REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 192 OF 2012

WILSON TARUS KANDIE ……. APELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable Rose Ndombi in Iten Criminal Case No. 626 of 2011, dated 3rd December 2012)

JUDGMENT

1. The appellant was convicted of the offence of Rape Contrary to ***Section 3(1) (a)*** as read with ***Section 3(3)*** of the ***Sexual Offences Act***. He was sentenced to fifteen (15) years imprisonment.
2. It was alleged in the particulars supporting the charge that on the 2nd day of August, 2010 at ***[particulars withheld]*** within Keiyo district of the Rift Valley province, the appellant intentionally and unlawfully caused penetration of his male organ into the vagina of *T J R* without her consent.
3. The appellant was dissatisfied with his conviction and sentence. He proffered the instant appeal to the High Court through a petition of appeal filed on 17th December 2012. On 7th May, 2015, the appellant obtained leave to amend his grounds of appeal. In his amended grounds of appeal filed on the same date, he raised seven grounds of appeal in which he in the main complained that his conviction was based on evidence which was contradictory and which was not sufficient to prove the charge facing him beyond any reasonable doubt. He also claimed that the trial magistrate erred in law and in fact by proceeding with the trial before he had been supplied with the prosecution evidence thus violating ***Article 50*** of the Constitution.
4. The appellant prosecuted his appeal in person. At the hearing of the appeal, he relied on his written submissions. He in addition made oral submissions in which he claimed that the indication in the P3 form that he was facing a charge of defilement not rape created confusion as it created doubt about the offence he was facing; that exhibits herein were unprocedurally produced in court as prior to their production, they had been kept by a witness one *Samuel Cherono* and not at the police station.

   He maintained that he was wrongly convicted on the basis of insufficient evidence which did not prove his guilt beyond reasonable doubt. He urged the court to allow his appeal.

5. The appeal was contested by the state. Learned prosecuting counsel *Ms. Karanja* in opposing the appeal submitted that the prosecution had adduced evidence in the lower court which proved beyond doubt that the appellant had raped the complainant. He had been positively identified by the complainant as her assailant and the medical evidence in the P3 form confirmed that the complainant had indeed been raped. She further submitted that the wrong indication in the P3 form that the appellant was facing a charge of defilement did not cause him any prejudice as the

charge sheet was clear on the charges preferred against him. Counsel further invited the court to note that the exhibits had been in the possession of the investigating officer before they were produced in court. It was the state's position that the appellant was properly convicted and that his appeal ought to be dismissed for lack of merit.

6. This is a first appeal to the High Court. I am thus enjoined to consider afresh the evidence presented before the trial court to draw my own conclusions regarding the soundness or otherwise of the appellant's conviction while bearing in mind that I did not see or hear the witnesses. See: ***Okeno V Republic (1932) EA I; Njoroge V Republic [1987] 99*** .

7. Having carefully considered the submissions made by the appellant and the state, the grounds of appeal and the evidence tendered before the trial court, I wish to start by addressing the appellant's complaint that the trial magistrate erred by proceeding with the trial before he had been supplied with prosecution witnesses statements thereby violating his rights under ***Article 50*** of the Constitution.

I have gone through the proceedings of the trial court. I find that this complaint is not merited since it is clear from the trial court's record that the learned trial magistrate ordered that the appellant be supplied with copies of witness statements and the charge sheet which was done well before the prosecution witnesses gave their testimonies. Nothing therefore turns on this ground of appeal.

8. Though the appellant had claimed that the evidence of prosecution witnesses was contradictory, my analysis of the evidence does not reveal any contradictions in the prosecution's case. I find that the five prosecution witnesses who testified in this case gave clear, consistent and straight forward evidence. That complaint is therefore without any foundation.
9. The only other issue remaining for my determination is whether the appellant was properly convicted. This leads me to a consideration of the evidence adduced before the trial court in support of the prosecution case.Briefly, the prosecution case is that the complainant (PW2) and the appellant were neighbours. Their respective homes were about 1-3 kms apart. PW2 recalled that on 2nd August, 2010 at about 6 p.m, she was walking home from a posho mill when she met with the appellant. They exchanged greetings and PW2 proceeded on her way. She noted that the appellant was following her but she was not worried since he was a person she knew. After walking for a short while, the appellant grabbed her and felled her to the ground. She was wearing a skirt, short, biker and underpant. The appellant pulled her skirt, then removed her biker and underpant. She started screaming. He then strangled her with one of his hands. He dragged her on the ground for about 100 metres after which he had sexual intercourse with her without her consent. After he was through with sexual intercourse, he started penetrating her private parts using his fingers. This continued for about 2 hours. She was rescued by her husband (PW4) who on returning home found she had not arrived and went out to look for her. As he was calling her name, the appellant heard him approaching and he disappeared. PW4 recalled that he found his wife lying on the ground unconscious. With the help of one Thomas, they assisted PW2 to walk home.

10. When they got home, PW4 realized that PW2 did not have her undergarments on. PW2 subsequently told him that she had been raped by Wilson referring to the appellant. On the following morning, he went back to the scene of crime where he found and collected PW2's short, biker and underpant which were all torn. The same were handed over to PW5 *PC Timothy Ngetich* at the Iten police station on the following day when PW2 went there to report the matter. PW5 issued her with a P3 form which was completed by PW1 *Jane Cheptoo* on the same day after examining the complainant. The P3 form, the short, biker and headscarf which PW2 was wearing when the offence was committed were produced in evidence as exhibit 1,2,3,4 and 5. PW5 confirmed in his evidence that the exhibits had been in his possession prior to their production. The appellant's claim in his submissions that the exhibits had been in the possession of PW4 is therefore baseless.

11. There is evidence from PW2, PW3, PW4 and PW5 that after 2nd August, 2010, the appellant disappeared from his home. He resurfaced in September, 2011 and on 18th September, 2011 he

was arrested by PW3 and handed over to PW5 at the Iten police station.

12. In his defence, the appellant gave a sworn statement in which he denied having raped the complainant as alleged. He however admitted that the two of them were neighbours but went further to claim that the charge was framed up against him allegedly because he had a land dispute with PW4.
13. Having carefully re-evaluated the evidence on record as summarized hereinabove, I find that PW2's claim that she had been raped on 2nd August, 2010 was materially collaborated by the testimony of PW1 and the medical evidence in the P3 form. PW1 noted scratch marks and bruises on her face, neck, left knee and right leg. There was also a perineal tear on her private parts. A vaginal swab revealed the presence of spermatozoa in her vagina. The injuries noted were two days old. In my view, the presence of scratch marks, bruises on her face, neck and legs and tear on her private parts together with the presence of spermatozoa on her vagina is sufficient proof that the complainant had been engaged in sexual activity without her consent.

14. The recorded evidence shows that the offence was committed for about two hours from about 6 p.m to 8 p.m. PW2 therefore had sufficient time to see and recognize her assailant even before darkness fell. It is not disputed that PW2, PW4 and the appellant were neighbours and consequently, PW2's identification and recognition of the appellant as her assailant was reliable and satisfactory. The circumstances surrounding his recognition were conducive to a correct and positive identification with no possibility of mistake. I am hence convinced that the appellant was positively recognized as PW2's assailant.

15. It cannot be true that the appellant was framed with the offence allegedly because he had a land dispute with PW4. PW4 denied that he had any dispute with the appellant in his evidence under cross examination. Moreover, PW4 was not the complainant in this case. The complainant was PW2 and there was no suggestion that she had any reason to give false evidence against the appellant. More importantly, the evidence that the appellant went underground soon after the date the offence was committed only to resurface about one year later leads to a reasonable inference that the appellant knew he had committed an offence and that his attempted disappearance was an effort to escape the course of justice.
16. For all the foregoing reasons, I have come to the same conclusion as the learned trial magistrate that the prosecution proved its case against the appellant beyond any reasonable doubt. I am thus satisfied that the appellant was properly convicted.

The fact that PW1 wrongly indicated in the P3 form that the offence being investigated was defilement instead of rape in my opinion did not create any confusion with regard to the offence which was facing the appellant. The P3 form was not the charge sheet. The charge sheet clearly stated the offence which had been preferred against the appellant who was then the accused person. The appellant actually pleaded to the charges and defended himself in the trial against the said charges. He cannot now turn around and say that he was not sure about the offence he was facing. I am thus in agreement with learned prosecuting counsel *Miss Karanja* that the indication of the wrong offence in the P3 form did not occasion the appellant any prejudice and cannot be used to vitiate his conviction.

17. On sentence, ***Section 3(3)*** of the ***Sexual Offences Act*** prescribes a minimum of ten years imprisonment which can be enhanced to life imprisonment. The appellant was sentenced to fifteen (15) years imprisonment. Given the seriousness and gravity of the offence in respect of which the appellant was convicted, and the manner in which the appellant committed the offence, i cannot say that the sentence of fifteen (15) years imprisonment was either harsh or excessive. The sentence is well within the law and is commensurate with the offence the appellant committed. The sentence is consequently upheld.
18. In the result, i find that this appeal lacks merit. I accordingly dismiss it in its entirety.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of October, 2015

In the presence of:

The Appellant

Miss Mwaniki for the state

Mr. Lesinge Court clerk