



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 224 OF 2009

PHILIP KIPKEMOI BET.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon J. G. King'ori - Senior Principal Magistrate delivered on the 24th July, 2009 in CMCR Case No. 354 of 2009)

JUDGMENT

The appellant **PHILIP KIPKEMOI BETT** has filed this appeal challenging his conviction by the learned Senior Principal Magistrate sitting at Nakuru Law Courts. The appellant was arraigned before the trial court facing a charge of **RAPE CONTRARY TO SECTION 3(1) as read with SECTION 3 OF THE SEXUAL OFFENCED ACT, 2006**. The particulars of the charge were that

“On the 12th day of December, 2008 in Nakuru District within Rift Valley Province intentionally and unlawfully committed an act which caused penetration to the genital organs of C C N without her consent”

The appellant entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 11/3/2009. The prosecution led by **CHIEF INSPECTOR GRACE** called a total of six (6) witnesses in support of their case.

The complainant **C C N** told the court that on 12/12/2008 at 9.00pm she left her house and together with her friend ‘**Veronica**’ went to Malange Bar. They took drinks until 10.00pm. They then left the bar and began to walk home. As they walked they noticed footsteps behind them. They quickened their pace. The people following began to chase them. One of the pursuers caught up with **PW1** tripped her and she fell down. The complainant tried to scream but the man held and squeezed her choking her. The other man who had chased the complainant’s friend ‘**Veronica**’ returned. The two men lifted the complainant and carried her into the bushes. They removed her clothes and under-pants and then began to rape her in turns, and this continued for some time. The two men then took the complainant to the side of the road and stood there guarding her. One of them had a bow and arrow.

PW2 JOSEPH RONO TALLAM told the court that on the material night he was coming home from Transmara. He was walking and upon reaching Lyons he came across three people by the side of the road. The men ordered him to stop. **PW2** recognized the voice of ‘**Philip**’ the appellant whom he knew well. **PW2** called appellant by his name and he responded. He approached them and saw the complainant

seated there crying. The appellant asked **PW2** if he knew the complainant and **PW2** indentified her as '**C C N**'. They demanded to know if she was a Kikuyu or a Kalenjin. **PW2** told them she was a '**pure Kalenjin**' and begged the men to release her. The men agreed on condition that the complainant does not report what they did to her. **PW2** then accompanied the complainant home.

The complainant went and reported the rape to the police. She also went to Njoro Health Centre where she was examined and treated. Sometime later **PW2** spotted the appellant at a bar. He alerted the complainant who called police. The appellant was arrested and taken to the police station where he was later charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant opted to make a brief unsworn statement in which he denied having raped the complainant.

On 24/7/2009 the learned trial magistrate delivered his judgment in which he convicted the appellant of the offence of rape and sentenced him to serve twenty (20) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

This being a first appeal I am under a duty to re-examine and re-evaluate the prosecution case and to draw my own conclusions thereon (**see AJODE Vs REPUBLIC [2004] KLR 80**). Although the appellant had filed a Notice indicating his intention to withdraw his appeal against conviction and only challenge his sentence, he did not verbally state this at the time the appeal was being heard. The learned State Counsel **MS RUGUT** made submissions opposing the entire appeal. Therefore for completeness I will consider the entire appeal.

My perusal of the record of this trial reveals three crucial questions which must be answered

1. Was the complainant raped as she alleges?
2. If yes, then who perpetrated the rapes?
2. Was the sentence handed down appropriate?

Section 3 of the Sexual Offences Act, 2006 defines rape in the following manner

“3(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”

The complainant in her evidence told the court that on the material day at about 10.00pm she was walking home with her friend Veronica. Some men began to follow them. When the ladies ran the men gave chase. One man tripped the complainant and she fell down. The two men then carried her into the bushes. They undressed her removing her underwear. The men then proceeded to rape her in turns one after the other. One man would hold her legs apart enabling his companion to penetrate and rape her. The men both raped her several times.

After the incident the complainant reported the matter to the police. Corroboration of the complainant's allegation that she had been raped is provided by her neighbour **PW4 MIRIAM AKALI LOCHO**. She confirms that when complainant arrived home that night she told her that she had been raped by 2 men. The complainant made the claims of rape immediately – it was not just an afterthought.

PW6 PC(N) ZIPPORAH MUTUTA is the officer who booked the report. She noted that the complainant's neck was bruised and swollen confirming her claims that she had been strangled. The complainant also sought treatment at the Njoro Health Centre.

PW5 TABITHA NGUGI a registered nurse at the Health Centre testified that she did examine the complainant on 13/12/2008. She produced the duly filled P3 form. The complainant being an adult woman was probably not a virgin. However, **PW5** noted the following

“Genital examination – she had foul smelling vaginal discharge which were creamish and thick with blood stains. She had bruises at the entrance of the vagina” (my emphasis).

The doctor upon further lab examination found the complainant to be HIV positive and positive for syphilis. She was put on treatment and discharged. The presence of the creamish – blood stained discharge is an indicator that penetration had occurred. The bruises at the mouth of the vagina indicates that the penetration was forceful. I have perused the P3 form **P. Exb 1**. It indicates that the complainant was found to have **“tenderness on both legs”**. These findings corroborate the complainant's testimony that her attackers strangled her in order to subdue and that her legs were forcibly held apart in order to facilitate penetration. It is abundantly clear therefore that there was no consent by the complainant to the sexual intercourse. Her assailants had to assault her and use force in order to achieve penetration. The medical evidence corroborates the testimony of the complainant. I find as a fact that indeed the complainant was raped as she had alleged.

The next question would be the identity of the attackers. The incident occurred at 10.00pm no doubt it was dark. However, in her evidence the complainant testified that there was moonlight which enabled her to see the men who attacked her. The incident took long. The men felled her, raped her repeatedly then dragged her to the road side where they stood guarding her. She had ample time to see her attackers well.

PW2 JOSEPH RONO TALLAM told the court that on that material night he was walking home when he came across two men guarding a lady. The men ordered him to stop. **PW2** stated that he recognized the voice of one **‘Phillip’** (the appellant herein) a man whom he knew well from before **PW2** states clearly in his evidence at Page 5 line 15

“I recognized the voice of Phillip who lives in the neighbourhood. He was employed by my neighbor as a herd's boy and I used to play pool with him. I knew him very well. I called out his name “Phillip” and he also recognized me and called me by name”

The appellant was a person who was very well known to this witness. The witness often played pool with the appellant. There is clear evidence of recognition. **PW2** goes on to state at page 5 line 18

“He (appellant) asked me to approach where they were. When I got there, I saw C C N whom I knew. She was crying. I asked her what the matter was. She told me that the men had harassed her from 9.00pm.”

Thus **PW2** confirms that he met appellant in the company of the complainant on the night in question. The complainant was crying and she informed the witness that the men had harassed her.

PW2 states that the appellant told him that they had raped the complainant. I am fully cognizant of the provisions of Section 25A of the Evidence Act regarding when such an admission would be acceptable as evidence. However even disregarding this alleged admission I find that there was overwhelming evidence placing the appellant at the scene with the complainant on the night in question.

It is pertinent to note that the appellant upon realizing that **PW2** knew the complainant asked **PW2** whether the lady was a Kikuyu or a Kalenjin. This query by the appellant implies that this was a hate crime targeting a particular community **PW2** responded that the complainant was a **“pure Kalenjin”** who had lived in the area for long. It is only then that the appellant and his companion agreed to release the complainant on condition that she would not report the incident. There has been a clear and positive

identification by **PW2** of the appellant as the man he found standing guard over the complainant by the roadside **PW2** saw and spoke to the appellant and pleaded for the release of the complainant. The appellant on his part also clearly recognized **PW2** and that is why he called **PW2** to approach them. I find there is no possibility of a mistaken identity.

The complainant told the court that after being released by her attackers **PW2** escorted her to her house. However, upon arrival home she realized she did not have her house keys. The complainant requested **PW2** to return to collect her keys. **PW2** returned to the appellant and his companion and collected the keys from them. His evidence is corroborated by the complainant. **PW2** states as follows at page 6 line 2

“So she (complainant) told me to escort her to her gate which I did but before getting there, she told me the two men had robbed her keys. That to go back to where the men were. I asked them for the keys and Phillip (appellant) gave me the keys....”

The fact that the appellant had the complainant’s key immediately after her assault and rape is further proof that the appellant participated in the attack. Based on the evidence I am satisfied that there has been a clear positive and reliable identification of the appellant as one of the men who raped the complainant. The appellant’s conviction by the trial court was sound and I do confirm the same.

Following his conviction the appellant was allowed an opportunity to mitigate. The learned trial magistrate citing the seriousness of the offence sentenced him to serve twenty (20) years imprisonment. Section 3(3) of the Sexual Offences Act, 2006 provides that

“(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”

Thus a conviction on a charge of rape carries **mandatory minimum sentence of ten years** and a maximum of life imprisonment. I do agree with the trial court that the offence is serious. This was a case of multiple rape which had tribal under tones. I find that the twenty (20) year sentence imposed by the trial court was both legal and appropriate given the circumstances of the offence. I do uphold that sentence. Finally his appeal fails and is hereby dismissed in its entirety.

Dated in Nakuru this 17th day of August, 2016.

Appellant in person

Mr. Chirchir for State

Maureen Odera

Judge

17/8/2016