

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 24 OF 2013

(Being an Appeal Against the Conviction and Sentence by the Honourable M.O. Okuche, Acting Principal Magistrate at Sotik in Criminal Case No. 915 of 2011 in Judgement Delivered on 24.05.2013)

PHILOMON KIPLANGAT RONO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 16th October, 2013)

JUDGMENT

The appellant Philomon Kiplangat Rono was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006. The particulars, as set out in the judgment by the learned trial Magistrate delivered on 24.05.2013, were that on 14.08.2011 along *{particulars withheld}* Konoin District within Rift Valley Province, the appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of J C without her consent. In alternative, he was charged with the offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006. The particulars as set out in the judgment by the trial court are that on 14.08.2011 at about 10.00am along *{particulars withheld}* within Rift Valley Province, the appellant intentionally touched the vagina of J C with his penis against her will.

In the judgement, the learned trial Magistrate found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant as charged pursuant to section 215 of the Criminal Procedure Code. The appellant was sentenced to serve five years imprisonment.

The appellant filed the petition of appeal on 30.05.2013 through M/S. Bett & Company Advocates. The grounds of appeal included that the learned trial Magistrate erred in fact and law because there was insufficient evidence to sustain the conviction; undue weight was given to prosecution case and least weight to defence case; there were material contradictions and gaps in the prosecution case; the right of the accused to representation, witness statements and sufficient opportunity to prepare defence was not upheld; the burden of proof was unfairly shifted from the prosecution and placed upon the appellant; and the sentence imposed on the accused was manifestly excessive in the entire circumstances of the case.

At the hearing of the appeal, counsel for the respondent informed the court that the state was conceding the appeal in view of the following grounds:

- a. The rights of the accused as protected in Article 50(2) (c) and (j) of the Constitution, on adequate time and facilities to prepare a defence and prior information of the evidence the prosecution intended to rely upon respectively, was infringed. Page 6 of the proceedings showed that the accused applied to be provided with the prosecution witness statements and the record did not show that the request was allowed and the statements provided to the accused. Thus, the respondent's counsel urged the court to consider that in the circumstances of the case, the accused had not been accorded a fair chance to prepare a defence as he was denied access to the prosecution evidence prior to the hearing.

- b. The second ground for conceding the appeal was that the record showed serious and many inconsistencies in the prosecution case. For instance, PW1 stated she saw a person she knew, meaning the accused, and then later in her evidence in chief denied to have known the accused. PW1 also testified that the incident had been at 10.00am in broad day light and in cross-examination stated she could not tell or did not know if the accused was naked. In another inconsistency, PW1 stated that the accused had a motor vehicle being a white probox registration No. KBN 338N while PW2 who supposedly, was at the scene, testified that there was no motor vehicle at the scene. In another inconsistency, it was submitted that PW2 stated that he did not know how PW1 got his number. Thus, if the number was known, it was submitted, and then PW1 could not be believed in her testimony that PW2 was a stranger and a mere rescuer. Finally, PW4 was inconsistent on the date the report was made, in evidence in chief stating it was 15.8.2011 and in cross-examination stating it was 14.8.2011.

Counsel for the appellant submitted that it was the duty of the trial court to ensure that the rights to a fair trial were upheld by the prosecution especially in this case where the accused did not have legal representation. It was further submitted for the appellant that the material inconsistencies in the prosecution evidence and as singled out by the respondent's counsel were never resolved by the end of the trial. The accused had given a lengthy statement in self defence that was reasonable and never taken into account throughout the judgment. Thus it could not be said that the prosecution had established its case beyond reasonable doubt as the appellant had established doubt in the prosecution's case.

This court has perused the trial court's record and finds that the two grounds as urged by the respondent's counsel for conceding to the appeal are valid. The court finds that there were glaring inconsistencies in the prosecution evidence. It is notable that during the evidence in chief PW2 stated, referring to the accused, thus **"I don't know the accused. I only came to know him in court by name."** During cross-examination, referring to the accused again, PW2 stated thus, **"I know you are a driver. I have seen you on several occasions at Litein."**

The court finds that such inconsistencies and others as singled out by counsel for the respondent were glaring and were never resolved by the trial court. The court finds that the inconsistent evidence cast a wide shadow of doubt in the prosecution's case as urged at the trial and as submitted for the appellant, it could not be said that the prosecution had established its case beyond reasonable doubt.

In conclusion, the appeal is allowed, the finding of guilt by the trial court and the consequential conviction and sentence quashed as the appellant is acquitted and discharged forthwith.

Signed, dated and delivered in court at **Kericho** this **Wednesday, 16th October, 2013.**

BYRAM ONGAYA

JUDGE