IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 296 OF 2011

EZEKIEL KIPKEMOI KEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Ezekiel Kipkemoi Keboi was charged with the offence of rape contrary to **Section 3(1)(b)** as read with **Section 3(3)** of the **Sexual Offences Act No. 3 of 2006.** The particulars of the charge are that on 19/1/2011 at *Particulars withheld*, within Rift Valley Province, unlawfully and intentionally inserted his male genital organ into that of EC, a woman aged 27 years. In the alternative, he faced a charge of indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act No. 3 of 2006.** He was convicted of the main charge of rape and sentenced to serve 18 years imprisonment. No finding was made on the alternative charge. Being aggrieved by both conviction and sentence, the appellant has preferred this appeal based on grounds contained in his petition of appeal which are as follows:-

1. **That his right to a fair hearing was breached in that he was not provided with an interpreter;**
2. **That he was detained in police custody for 6 days contrary to Article 49;**
3. **That the trial court failed to consider his defence;**
4. **The trial court failed to consider all the evidence adduced and that case was not proved to the required standard.**

In his oral submissions, the appellant said that, the complainant's testimony was not truthful because she claimed to have fainted during the ordeal but yet was able to see him before arriving at the hospital; that the prosecution failed to produce any exhibits; that the complainant belongs to his family and the charge was meant to keep him in jail so that they can sell the piece of land over which they had a dispute. Lastly, he claimed to have been in jail in 2009 for stealing and was released in December 2012 and was arrested in January.

The appeal was opposed by the learned counsel for the State, Mr. Chirchir who urged that the incident occurred about 2.00 p.m., the appellant was well known to the complainant as a neighbour; that the complainant was not able to resist when the appellant got hold of her, he made her fall, covered her mouth and nose as a result of which she fainted. She came to later about 5.00 p.m., injured and in pain. Counsel observed that thee is no blood relationship between the appellant and complainant or PW2 save that the appellant's brother sold land to PW2. Mr. Chirchir also submitted that the appellant's conduct of taking to his heals on seeing the police before arrest was telling.

This being the first appellate court, it behoves me to re-evaluate the evidence adduced in the trial court and arrive at my own findings and conclusions (**Ajode v Rep (2004)KLR**). The evidence before the trial

court was as follows:-

PW1, E C, a resident of MK was at the house of PW2, R K C where she had gone to assist with cooking for workers. This was on 19/1/2011. She recalled that about 2.00 p.m. while preparing to cook ugali, the appellant entered the house, and asked for Julius, PW2's brother. PW1 knew the appellant as a neighbour. He approached her, held her, covered her mouth, fell her on the ground, pulled her legs apart, and tore her clothes including the pant. She was unable to breath well because the appellant had held her mouth and nose tightly and she became unconscious only to come to about 5.00 p.m. when she felt pain in the abdomen. She was taken to hospital next day. She informed PW2 that it is Ezekiel, the appellant who had defiled her. She was examined and treated at Njoro Hospital where a P3 form was also filled. PW2 reiterated what PW1 told the court and said that about 2.30 p.m. she heard screams emanating from her house. She went found children crying. On entering the house, found Ezekiel (appellant) zipping his long trouser as he left the house. She found PW1 lying on the floor unconscious. They reported at Mau Narok Police Station next day and were referred to hospital where a P3 form was filled.

PW3, Robbinson Kipsut is a registered clinical officer at Njoro Dispensary. On 20/1/2011, he examined the complainant, found her with a human bite on the left side of the face, her private parts had hyperemia, redness of vaginal walls. He did a high vaginal swab and found pus cells and spermatozoa and concluded that she was indeed raped. He examined PW1 after 24 hours.

PW4, PC Nicholas Mutuku, then of Mau Narok Police Station, investigated this case. He received a report from the complainant, E C that she had been raped on 19/1/2011. He issued her with a P3 form which was filled by PW3. He got information that the appellant had been sported at his home and with help of members of public, arrested the appellant who tried to run on seeing the police.

When called upon to defend himself, the appellant made an unsworn statement. He told the court that on 19th he had a tea party at his home and spent the day preparing for it and celebrated till next morning. He went to visit his wife at the centre, did not get her and went back home. He found his neighbours with a party like the one he had made and he joined in taking the tea which he also referred to as busaa. Police went to the said home, demanded Kshs.200/- but he said that it was traditional brew and one Administration Police was not happy with how he talked. The police officer threatened to shave his head with a panga, started to beat him and left with him allegedly for failing to shave hair, the OCS was called, and he was picked him up and beaten him more. He was at the police station for 6 days before he was charged. He said that this case is fabricated because in August 2008, he was charged with house breaking, pleaded guilty and was sentenced to 2 years imprisonment on 12/9/09. After release, before 3 weeks ended, he was arrested again and he blames his arrest on his family – mother and brothers who are trying to deny him his inheritance for reasons that he was born of a different father; that at one time he went to his paternal grandfather who wanted to give him land but his first father denied that he was the son.

I have considered all the evidence adduced before the trial court the submissions by the appellant and the State. The appellant did not deny knowing the complainant. Infact the appellant claimed to be related to the complainant which the complainant denied. The issue of identification therefore does not arise.

Although the appellant claims that he was framed by his family that allegation comes late in his defence. If indeed the complainant and PW2 are his relatives, he never put any questions of that nature to them. It is the investigation officer that he asked about his mother's relationship with the OCS of the area. As far as PW1 and PW2's evidence is concerned, the appellant's defence was a total afterthought and there is no evidence that PW1 and PW2 are his relatives or that they had reason to frame him. PW2 said that she has no relationship with the appellant save that the appellant's brother sold land to them. There was no reason for the trial court to doubt PW1 and PW2 nor do I.

PW1 gave a graphic description of how the appellant attacked here. It was in broad daylight at 2.00 p.m. She was alone with children aged 3 and 2½ years who are not capable of giving evidence. She is physically impaired. PW2 said she was alerted by the cries of the two toddlers and found the appellant leaving her house zipping up his trouser. Her evidence corroborated that of PW1.

The complaint is physically imparied and I believe the assailant took total advantage of her condition. Upon examination of PW1 by PW3, he found that PW1 had indeed taken part in a sexual activity as there was presence of pus cells and spermatozoa found in the vaginal swab taken from her. She was also injured, had a human bite on the face and redness of the genital organs. PW1's testimony was not shaken and I have no doubt that she was raped by the appellant.

The appellant complained that his right to fair hearing was breached in that he was not accorded an interpreter. **Article 50(2) (m)** of the **Constitution** guarantees an accused person a right to have assistance of an interpreter without any payment if the accused person does not understand the language used at the trial. I have perused the trial court record. It is true that when plea was taken by then Principal Magistrate, Mr. Korir, he did not indicate what language the appellant understood or in which language the plea was taken. It is, however, clear from the record that the appellant communicated with the court in some language because he even asked to be taken for treatment and the court made the said order. It is not until the hearing kicked off that the trial court, Mr. Baraza, recorded that the witnesses testified in the Kiswahili language. The appellant cross examined PW1, PW2, PW3 and PW4 who testified in Kiswahili language. The appellant also made his statement in defence in Kiswahili. I find that the appellant was not prejudiced in any way because he understood Kiswahili, his lengthy statement in defence was in Kiswahili meaning he understood that language. In any event, if he did not understand the language of the court, he should have complained then. That does not however, excuse the trial court's negligence in not stating the language of the court or the language that the appellant understood and was comfortable to defend himself. That ground must fail.

Article 49(I)(f) of the **Constitution** requires that an accused person be taken to court as soon as is reasonably possible but not later than twenty four hours after being arrested. The appellant claims to have been taken to court after 6 days. PW4 testified that he arrested the appellant on 21/1/2011 and the charge does confirm that fact. The charge sheet shows that the appellant was arraigned in court on 24/1/2011 and that is the date the plea was taken. 21/1/2011 was a Friday and the next day that the appellant could have been arraigned in court was Monday, 24/1/2011. Courts do not sit on weekends and **Article 49(1)(f) (ii)** provides for arraignment in court on the next working day if the day following arrest falls on a weekend. The appellant's right under the said Article was not violated and that ground must fail.

Whether the trial court considered the defence: At the second last paragraph of the judgment, the court disbelieved the appellant's story that he only went to get cups from PW2's home because he had a tea party. The court believed PW1's evidence which was corroborated by that of PW2 and PW3. The defence was indeed considered.

Having carefully considered all the grounds raised on appeal, I find no merit in any of them. There is overwhelming evidence that the appellant went to PW2's house where PW1 was helping with cooking raped her, left her unconscious and was found by PW2 leaving the house as he zipped his trouser after the act. His defence is not believable and is hereby dismissed. The conviction is sound and safe and I confirm it. The appellant was sentenced to serve 18 years – after the court considered that he took advantage of a physically impaired person. The minimum sentence under **Section 3(3)** of the **Sexual Offences Act** ten years imprisonment. The sentence is fair and I find no reason to interfere. In the end, the appeal is hereby dismissed.

DATED and DELIVERED this 24th day of September, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant present in person

Mr. Chirchir for the State