



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 44 OF 2011

PHILIP KIBET CHEPKWONYAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 884 of 2010 Republic vs Phillip Chepkwony in the Resident Magistrates Court at Eldama Ravine by M. Kasera, Senior Resident Magistrate dated 24th February 2011)

JUDGMENT

1. The appellant was convicted for rape contrary to section 3(1) as read with section 3(3) of the Sexual Offences Act. He was also found guilty of causing grievous harm to the complainant contrary to section 234 of the Penal Code. He was sentenced to twenty years imprisonment for the rape; and, to seven years imprisonment for causing grievous harm.
2. The particulars of the first count were that on the 15th August 2010 at [particulars withheld] in Koibatek District within the Rift Valley Province he intentionally and unlawfully caused his penis to penetrate the vagina of *J. M. K. [particulars withheld]* without her consent. The particulars of the second count were that on the same date, he caused grievous harm to the complainant.
3. The appellant has appealed against his conviction and sentence. On 29th January 2015, the appellant was granted leave to amend the grounds of appeal. The amended grounds can be condensed into five: first, that the State failed to prove both offences beyond reasonable doubt; secondly, that the trial court relied on contradictory evidence of a single identifying witness. In particular, the appellant submitted that the evidence was inconsistent with the exhibits produced in court. Thirdly, it is pleaded that critical witnesses were not called to the stand; fourthly, that the defence of the appellant was not taken into account; and, fifthly, that the learned trial magistrate erred by imposing two sentences without directing whether they would run concurrently or consecutively. At the hearing of the appeal, the appellant relied wholly on his hand-written submissions filed on 29th January 2015.
4. The State contests the appeal. In a nutshell, the case for the State is that the appellant was positively identified; that his defence 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.
5. 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.
6. PW1 was the complainant. She testified that on 15th August 2010 at about 4:00 in the afternoon,

she was walking from a place called Maji Mazuri. She proceeded to Benonin. She met a man known as Wangila (PW2). She talked to him. The accused then approached them from behind. She left the appellant talking with Wangila. The appellant then followed her, tried to snatch her *kiondo*, knocked out her two teeth and raped her. She narrated her ordeal to the trial court-

“At a Corner “B” Benonin and Majimazuri he tried to snatch my kiondo he hit my mouth and removed two teeth. I raised an alarm; he squeezed my neck. He pulled me to the forest; he wanted to rape me. I told him he is like my son. He tore my inner wear. I had not had sex for a long time and I bled from my private parts. He plucked grass [and] put it in my mouth so that I do not make noise. He inserted his penis in my private part. He covered my mouth with my jacket”.

7. The complainant produced her outpatient record and treatment chit from Eldama Ravine Hospital, the sweaters, bloodstained petticoat, and one of the teeth removed by the appellant. In particular she produced her stained under pants. PW4, the clinical officer, confirmed the panties were stained with spermatozoa.
8. Wangila (PW2) was on his way to Maji Mazuri. He confirmed he met the appellant and complainant at 3:50 p.m. or thereabouts on the material day. He testified that the appellant followed the complainant. When PW2 reached Maji Mazuri, the complainant called him and informed him that the appellant had attacked and raped her. PW2 informed the area chief about the incident.
9. PW4 was the clinical officer at Eldama Ravine Hospital. He examined the complainant on 20th August 2010 and filled out a P3 form (exhibit 9). His evidence, in the material part, went as follows-

“She [complainant] is 49 years. She said she was raped. On examination, her pant was stained with spermatozoa. She had bruises on the neck. Lab test was done. Nothing was found on lab test. Medicine was given. On vaginal examination, whitish discharge; no tears”

10. The P3 form (exhibit 9) shows there was a whitish urethral discharge and no visible tears to the vagina. He noted multiple bruises on the neck and throat. He classified the degree of injury as *grievous harm*.
11. 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.”

12. 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.

13. From the evidence, it is obvious that the complainant and the appellant met at a place called *Corner “B” Benonin*. The complainant spoke to him and PW2. The offence occurred at about 4:00 in the afternoon. The conditions for identification were good. The complainant tried to plead with

- the appellant not to rape her telling him that he “*was like her son*”. The complainant did not heed her protestations. He went ahead to assault her, knock out her two teeth and rape her. The injuries to her neck, throat and mouth demonstrate clearly that the sexual intercourse was non-consensual.
14. PW1 immediately called PW2 to inform him that the appellant had raped her. The injuries to her neck were corroborated by the doctor. I have reached the inescapable conclusion that the appellant was positively identified as the person who attacked and raped the complainant. In addition, the P3 form filled by the clinical officer indicates that the complainant sustained *grievous harm*. Her neck and throat had bruises; her two teeth were knocked out. One tooth was produced in evidence (exhibit 10).
15. I have juxtaposed that evidence against the defence proffered by the appellant. The appellant testified that on 15th August 2010 he was at home; that he did not go out; and, that he slept in his house. On 16th August 2010 he did not go out either. He said he had visitors. He was thus surprised when he was arrested on 28th August 2010 and later charged for these offences. Upon cross-examination he said he did not know the complainant or PW2. The defence was feeble and unbelievable. The appellant was identified in broad daylight as the person who committed the offences.
16. The appellant was setting up an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution’s case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang’ombe v Republic* [1976-80] KLR 1683, *Karanja v Republic* [1983] KLR 501. I agree with the trial court that the *alibi* was a red herring. It is also not true that the defence proffered by the appellant was disregarded.
17. 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).
18. In the instant case, I have reached the conclusion that the appellant attacked the complainant. He had non-consensual sexual intercourse with her. That evidence was corroborated by PW4. In any case under section 124 of the Evidence Act, the evidence of the complainant would have been sufficient to convict the appellant. The totality of the evidence proved the culpability of the appellant for the offence of rape and for causing grievous harm.
19. That takes me to the appeal on sentence. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”

20. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”

21. I am minded to review part of the sentence. I agree with the appellant that the learned trial magistrate failed to specify how the two sentences were to run. Under the Criminal Procedure Code, that was *not* fatal. It simply meant that the sentences would run *consecutively*. However, the violence meted out on the complainant was *in the course* of the rape. Having sentenced the appellant to twenty years for rape, it was inappropriate to sentence him for a further seven years for the grievous harm committed in the process. See *Anjononi & another v R* [1976-80] 1 KLR

1566. Under section 3(3) of the Sexual Offences Act, the *minimum* sentence for rape is ten years but which can be enhanced to *life*. Considering the savage attack and the violence meted out on the complainant, the sentence of twenty years was appropriate.

22. The upshot is that the appeal on conviction is devoid of merit. The appeal on conviction is dismissed. I set aside the sentence of seven years for the offence of *grievous harm*. I uphold the sentence for the offence of *rape*. The appellant shall thus continue to serve the sentence of twenty years handed down by the trial court.

It is so ordered.

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

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant in person.

Mr. J. W. Mulati for the State.

Mr. J. Kemboi, Court Clerk.