ELLY KIPLAGAT CHUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in the Criminal Case No. 91 of 2011 of the Senior Resident Magistrate's Court at Mariakani – D.M. Machage – SRM)

JUDGMENT

ELLY KIPLAGAT CHUMO hereinafter referred to as the appellant was tried and convicted of an offence of **RAPE** contrary to section 3(1) of the Sexual Offences Act No. 3 of 2006 and sentenced **TO FIFTEEN (15) YEARS** in jail with hard labour.

The particulars of the charge were that on the 4th day of January 2011, at {*particulars withheld*}, Kilifi county within Coast Province he intentionally and unlawfully caused his penis to penetrate the vagina of H.H.J. without her consent.

The appellant being aggrieved by the conviction and sentence has lodged this appeal.

The brief circumstances of the case are that on the material date, the appellant went to the home of the complainant, H.H.J. He was accompanied by the complainant's brother. The complainant's brother left for school. The complainant's parents were away on duty. After the complainant's brother left, the appellant entered the house and requested the complainant to give him water to drink. He was given. He then followed the complainant to the kitchen and told her that he wanted **"her goods**". He then grabbed her and fell her on the ground on the carpet. He warned her not to scream. He then lifted her mini skirt and "**penetrated"** her. He finished and left, locking the door from outside. A casual worker in the home later opened the door for the complainant. She then sent the worker to call a neighbour. The neighbor came and then called her mother. She was taken to the Army hospital. Apparently, the appellant was working at Mariakani Barracks as an Army Officer and so was the father of the complainant and both were staying at the army residential quarters. After being examined at the Army Hospital, the complainant was referred to the District Hospital at Mariakani. Subsequently, she was issued with a P.3 form which was duly filled and produced in court. The appellant was then arrested and charged accordingly.

The appellant was put on his defence at the close of the prosecution. He told the Court that on the material date he was unwell. As he was going to hospital, he met the complainant's mother and inquired as to how the complainant, H.H.J, was doing. He was told she was fine. He then went to the complainants' home. He found her with her elder and younger brother. He drunk water, excused himself and went to hospital. He then had lunch up to 2 p.m. He returned to the complainant's home and inquired from the complainant's brother, if she was there. He confirmed H.H.J was at home. He then talked with her for about one hour, in the presence of her younger brother and left for work. He denied having raped her. That, he was later charged with trespass to a private house by the military police and fined "**some money**" by the administration. However, he was later charged as herein.

In the judgment delivered by the Learned trial Magistrate, the appellant was convicted based mainly on the evidence of the complainant. The Learned Magistrate observed:-

“The Court had the opportunity to assess the demeanor of the complainant, and noted that she was a frustrated and bitter young woman reasons she had been penetrated with the person thought was a friend of the family”

The trial Magistrate concluded:

“I am therefore satisfied beyond reasonable doubt, that the accused raped the complainant and proceed to convict him accordingly pursuant to Section 215 of the Criminal Procedure Code. I order accordingly”.

At the hearing of the appeal the appellant appeared in person. He relied entirely on the written submissions he filed.

He filed several grounds of appeal, namely, that the Learned trial Magistrate failed to consider that the evidence of PW1 and PW2 was based on conspiracy, that the offence of rape was not proved, that the doctor’s evidence favoured him, that he was not given a fair hearing contrary to Article 50 (2) a,b,c,d of the new Constitution and that, the Armed Forced Act was not adhered to thus resulting in prejudice to him. Finally, that the defence evidence was improperly rejected as no reasons were given for rejecting it.

In opposing the appeal, the Learned State Counsel Mr. Gioche submitted that, the elements of rape are found under Section 3 and 43 of the Sexual Offences Act. He identified them as:

- **penetration,**
- **lack of consent, and**
- **use of force.**

He submitted that in this case, the complainant denied having given the appellant consent. That, she was in state of confusion after the incident and her clothes were blood stained. That, she testified that, the appellant penetrated her private parts and used force. The counsel invited the court to note the conduct of the doctor who filed the P.3 form. That the Doctor was not willing to give evidence and altered his report. The trial Magistrate dealt with that issue of the conduct of the doctor at length in the judgment. He further invited the Court to note the alterations in the P.3 form. As regards the issue of age, of the victim, the State Counsel submitted, the same is irrelevant for the purpose of proving a charge of rape. He submitted that although the DNA was not done, there was adequate evidence to sustain a conviction. Finally he submitted that, the appellant was well known to the complainant before the alleged incident. He told the Court to uphold the conviction and the sentence.

After hearing both the appellant and the State Counsel, I have considered the evidence adduced before the trial Court, the amended grounds of appeal, and the written submissions in support. I have also considered the submissions by the State Counsel in opposing the appeal. As a 1st appellate Court, my duty is to re-evaluate the evidence afresh, and draw my own conclusion. I caution myself that, I did not have the benefit of the demeanour of the witnesses. Analysis of the evidence reveals that, the appellant was well known to the complainant, this is reflected in the evidence of PW1, H.H.J. as follows:

“**I know the accused. I stay at Mariakani Barracks with my father and mother. He works at Mariakani Barracks. He had come. He is at Nyali Barracks, the accused.”**

On his apart, the appellant testified

“I am number 75496 Sergeant Private. I know the complainant and her family. They are my family friends. I work with her family”.

and the complainant’s mother testified.

“I know the accused. He used to work at New Army Camp. The New Army Camp is called Nyali. He used to come to my place with my other relatives. He used to visit.”

Thus, the complainant and the appellant were well known to each other and had a cordial relationship. This fact was well appreciated when the trial Magistrate observed

"**The accused was well known to not only the complainant but her parents as well and would visit them at free will. There existed no grudge between them."**

However, the question is this: ***What transpired on the material date? Was H.H.J raped? Was she raped by the appellant?*** Under Section 3(1) a person commits an offence of rape,

a) If he or she intentionally and unlawfully commits an act on which causes penetration with his or her genital organs.

b) The other person does not consent to the penetration.

c) The consent is obtained by force or by means of threats or intimidation of any kind.

The word penetration is defined under section 2 of the Act as:

"**penetration" means partial or complete insertion of the genital organs of a person into the genital organs of another person"**

Under section 43 of the Act, the terms **"intentional"** and "**unlawful"** acts are explained. In the instant case, the version of what transpired is heavily reliant upon the evidence of the complainant H.H.J. She testified in a nutshell, that,

"**I was in a mini skirt in the house. He lifted it. I was in hot pants, he penetrated me by the side of my inner pant"**

Her evidence was found to be reliable by the Trial Magistrate who observed.

"The complainant as I said a young but firm and straight to the point. . . ."

As earlier stated, the trial Court is the only Court that had the benefit of the demeanor of the witnesses. Be it as it were, I find that the evidence of H.H.J required corroboration.

I find that several issues are not in dispute. As earlier stated the complainant and the appellant knew each other. They have both testified to that effect. Apparently from the evidence of both, they met at the complainant's house on the material date. According to the complainant, the appellant went to their house over lunch hour with the brother. The brother went to school. The appellant knew she was alone. He went to the house where she was, asked for water and then proceeded to rape her. On the other hand, the appellant testified, he went to the complainant's home and found her with her younger brother. He testified

"I had lunch until 2.00 p.m. I then proceeded to H.H.J's house and found her younger brother. I asked if H was still there. She was. She told me that her older brother had been escorted to school. It was about 2.00 p.m. At 4.00 p.m. I proceeded back to work. He talked with H. for about one hour in the presence of her young brother."

Thus, it's clear from the evidence the complainant and the appellant met and/or were with each other at H's place of residence, at least between 2 to 4 p.m. But the question is this, ***Did the appellant rape H?*** I find the main corroborative evidence is that of the Medical Officer. I have read through the trial Court's proceedings and the judgment. I have also looked at the P.3 form and it is crystal clear to me that the Clinical Officer who filled the P.3 from and testified was to say the very least, **NOT** professional at all in his conduct.

To even make the matter worse and unethical, is the fact that, the Clinical Officer did cancel his initial

findings which led to the conclusion that the complainant was or could have been sexually assaulted and substituted it, with findings to the contrary. A look at the P.3 form reveals on page 2, under question 3 regarding probable type of weapon causing injury he answered **"penile penetration".**

On page 3 question 2 (a) regarding the details of physical state of and any injuries to genitalia with reference to labia, majora, labia manora, vagina and cervix and conclusion, the answer indicated initially was "ventral tear at 9.00 per position"

This answer is later cancelled and replaced with an answer. **"NAD - on menses. Hymen not intact**"

There is no initial against that cancellation. Again to the question relating to presence of discharge, blood or venereal infection, from genitalia or on body externally the initial answer was **"bleeding profusely**" and the same is cancelled to read **"No blood seen".** Thus to state that the complainant had menses, yet no blood was seen is contradictory. Thus, the lamentation of the Trial Magistrate over his conduct was not in vain. These is a clear indication, the Clinical Officer purposely and intentionally altered the initial findings in the P.3 form to defeat the administration of justice.

In fact, he should have been investigated. I, therefore hold that his initial findings before cancellation stand, and that the probable weapon of use was **"penile penetration",** if that is so then, the conclusion by the Doctor that **"Rape not confirmed"** was in bad faith and unsustainable. I hold as did the trial Magistrate that the Clinical Officer was bent to assist the suspect. It's very unfortunate. The initial finding in the P.3 form before alterations corroborates the evidence of H.H.J regarding the events of the day. Indeed the evidence of the mother of the victim was:

"She was in a state of confusion. Her clothes were blood stained. Inner pant also the clothes were taken to police handed to Rose"

and that of P.C. Rose Ngui that;

"I also received her inner pants. The pant was presented to me a time. (MFII) soaked blood stained white pant (exhibit") and corroborates

PW1's evidence. Equally that of Charles Tsimbe W.O a Community Nurse at Medical Barracks

Mariakani. He testified that the doctor who first attended to the complainant indicated in his notes that the complainant

"She was depressed. She could not talk so much. She had blood soaked under clothes. She was counseled then she was referred to Mariakani District Hospital for treatment."

All this evidence supports the evidence of the complainant. In my considered opinion, the complainant was indeed raped. I don't find credence in the evidence of the appellant that he did not rape her. The complainant denied having consented to the act of rape. She could not probably consent to the act of rape and more so in her parents' home, in the absence of anyone and later complain. She testified, the appellant indeed grabbed her onto the ground on the carpet, and warned her not to scream. That, in my opinion amounts to a threat. It's clear, all the ingredients of rape as aforesaid, exits. The P.3 form also indicates, she suffered **"harm".** I therefore concur with the findings of the trial Magistrate that the offence of rape was proved. The grounds of appeal herein therefore hold no water. I find no evidence of conspiracy between the complainant and the mother to fix the appellant as alleged by the appellant. The offence of rape was proved beyond reasonable doubt, the doctor's findings were manipulated and altered to defeat the administration of justice and favour the defence, and holds no water. There is no evidence that the appellant was denied a fair trial as envisaged under Article 50 (2) of the new Constitution. The violation of the Armed Forces Act, was not relevant, as it does not apply here in this matter.

Finally I find the appellant's defence was considered as per the judgment by the trial court and dismissed. The Magistrate observed in the judgment;

"the accused denied the offence"

All in all I find the conviction of the appellant was safe and uphold it.

As regards sentence I find that, there was no ground of appeal relating to the same. However, I shall deal with it. The appellant was sentenced to 15 years imprisonment. The minimum sentence is 10 years. The appellant mitigated that, his was a first offender with a wife and 2 children. His mitigation was considered. **HOWEVER** I don't know where the trial Magistrate got the issue of **hard labour** from. The same is not provided for under the Act, the sentence can only be enhanced to imprisonment for life. I therefore set aside the sentence herein, and having considered the appellant was a Civil Servant has who has already been dismissed from employment and was a first offender, I substitute the sentence and order he shall serve **(TEN) 10 YEARS** imprisonment.

Ordered accordingly.

Dated, delivered and signed in open Court on this 23rd day of August 2012 at Mombasa.

G.NZIOKA
JUDGE
23.08.2012

In the presence of:

Mr. Giochie for the State

Appellant in person

Benta – Court clerk.