



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT KABARNET**

#### **CRIMINAL APPEAL NO 75 OF 2017**

#### **[FORMERLY ELDORET HCCRA NO. 16 OF 2016]**

**REUBEN CHEBOIWO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Appeal from the original conviction and sentence in Cr. No. 340 of 2015 in the Principal Magistrate's Court at Kabarnet delivered on the 1<sup>st</sup> day of February, 2016 by Hon. S.O. Temu, PM]**

### **JUDGMENT**

1. The appellant herein was charged with the offence of rape contrary to section 3(1)(a) of the Sexual Offences Act and an Alternative charge of Indecent act with an adult contrary to section 11A of the Sexual Offences Act. The particulars were that the appellant on the 16<sup>th</sup> day of April, 2015 at around 1400 hrs in Baringo Central Sub-County within Baringo County did intentionally and unlawfully caused his penis to penetrate the vagina of L K a girl aged 27 years old in contravention of the Act. The alternate were that Reuben Cheboiwo on the 16<sup>th</sup> day of April, 2015 in Baringo Central Sub-County within Baringo County unlawfully and intentionally did indecent act by causing his penis to come in contact with the vagina of L K a girl aged 27 years contrary to the said Act.

2. Through amended supplementary grounds of appeal the appellant appealed on the following grounds of appeal:

1. *That the trial magistrate failed in law and facts when he convicted me on the basis of evidence which was not sufficient to prove the offence beyond reasonable doubt.*
2. *That the medical evidence does not support the offence charged.*
3. *That the learned trial magistrate erred in law and facts by disregarding my defence without cogent reason.*
4. *That the trial magistrate failed in law and fact by convicting on section 8(1) which is not inclined with the charge.*

#### **Written submissions**

3. The appellant submitted that:

*In support of my contention my case was manifestly a nullity, may it be observed from the record that the evidence adduced by the prosecution was inconsistent, contradicting and the witness and their testimony on the nature of the offence I was charged with.*

*The testimony of PW1 cannot be relied on. She says that the accused went to where she was and pulled her to the bushes and asked for her to have sex, "The accused forced me to remove my clothes while holding my hands, I was standing as the accused removed my clothes , I stood still as the accused had threatened to kill me." The trial court was duty bound to apply the principles applicable in case of this nature, having appreciated this was a rape case involving a woman old as she was.*

*A mere threat that she will be killed could not make her give in to sexual intercourse at that particular time. It was a daylight if it was at night such threats would have made sense. This is beyond imagination and is more than meets the eye.*

*The complainant further alleges that I followed her into the bushy path, I removed her clothes without any struggle and the clothes were not torn. This means she gave in without struggle. The scenario puts doubt to the nature of the act. It is un-logical for one of her age to be undressed without any struggle with the assailant. Hence evidence brought by the prosecution was not capable to have*

sustained a conviction.

It is not also not clear the date the complainant is alleged to have gone to hospital after the ordeal. The clinical officer states “she was raped on 14/4/2015 and was treated the same day at Tenges and came to referral hospital on 18/4/2015”. The complainant says that she went to hospital at Kiptagich on 15/4/2015 (the day before the offence) and on 16/4/2015 I went to Tenges.

The exact date to when the complainant is alleged to have been treated is not established. More interestingly is that no treatment chit from either Tenges or Kiptagich hospitals were produced. The prosecution did not avail whoever observed and gave her medication in these hospitals.

The P3 form talks of 27 years while the PRC talks of 31 years, part 3 of the P3 form shows the person examined is 29 years. These variations and contradictions is a lapse to the prosecution’s case. The Lab test were for one C K not L K who is the victim in this case this disputes the evidence of the prosecution as the whole matter was a fabrication. The above matter is full of contradictions and inconsistencies and thus those giving the evidence are not credible and unreliable. The documents produced are questionable and cannot hold up the conviction which was meted on me.

The mother of the complainant states the person whom the complainant was with came home without her. This person is not mentioned or who she is. The mother sent the chief to look for the complainant, which role was he playing and whose medical test are before court.

In **Ndung’i Kimanyi v. Republic** [1979] KLR 282 It was held that:

“the witness upon whose evidence it is proposed to rely should not create an impression to the court that he is not a straightforward person or raise suspicion about his trustworthiness or do so say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

In **Shantilal M Rawala v. Republic** [1957] EA 570 “when a witness causes contradicting and inconsistent testimony the evidence should not be admitted as being true.”

The findings of the doctor does not prove the charge.

It is my humble that the trial magistrate did not put any consideration to the unsworn defence. It is evident from the records that the complainant and I had land dispute which had lasted for seven years. The complainant did agree on the dispute in her testimony which the Chief had also been reported to. In **Stephen Cherlo Mavuo v. Republic** [2015] eKLR the court stated that:

“From the judgment of the trial magistrate I agree with the appellant’s counsel that the trial magistrate did not take into consideration the appellant’s defence in line with the prosecution’s evidence to arrive at a conclusion she did. His evidence to the evidence on record is quite scanty and wanting. From the decision in the judgment it is clear that she disregarded the appellant’s defence, but she did not give reason why she believed the prosecution’s evidence. A trial court is obligated to look at the cases as whole to see whether the prosecution case is credible and evidence reasonable, sufficient to discharge the burden squarely on it to prove a charge beyond reasonable doubt. In the case before me, the trial magistrate failed to appreciate the inconsistencies and anomalies in the prosecution evidence viz a viz the defence case.”

The trial magistrate convicted me under section 8(1) of the Sexual Offences Act which is non-existence in the charge and unconstitutional.

4. In reply Ms. Kenei Counsel for the DPP made oral submissions as follows:

*Appellant raises four grounds of appeal*

1. *Contradictory evidence*

Evidence of PW1, the appellant was well known by PW1 she stated that the appellant in p. 17-18 of the record had asked her to have sex with her on and when she refused he decided to rape her.

The P3 form and the treatment notes and the PRC was produced by PW4 who upon examining PW1 found numerous cells in the vagina walls and proceeded to conclude there was penetration.

Exhibit of P3, notes and reports all bore name of PW1, the contradiction as pointed out by the appellant if unfounded as the copy of the register of recipient report form bares a name L K. The same is signed for by K K as lab report. All the documents in the trial court belonged to PW1.

2. *That the medical evidence did not support the charge is therefore answered.*

Numerous cells not compared with his to prove he was the assailant. The semen is not necessary as what needs to be proved is only penetration.

Ground 3 is that the trial court disregarded his evidence. The trial court in making its judgment considered his defence but proceeded to convict after finding PW1 to be credible evidence. p. 34 line 5-7.

Section 124 of the Evidence Act allows these. Evidence of single witness, the court should warn itself after finding that the witness is credible.

Ground 4 that charge sheet is defective

Section 8(1) of the Sexual Offences Act. He was however charged under section 3(1) (a) of the Sexual Offences which carries a minimum sentence of 10 years.

The trial court at p.40 line 1-2 rape contrary to section 8(1) (a). It is curable under section 382 of the Criminal Procedure Code.

I pray that the conviction and sentence be upheld.

5. The prosecution had a total of six witnesses who testified and stated as follows:

1. **PW1 L K**

*"I am a resident of [particulars withheld] Village, Tenges area. I know Reuben Chobogwa as clan's man I have known him for many years. On 16/4/2015 I had gone to our farm in the morning and at 2pm when I was going home the accused followed me. The accused had come earlier on when I was at the farm and asked me why I had mentioned his name at the Chief's office and we had quarrelled and I left the farm and started to walk home. The accused had then followed me to the place where there were no homes and he pulled me to the bushes. The accused asked me to give in sex even if I liked or not. The accused had forced me to remove my clothes while he was holding my hands. The accused had stated that he was to kill me unless I gave in for sex. I had refused to remove my clothes and the accused had pulled my clothes off.*

*I was standing as the accused removed my clothes the accused had also removed his clothes. I had stood still as the accused had threatened to kill me. The accused had asked me to lie down and I refused and he had pushed me to the ground and the accused had lied on me and he raped me by inserting his penis to my vagina.*

*The accused had taken a while raping me and he finished and he left me. I had then gone home and I informed my mother, I had also informed the chairman to Nyumba Kumi.*

*I went to hospital at Tenges on the following day. I did not know that I was required to go to hospital on the same day. The hospital is private is called Hillside. I later went to Kiptagich and later to Kabarnet*

*I had reported the matter to Kabarnet Police station. I was issued with P3 and it was filled at Kabarnet Referral Hospital. The said document was taken by the police; P3 form and treatment notes and PRC. The clothes that I was wearing are home.*

**Cross-examined by accused**

*"I am 29 years old as I was born in the year 1986. I had informed the doctor that I was born in the year 1986. The Police Officer was present when I informed the doctor my date of birth. The information I gave the doctor is all meaningful. I did not lie on my age. I was married with three children. I have known you for many years since 2012. You have been our neighbour for many years. I have never had any differences with you. The Chief was informed of the incident but we did not negotiate about it. We have some family dispute over land boundary but I did not frame you. You had followed me from behind. We did not struggle as you raped me. You had removed without tearing them. I was injured during the rape ordeal. You had taken time raping me. I did not scream for help as you had threatened to kill me. I had reported the incident to my mother. The village elder had gone with me to the Chief's office. I was treated at Kiptagich hospital and I was issued with treatment notes. I had gone to Kiptagich on 15/4/2015 and on 16/4/2015 I went to Tenges.*

*I had reported the matter at the Police Station on 16/4/2015. I was not injured other parts of the body apart from the private parts."*

2. **PW2 J W**

*"I am a resident Chepkirol, I know the accused who is my neighbour. The complainant is my aunt. On 16/4/2015 the complainant and her mother had come to my home and the complainant had informed me that the accused had raped her.*

*I had then heard that the village chairman had informed the chief and the chief had asked us to go to his office on the following day. The following day we went to the Chief's Office and then left them there.*

*I did not see the accused on the same date."*

**Cross-examination by accused**

*“I did not visit the scene on the same date. The complainant had pointed out to us where he had taken her THE ROAD. When we were going to the Chief’s Office.”*

3. **PW3 S K**

*“I am a resident of Uji/Chepkirol. The complainant is my daughter. The accused is my clans person. On 16/4/2015 the complainant had gone to the shamba in the morning. At noon the person they were with came back I asked the Chief where the complainant was and she stated that she had not come and I sent her to call her.*

*When the complainant came home she looked sad and she was not able to eat and she stated that one person had raped her. I asked her who it was and she stated that it was Reuben. She stated that Reuben had rape her at the forest. I asked the complainant to go for medication and I went to the village elder PW2 herein to report. I did not see the accused on the date of the incident.”*

**Cross-examination**

*“The complainant is my daughter, you are my neighbour. I have never had any difference with you. You have never went to the Chief’s Office over any dispute. We have never quarrelled before the date of incident.*

*I was home on the date of incident with my grandchild. I did not know the distance from my home to the place of incident but it is a distance. I did not hear any screams for help. We reported the incident on the same day. We did not plan to frame you.”*

4. **PW4 Benjamin Kendagor**

*“I am a clinical Officer at Baringo Medical Hospital. On 18/4/2015 I filled P3 for one L K who was 27 years. She stated that she has been raped on 16/4/2015 by a person known to her. She was treated on the same day at Tenges and she came to the referral hospital on 18/4/2015 and she was given No. 115449/15 at the Hospital.*

*Upon examination she had no physical injuries. On section C she had no hymen, no tears but she had whitish discharge from her vagina. We took specimens from her urine and she had numerous cells on the vagina walls.*

*She had no infection or HIV. As per the examination the results was proven that she had been raped and penetrated. I had filled the P3 on 19/4/2015.”*

**Cross-examination by accused**

*“The complainant came to Kabarnet County Hospital after being treated at Tenges Hospital. The complainant had small notes from Tenges.*

*The complainant was treated at Tenges on the date she was raped. There was evidence of sexual intercourse as per the investigation and examination that was conducted at the lab and upon Physical examination. We are required to examine patients of sexual offences up to 72 hours and the complainant came to hospital at 48 hours.*

*The complainant stated that she was raped by a person known to her. I did not examine you.”*

5. **PW5 No. 100170 PC William Electine Wasiswa**

*“Attached at Kabarnet Police station. On 18/4/2015 I was at the station at 3pm when L K came and reported on the 16/4/2015 she had been raped by Reuben Chesogwa as she was clearing the shamba. The two had met in the bushes and the complainant did not scream as the accused had threatened to kill her. The complainant had been treated as she had treatment notes. I had issued the complainant with P3 form and it was filled at Kabarnet County Hospital. I recorded the statement and the accused was later arrested and he was brought to the police station and I charged him.”*

**Cross-examined by accused**

*“The report was made at the Police station on 18/4/2015 and she recorded her statements. The date and time when the report was made was recorded. I am the one who wrote the statement by the complainant and her witness. I had escorted the complainant to the hospital. The complainant did not bring her clothes to the hospital. She was examined at the hospital by the doctor and it was confirmed that she had been raped.*

*I did not visit the scene. You were not examined it was not a must to have you examined. The complainant did not tell me that you had a dispute.”*

6. The appellant/accused as **DW1** gave an unsworn statement and stated as follows:

*“My name is Reuben Chebogwo I am a resident of Tenges. I am a farmer. That charges are not true. On the date of the incident*

16/4/2015 I had woken up and went on my normal activities. When I reached my place of work I was given working tools and I worked up to 2pm and I took back the items and I was paid Ksh.600/= for two days and I went to the centre, Tenges and I had entered into an hotel and ate for 15 minutes and I went to bring items to take home. I had then gone home and met my child going to school and I asked for examination fees and I had informed her that I had paid.

When I was talking with the child the complainant passed going to the centre and she did not greet me and I went home. When I reached home I was informed that the complainant had passed there and she inquired about me and she was informed that I had gone to work.

The complainant had given my child Ksh.400/= for as payment for the work I did for her for two days.

That evening I ate and slept. The following day I woke up and I went to Tenges centre and I worked for food stuff and I went home at 2 pm. When I reached home I stayed with my children to the following day.

On 18/4/2015 I had gone to my business and when I went back home I was informed that a report had been made against me. Later I came to know that the complainant had reported me over a land dispute we had at the boundary. My children had early on cut the complainants trees and the complainant was annoyed.

The dispute lasted for 7 years. Later I was arrested over this case. If the charges were true the complainant should have reported on 16/4/2015 and not 18/4/2015. This was so because there was truth in this case. The complainant had gone to hospital on 18/4/2015. The complainant stated that she had gone to Kiptagich Hospital and when she testified in court she was treated at Tenges clinic from where she was referred to Kabarnet county hospital where she was examined and treated. There was no exhibit that was taken to the police against me. The investigating officer did not visit the scene. Even neighbours did not visit the scene which was on the road not far from the complainant says.

People use the said road to the river and drinking cattle. It was surprising that nobody passes that road. On 16/5/2015 I was from Ravine and I went home and I slept the following day I went to Tenges and I saw the area assistant and they had arrested me without telling me anything.

They had taken me to the AP camp and I was brought to court on 28/5/2015.”

7. The trial magistrate in making his judgment stated that:

Upon hearing the entire case the issues that arose for determination were that:

- a) Whether the complainant was raped by the accused
- b) Whether the accused was properly identified beyond reasonable doubt as the perpetrator.
- c) Whether the accused's defence raised any defence that could contradict the prosecution's evidence.

Since the accused and the complainant knew each other well and the accused had taken a while with the complainant on broad day light the issue of proper identification was clear that indeed the complainant knew the accused well.

**When the complainant was cross-examined she looked composed and she did not contradict the evidence she had given in chief and I had no doubt that she was telling the truth.**

The complainant confirmed that the accused had raped her by inserting his penis to her vagina and that was so confirmed by the clinical officer that indeed when he examined the complainant she had established that there was whitish discharge from her vagina and she had numerous cells on her vagina wall which confirmed that indeed there was penetration out of the rape.

**That was also confirmed in the P3 from and treatment notes produced as exhibit P1.**

The accused's defence that he had only been with the complainant passing did not contradict the evidence that he had raped her on the said date and PW1 had informed her mother about the incident immediately she reached home after the incident and she had given her name and thus the incident was not an afterthought. With the above finding I did find that the prosecution had proved their case beyond any reasonable doubt that the complainant was raped by the accused.”

#### **Issue for determination**

8. The issue for determination is whether the appellant had sexual intercourse with the complainant against her will or without her consent on the date stated in the charge sheet. As a first appellant court, the court is obligated to consider the evidence before the trial court and form its own independent conclusion before considering whether the conclusion of the trial thereon is to be upheld or quashed. See **Okeno v. R** (1972) EA 32.

#### **Determination**

9. Having examined the evidence presented before the court by the prosecution, the court finds that the complainant's case that she was raped

by the appellant is not supported by her testimony because of glaring inconsistencies and gaps in her evidence and that of the prosecution witnesses.

a) She says she did not scream because the appellant had threatened to kill her. What instrument or weapon was used to threaten her is not disclosed and, as urged by the appellant, it is unlikely that an adult female of 27 years could be threatened with death by an unarmed assailant and give in to demand for rape.

b) She stated that she had refused to remove her clothes and the appellant had removed them while she stood still because of the threat to kill. If she feared so truly that she would be killed if she refused him sexual intercourse, would she not have obliged quickly when instructed to remove her clothes? For the same reason, the court doubts the story that she had then been asked to lie down and she had refused to comply whereupon the appellant pushed her down and raped her.

c) The scene of the alleged rape was off a road which the appellant states was used by people and livestock being taken for watering. The complainant's nephew PW2 confirmed that *"the complainant had pointed out to us where [you] had taken her near the road when we were going to the chief's office"*. In such a setting, the complainant who knew the surroundings of the place she had been attacked could have attempted to seek help from passersby by screaming out for help. It did not help that the Investigation Officer did not visit the scene of crime.

d) The medical evidence did not corroborate the complainant's testimony of rape. A broken hymen for a complainant aged 27 years who is married with three children is no evidence of penetration. The report said that there were also no tears but there was whitish discharge and numerous cells on vagina walls. What is the meaning of the cells on the walls and the whitish discharge and how is that evidence of penetration, 48 hours after alleged rape? There was no medical evidence in this regard, and I do not find it supportive of the allegations of rape. It is also note worthy that although it was said that the complainant was examined a day after the incident at three hospital facilities at Hillside private, Kaptagich hospital and Tenges hospital before being referred to Kabarnet Referral Hospital, all the medical expert witness produced were, as demonstrated by the documents which are written in the same hand which filled the P3 form, his own examination notes at Kabarnet hospital conducted on the 18/4/2015, two days after the alleged rape.

e) There was no explanation as to why the appellant who the witnesses knew as a clansman was not arrested for over **a month and a half** after the alleged rape on **27<sup>th</sup> May 2015** until, as shown on the charge sheet, or over **a month** on the 16<sup>th</sup> May 2015 according to the appellant in his unsworn statement in defence. The charge sheet alleges the rape to have taken place on the 16<sup>th</sup> of April 2015. What was happening between the date of the alleged rape on 16<sup>th</sup> April 2015 to the date of arraignment in court on 28<sup>th</sup> May 2015?

f) The complainant's mother PW3 stated there was another child /person with whom the complainant had gone to the Shamba with and who had returned alone making the mother to send her to go and call her. This person was not called to testify as to what she had found out.

g) The handwritten record of the complainant's testimony with regard to the genesis of the alleged incident is as follows:

*"On 16/4/15 I had gone to our farm in the morning and at 2pm when I was going home the accused followed me. The accused had come earlier on when I was at the farm and he asked me why I had mentioned his name at the Chief's office and we had quarrelled and I left the farm and started to walk home. The accused had then followed me to a place where there were no homes and he pulled me to the bushes. The accused asked me to give in for sex even if I liked or not. The accused had forced me to remove my clothes while he was holding my hands. The accused had stated that he was to kill me unless I gave in for sex. I had refused to remove my clothes and the accused had pulled my clothes off. I was standing as the accused removed my clothes...."*

h) What was the quarrel about at the Chief's office? The typed record is different in this respect to the handwritten version. PW1 conceded that they had a boundary dispute with the appellant; her mother PW3 denied any such dispute saying *"we have never went (sit) to the Chief's office over any dispute. We have no land dispute. We have never quarrelled before the date of the incident."*

i) The Court must then wonder who as between the complainant (PW1) and her mother (PW3) is telling the truth as regards the existence of a land dispute and of previous proceedings at the Chief Office about which the complainant said the appellant quarrelled with her during his encounter with her earlier on the morning of the alleged rape. And if one of them is lying, how can the court rely on their evidence?

j) In addition to the above, PW2 the complainant's nephew, during examination-in-chief testified as follows:

*"I know the accused who is my neighbour. The complainant is my aunt. On 16/4/2015 the complainant and her mother had come to my home and the complainant had informed me that the accused had raped her. I had then rung the village chairman, chairman had informed the chief and the chief had asked her to go to his office on the following day. The following day we went to the chief's office and I left them there."*

It is inconceivable that a responsible Chief informed of a rape incident would ask the victim to go to his office on the following day, with no reference to need to go for hospital examination and report to the police? The said Chief did not testify before the Court and it is not possible to confirm what really was the dispute before him.

10. The appellant stated that there was no truth in the charges of rape before the court and it was only a frame up over their 7 year land

dispute, and that if the charges were true the complainant should have reported the matter on the date of the alleged rape on 16/4/15 and not 18/4/15. In view of the evidence of the complaint that they had a quarrel over her alleged mentioning of his name at the Chief's office and her admission that they had a boundary dispute with the appellant, a doubt is raised as to the rape in view of the gaps in the evidence and the inconsistencies pointed out above. That doubt must be given to the benefit of the accused appellant.

11. Consequently, the court is, with respect, unable to affirm the conviction and sentence passed by the trial court.

### **Orders**

12. Accordingly, for the reasons set out above, the court finds that the appellant's appeal against conviction has merit and the same is allowed. Consequently, the court quashes the conviction of the appellant for the offence of rape contrary to section 3 (1) of the Sexual Offence Act and sets aside the sentence of imprisonment for 15 years imposed on him thereof, and therefore directs that the appellant be released from custody forthwith, unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED ON 1<sup>ST</sup> DAY OF AUGUST, 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances: -**

Appellant in person.

Ms. Macharia, Ass. DPP for the Director of Public Prosecutions.