidence and find that it contains an inconsistency that has not been explained. If the appellant and two others took PW1 and Davy to the police post, does that fact show that the appellant was Davy and therefore the rapist? I do not think so.

32. Although the prosecution does not have to call every witness, I am of the considered view that Davy ought to have been called as well as the in charge of Makutano Police Post to confirm to the court the allegation that Aden and Matiba were not police officers and also that Geoffrey Kiptoo was not the suspect. In the absence of those witnesses, this court has considerable doubts about the testimony of PW1 who was said to have got to the police station in a shambolic and drunken state. True, there may have been no motive for PW1 to lie against anyone, but there is a high probability that PW1 was mistaken about the person who raped her.

33. From the foregoing, I am satisfied that this appeal has merit. The same be and is hereby wholly allowed. The conviction is quashed and the sentence of 10 years imprisonment is set aside. Unless there is any other reason for holding the appellant in custody, he is to be released therefrom forthwith.

34. Orders accordingly.

**Judgment delivered, dated and signed in open court at Kapenguria on this 30<sup>th</sup> day of April, 2019.**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

Present in person – for Appellant

Mr. Thuo for Respondent

Mr. Juma Barasa – Court Assistant