REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 7 OF 2009

SIMON SHIBO……..……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2830 of 2006 Republic vs Simon Shibo in the Resident Magistrates Court at Eldoret by A. B. Mongare, Resident Magistrate dated 19th November 2008)

JUDGMENT

1. The appellant was convicted for rape contrary to section 140 of the Penal Code. He was sentenced to eighteen years imprisonment together with hard labour. The particulars were that on 30th April 2006 in Lugari District within Western Province, he had carnal knowledge of P M without her consent.
2. The appellant has appealed against his conviction and sentence. The primary grounds in his petition are three-pronged: first, that the case was not proved beyond reasonable doubt; secondly, that the trial court did not take into account his *alibi*; and, lastly, that the medical report was dubious and did not connect him with the offence. In particular, he contended that the examining doctor was biased; and, that no specimen was taken from the appellant linking him with the attack on the victim. At the hearing of the appeal, the appellant relied wholly on his hand-written submissions.
3. The State contests the appeal. In a nutshell, the case for the State is that the appellant was positively identified; that his *alibi* was a red herring; and that there was consistent and corroborated evidence that established the culpability of the appellant. I was accordingly urged to dismiss the appeal.
4. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been very cautious because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
5. PW1 was the complainant. She testified that she had gone to fetch firewood in forest. She narrated her ordeal to the trial court-

> *"I had a sack and an axe. I went and started splitting firewood. I started going back home it was around 2:00pm. I did not reach home safely. I was passing through the forest on a foot path. I met Simon Shibo in the forest. He is before court. I knew him; he did not greet me. He passed me then suddenly he held me on the eyes. The fire wood fell from my head. I fell down we struggled. I was injured on the left arm and on my left leg thigh. [He] overcame me. He had a copper wire; he tied it around my neck. I lost*

consciousness. When I [re]gained consciousness I found myself at home on bed. Besides the injuries sustained I realized that my petticoat was torn. It was soiled with the blood. Plus the pant……..…he raped me for one hour. I could not scream he had strangled me. I regained [sic] after 4.30p.m."

6. PW3 found the complainant lying on the ground in the forest. She was on her back. Her dress was torn and the front was lifted. The lower body was uncovered. Her panties were torn and next to her leg. They had what appeared as bloodstains. He also saw the firewood and axe on the ground. He was joined by PW4. PW4 confirmed the narrative by PW3. The complainant was a neighbor of PW4. PW4 called other women and they took the complainant to the complainant's house and later to Webuye Hospital. PW2 said that they went to the home of the appellant with the complainant. When the appellant saw them, he started running away. The public gave chase, apprehended him and handed him to the police. The offence was reported to Kogo Police Post and later to Turbo Police Station.
7. PW7, Dr. Edward Milabo, examined the complainant at Webuye Hospital. He produced the P3 form (exhibit 4). His evidence, in the material part, went as follows-

"Injuries on the neck; she had bruises on her neck. There were strangulations [sic] on the neck throat. Upper limbs were normal. Injuries were four days old. The cause was struggle to avoid rape. High vaginal swab. The remarkable [sic] injury on the neck was harm. I filled and signed P3 form. We followed up and confirmed it was rape there were bruises on the labia majora and minora. She had altered vaginal discharge.There were red blood cells seen from the lab results. In conclusion physical findings were consistent with vaginal penile penetration indicating there was struggle. She was raped."

8. From that evidence, it is obvious that the complainant and the appellant were not complete strangers. She knew him. When they met in the forest on the material day, the appellant did not greet her. As they passed each other, the appellant turned back, held her on the eyes and tied a copper wire on the neck; the complainant lost consciousness. The injuries to her neck were corroborated by the doctor. The doctor's evidence was emphatic that the complainant had non-consensual intercourse.
9. The complainant did not see the appellant raping her. She had passed out. When she came to she discovered her petticoat and panties were torn and soiled; they also had bloodstains. Those items of clothing were produced in evidence. PW3 and PW4 found the complainant lying on her back in the forest. They confirmed that her dress was torn; that her lower body was uncovered; and that the torn and bloodstained panties lay next to the complainant's leg.
10. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

11. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

See also *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. *Obwana & Others v Uganda* [2009] 2 EA 333.

12. I have reached the inescapable conclusion that the appellant was the person who attacked the complainant as they were passing each other in the forest. She positively identified him at that point in time as they struggled and before she passed out. As I stated, they were not strangers at all. That to me is evidence of recognition; some stronger evidence than that of identification. PW3 and PW4 found the complainant lying on the ground in the forest after her ordeal. There is thus very strong *circumstantial evidence* that the appellant had the opportunity and raped the complainant. All the evidence points *irresistibly* to him. In addition, when the appellant later saw PW2 and the complainant enter his homestead, he ran away before being apprehended by the public and handed over to the police. A court may convict on circumstantial evidence; but the circumstantial evidence *must* point *irresistibly* to the accused to the *exclusion* of all others. In *Sawe v Republic* [2003] KLR 364, the Court of Appeal affirmed that position. At page 375 is the following passage-

> *"There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused"*

13. It is not true that the defence proffered by the appellant was disregarded. All that the appellant said at his trial was the following: "*I am Simon Shibo. I stay at Turbo Mawe Tatu. I am a farmer. I did not commit the offence. The witnesses are lying. That is all"*. The trial court found the defence to be a sham. I find that the appellant was positively identified by the complainant as the person she met at the material time and who attacked her. The defence of *alibi* could not stand and was not even pleaded by the appellant at his trial. Subject to section 111 of the Evidence Act, the legal burden of proof rested throughout with the prosecution. There is no room for presumptions in a criminal trial. See *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported). In the instant case, I have reached the conclusion that the appellant attacked the complainant. He had non-consensual intercourse with her. That evidence was corroborated by PW3, PW4 and PW7. And like I stated, when the appellant later saw PW2 and the complainant enter his homestead, he tried to escape. The totality of the evidence proved the culpability of the appellant for the offence of rape.
14. The upshot is that the appeal on conviction is devoid of merit. The appeal on conviction is dismissed. Regarding the sentence, the offender is liable to life imprisonment. The sentence of eighteen years was thus lenient and well within the law. However, I will set aside the part of sentence on *hard labour*. The appellant shall thus continue to serve the sentence of eighteen years handed down by the trial court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 19th day of February 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Mr. Mulati for the State.

Mr. J. Kemboi, Court Clerk.