REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 304 of 2010

CHARLES KIOKO KIMULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court

Criminal Case No.27 of 2010 by Hon. E.Juma Osoro,SRM on 28/10/2010)

JUDGMENT

The appellant, **Charles Kioko Kimuli** was charged before the Principal Magistrate's Court at Kitui with the offence of rape contrary to section 3 of the Sexual Offences Act. It was alleged that on 2nd July, 2010 at about 12 a.m. at [particulars withheld], Kitui District of the Eastern Province, the appellant committed an act which caused penetration with **M K** an adult aged 75 years without her consent. In the alternative he was charged with indecent act with an adult contrary to section 11(6) of the Sexual Offences Act, particulars being that on the same day, place and time the appellant committed an act of indecency with **M K** an adult aged 75 years by touching her private parts, namely vagina, breasts and buttocks by using his hands.

The appellant denied both charges and his trial ensued. The prosecution's case was that on 2nd July, 2010 at midnight, **M K,** hereinafter "***the complainant***" was asleep in her house with her 2 grandchildren, one of whom was **M R** (PW4). She suddenly heard a knock on the door. She got out of bed to check but it was too late as the door was forced open and a person whom she later claimed to be the appellant entered. The appellant then grabbed her and pushed her to the bed. The complainant however managed to grab her torch and flashed it on the appellant's face. She was able to identify his features. The appellant struggled with her on the bed until they fell on the floor. The appellant then gagged her mouth with a maize cob and proceeded to sexually assault her for over 4 hours. PW4 heard the commotion and screamed. However, the appellant ordered her to keep quite. As the appellant sexually assaulted the complainant, he lost his mobile phone in the process. When done, the appellant asked the complainant and PW4 to assist him to search for his mobile phone. They did so all in vain. The appellant left briefly but returned and asked the two to continue searching for the phone. The appellant, the complainant and PW4 extended the search outside the house and even into the farm but it was all in vain. Thereafter the appellant left. The following morning the complainant came across the mobile phone in the house. She immediately contacted a village elder, **D K W** (PW3) and made a report of the incident. She also handed over to him the mobile phone. In turn he notified the Assistant Chief **Abednego Musyoka Munguti** (PW5). Using the mobile phone they were able to establish that it belonged to the appellant. They traced the appellant whom they arrested and handed over to **P.C. Aex Kaitany** (PW6) of Kwa Vonza Police Post. The complainant was subsequently examined by a **Martin Njue** (PW1) a clinical officer then attached to Kitui District Hospital who filled the P3 form that was tendered in evidence. The appellant

was then charged with the offences.

In his sworn statement of defence, the appellant denied committing the offences. His defence was limited to the circumstances of his arrest. On 2nd July, 2010 he had worked on his farm all morning and returned to his house at about 1pm to rest. As he was doing so the Assistant Chief (PW5), the village elder (PW3) and other members of the public came to his house and arrested him and took with them his mobile phone which was on the table.

The learned magistrate having keenly evaluated the evidence of the prosecution and that of the defence found in favour of the prosecution, convicted the appellant and sentenced him to 20years imprisonment. It is against this conviction and sentence that the appellant has lodged the instant appeal. He blames the learned magistrate for convicting him when the ingredients of rape were not proved, there were glaring inconsistencies in the prosecution case, the evidence of identification was suspect and finally, that the circumstantial evidence was weak.

When the appeal came before me for hearing, on 10th July, 2012, the appellant elected to pursue the same by way of written submissions. I have carefully read and considered them.

The appeal was opposed. **Mr Mukofu,** learned State Counsel in opposing the appeal submitted that the complainant positively identified the appellant in the act by her torchlight which she flashed on the appellant's face. Besides she spent considerable time with the appellant. Further, the appellant's mobile phone was found at the scene of the incident the following day. This evidence tied the appellant to the offence.

As a first appellate court, I am required to re-evaluate the evidence tendered during the trial afresh and reach my own conclusion as to whether the appellant's conviction should stand. See **Okeno vs Republic]1972] E.A. 32** . It is not in dispute that on the material day, the complainant's house was broken into at midnight. According to the complainant, the person who broke into her house as she slept with her 2 grand children proceeded to rape her. In the process she managed to pick her torch and flashed at him. Apparently, she was able to note the appearance and critical features which she attributed to the appellant. The Sexual assault if at all lasted 4 hours. Thereafter appellant asked her together with her 2 grandchildren to assist him look for his lost mobile phone. After looking for the phone in vain, the appellant left. The phone was recovered the following morning and was used to track down the appellant. Going by these facts, no doubt the complainant was in close proximity with the appellant. These circumstances allowed the complainant to positively identify the appellant. The finding of the mobile phone the following morning at the scene of crime placed the appellant at scene of crime. This far so good.

However, was the offence charged proved? I do not think so. The appellant was charged with rape in the main count. In this regard, apart from the evidence of the complainant, the other evidence which was critical was that of the clinical officer. All that he testified to was that there were no injuries on the complainant's genitalia. However, he noted whitish vaginal discharge on the external genitalia. HVS was done and no spermatozoa were seen. He also noted though few pus cells. The whitish discharge was indicative of bacterial infection. He then filled and signed the P3 form. Nowhere in this evidence does he confirm that the complainant had been sexually assaulted. Indeed even the P3 form tendered in evidence is silent as to whether the complainant was assaulted. He does not attribute the presence of vaginal discharge to sexual assault. It may well be that the discharge was as a result of other activities, not necessarily sexual assault. It is instructive that the complainant was examined the following day, yet no spermatozoa were seen. In cases of this nature it is for the prosecution to prove that the complainant was sexually assaulted. Such evidence can only come by medical examination. The medical evidence tendered in this case fell far too short in establishing that the complainant was raped and that she was so raped by the appellant. Because of this doubt, I cannot say that the conviction of the appellant was safe; I must resolve that doubt in favour of the appellant.

It is for this reason that I am compelled to allow this appeal, quash the conviction and set aside the sentence imposed. The appellant should forthwith be released from prison custody unless otherwise

lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

ASIKE MAKHANDIA
JUDGE