REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 115 OF 2015

REPUBLIC……………………………………PROSECUTOR

VERSUS

STEPHEN KIMOTHO MUTIIRIA………….......……ACCUSED

(Appeal from the Ruling of the Chief Magistrate's Court at Molo Hon. J. H. S. Wanyanga –Resident Magistrate delivered on the 29th April, 2015 in CMCR Case No. 1761 of 2013)

JUDGEMENT

The appellant **STEPHEN KIMOTHO MUTIIRIA** has filed this appeal challenging this conviction and sentence by the learned Resident Magistrate sitting at Molo Law Courts.

The appellant had been arraigned before the trial court on 3/9/2013 on a charge of **RAPE CONTRARY TO SECTION 3 OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that

> ***"Between 30th and 31st day of August 2013 at night time in Elburgon in Molo within Nakuru County. Intentionally and unlawfully caused his penis to penetrate the anus of JKN."***

The appellant additionally faced an alternative charge of **INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11 (A) OF THE SEXUAL OFFENCES ACT, 2006.**

The appellant entered a plea of '**Not Guilty'** to both charges. The trial commenced on 31/12/2013. The prosecution led by **PC NYANGWA** called a total of three (3) witnesses in support of their case.

PW1 JKN told the court that on 30/8/2013 he was in a hotel taking supper. The appellant also came into the same hotel and took a meal. The two then went to a nearby bar and took drinks together. **PW1** was experiencing pain in his right leg due to a fracture injury, he had sustained previously. In order to dull the pain **PW1** had taken three (3) piriton tablets.

Due to the pain in his leg **PW1** was not able to proceed home after the drinks so the appellant offered to accommodate him in his house. They went together to the appellant house where **PW1** swallowed another three (3) tablets of piriton (making now a total of six (6) tablets of piriton he had swallowed). The two then slept.

At about 3.00am **PW1** awoke to an itchy sensation in his anus which was also slippery. He enquired from the appellant who suggested that **PW1** may have soiled himself. **PW1** wiped his anus with a piece of

mattress and the appellant later proceeded to burn that piece.

The next morning **PW1** woke up at 6.00am to find his inner wear stuck to his body. He went home and upon removing the inner wear found it heard seminal fluid on it **PW1** then proceeded to report the mater at Elburgon Police Station. He later went to hospital where he was treated.

The police launched investigations into the matter, where upon the appellant was arrested and charged with this offence of rape.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. The appellant gave an unsworn defence in which he denied having raped and/or indecently assaulted **PW1**. On 27/3/2015 the learned trial magistrate delivered his judgment in which he acquitted the appellant of the main charge of Rape but convicted him of the alternative charge of Indecent Assault on an adult. The trial court thereafter sentenced the appellant to serve ten (10) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal. The appellant who was not represented during the hearing of this appeal opted to rely on his written submission. **Mr Chigiti** learned State Counsel opposed the appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same **(see AJODE Vs REPUBLIC [2004] KLR 83)**

In this case the appellant had been charged with the offence of Rape. One of the Key ingredients of the Offence of Rape is penetration. The prosecution must adduce evidence to prove that penetration did occur. In this case PW1 had no idea what had happened to him. By his own admission he was drunk and had ingested six (6) piriton tablets – clearly the witness had what is called in common parlance **'blacked out'.**

PW1 spoke of having noted some fluid on his inner wear. This item of clothing was not submitted to the Government Chemists for analysis. It is not clear therefore what this sticky substance was **PW3 JOEL MUKAMBA** the doctor in his evidence only spoke of a **'white smelly dry stain'** on the anus of **PW1**. There was no indication from the doctor of what this stain could have been. This could have been seminal fluid or urine or faecal matter. In his judgment the trial magistrate observed that

> ***"The doctor also confirmed that penetration was never confirmed"***

Thus the court correctly concluded that in the absence of proof of penetration the Offence of Rape cannot be said to have been proved. The trial court therefore, correctly in my view acquitted the appellant on this charge.

On the alternative charge of Indecent Act with an adult the same evidence is available. There exists no proof that there was any sexual assault on the complainant through his anus. There is no proof of what the nature of the fluid **PW1** saw on his inner wear was. There was no proof of penetration. There was no evidence to suggest any kind of assault, sexual or otherwise were on the person of the complainant. **PW3** the doctor stated that no tears or abrasions were seen on the anus. No blood stains were noted. There was no evidence of HIV infection or any other sexually transmitted infection. **PW1** himself had blacked out due to ingestion of a combination of six piriton tablets and alcohol. He has no idea what happened. I find that the charge of Indecent Act was not sufficiently proved. The trial court erred in rendering a conviction on this charge. I therefore quash the appellant conviction on this charge and the ten (10) years sentence of imprisonment is also set aside. This appeal therefore succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 18th Day of April 2017.

Appellant in person

Mr Motende for state

Maureen A. Odero

Judge