



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 64 OF 2012

**(BEING AN APPEAL AGAINST THE ORIGINAL CONVICTION AND SENTENCE BY THE
HONOURABLE M.O. OKUCHE , SENIOR RESIDENT MAGISTRATE AT SOTIK IN
CRIMINAL CASE NO. 131 OF 2009 IN THE JUDGMENT DELIVERED ON 28.06.2010)**

JAPHETH KIPKURUI KORIR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(BEFORE HON. JUSTICE BYRAM ONGAYA THURSDAY 24TH OCTOBER, 2013)

JUDGMENT

The appellant is Japheth Kipkurui Korir. He was charged with the offence of rape contrary to section 3(1) (a) of the Sexual Offences Act No.3 of 2006. In alternative he was charged with the offence of indecent act with a woman contrary to section 11(1) of the Act. He was convicted as charged in the main count and sentenced to 7 years imprisonment.

The appellant has appealed against the conviction and sentence. To urge his case, the appellant relied on the following grounds:

- a. The evidence was grossly at variance with the particulars of the offence as charged.
- b. The appellant pleaded not guilty and the burden of proof was unlawfully shifted to the appellant.
- c. The prosecution evidence was contradictory and inconsistent.
- d. The trial court considered extraneous circumstances to convict the appellant.
- e. The appellant was not taken for medical examination to rule out that the offence was committed by any other person.
- f. The trial court imposed a sentence that was harsh and excessive.

Counsel for the appellant Mr. Mutanya Advocate submitted that he wholly relied on the grounds as stated.

Counsel for the respondent Mrs. Muthee submitted that the P3 did not disclose any evidence of rape having taken place because the clinical officer found that the complainant was normal without injury on genitalia. She further submitted that PW3's identification evidence was not useful because PW3 did not vividly describe the person he saw at the time of the alleged offence. Further, she submitted PW3 testified to have seen the complainant naked and the appellant running away but did not testify to have witnessed the alleged rape. Counsel submitted PW5 acted on PW5's information. It was hearsay that the complainant had been raped by a person with a stick and PW5 who was not at the scene merely suspected that the appellant wore a red jacket at time of alleged offence. Counsel for the appellant concluded that the evidence was unsafe hearsay that could not sustain the conviction for the offence as charged.

Counsel further conceded that the prosecution did not prove the case beyond any reasonable doubt especially that the appellant was not subjected to medical examination to rule out that any other person may have committed the offence. It was submitted that PW4 admitted that the investigations were shallow. It was submitted that it was material that the investigator did not established whether the complainant had a spouse and whether she may have engaged in sexual activity with such spouse on the material date. The submissions for the respondent concluded that the established doubt in the prosecution's case should be to the benefit of the appellant as the appeal should succeed by quashing the conviction and setting aside the sentence.

This court has considered the submissions and perused the record of the trial court. PW2 the clinical officer who examined the complainant PW1 testified that there was no evidence of ejaculation but there was evidence of penetration. However, the medical examination was 2 days after the alleged rape on 14.2.2009. PW1 did not testify that she knew or could recall any distinctive features of the person who raped her at about mid night of the material date. PW3 testified it was Evans (not the accused) who was arrested. The court finds that PW3 did not testify that he witnessed the rape and his evidence was incoherent as to whether it was Evans or the accused who had committed the offence. PW5 testified that he was told on the material night of the alleged rape that PW1 was raped by a person with a stick. That was obviously hearsay evidence that was unsafe especially that the person who told him remained undisclosed and was not called to testify. This court has carefully considered the trial court's record and finds that there was no material evidence before the trial court to link the appellant to the offence as charged.

Accordingly, the appeal is allowed, the conviction is quashed, the sentence is set aside and the appellant is set at liberty unless otherwise lawfully held in custody.

Signed, dated and delivered in court at **Kericho** this **Thursday, 24th October, 2013**.

BYRAM ONGAYA

JUDGE