REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 67 OF 2008

JAPHET RUTTO...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an Appeal from the Judgment of Hon. H. Nyaga (Senior Resident Magistrate) in Kabarnet SRM.CR No. 64 of 2008

delivered on the 26th August 2008)

JUDGMENT

JAPHET RUTTO (the Appellant) appeared before the Senior Resident Magistrate at Kabarnet facing two counts viz:-

(i) Rape contrary to S. 3 of the Sexual Offences Act in that on the 18th February 2008 in Baringo District Rift Valley Province, unlawfully had carnal knowledge of K.C without her consent.

(ii) Assault causing actual bodily harm contrary to S. 251 of the Penal Code, in that on the 18th February 2008 in Baringo District, unlawfully assaulted K.C thereby occasioning her actual bodily harm.

As an alternative to the first count, the appellant was charged with indecent act with an adult contrary to S. 11 (6) of the Sexual Offences Act. He was said to have indecently assaulted the complainant by touching her private parts without her consent. The appellant pleaded not guilty to all the counts. He was tried and convicted on both counts. The learned trial Magistrate imposed a sentence of twenty (20) years imprisonment without indicating on what count.

Undoubtedly, the sentence was for the main count of rape which carries a maximum sentence of life

imprisonment and a minimum sentence of ten (10) years imprisonment.

The offence of assault under S. 251 of the Penal Code, carries a maximum sentence of five (5) years imprisonment. It would therefore follow that the learned trial Magistrate failed to impose sentence on count two.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal which impliedly is against sentence rather than conviction as may be deciphered from the prayers sought in the petition of appeal i.e. the appeal be allowed and the sentence be reduced.

However, to be on the safe side, it would be more appropriate to proceed with the appeal on the basis that it is against both conviction and sentence. The appellant represented himself at the hearing of the appeal and relied on handwritten submissions which he presented.

The learned State Counsel, **MR. KABAKA**, opposed the appeal on behalf of the State respondent. In his submissions, the appellant contends that there was inconsistency in the evidence of the prosecution witnesses regarding his alleged recognition as the offender and that the identification of the clothes worn by the complainant was doubtful such that the description given of them was an afterthought. The appellant also contends that there was contradiction regarding the actual date of the offences in that three different dates were mentioned i.e. 14/12/08, 18/02/08 and 17/02/08.

It is further contended by the appellant that all witnesses (PW1, 2 and 3) were from the same family thereby posing the possibly of a frame up and that PW2 and PW3 were not certain as to which person committed the offences.

The learned State Counsel submitted that the medical report (P.Ex.5) confirmed that the complainant (PW1) was raped and that the complainant had previously known the appellant thereby making it easy for him to be recognized since the offences occurred in broad daylight. Further, the ordeal went on up to 7.30 p.m. when PW2 and PW3 found the appellant on top of the complainant with his trousers pulled down. They (PW2 and 3) saw and recognized the appellant as their neighbour. PW3 had a torch which assisted in the appellant’s identification.

The learned State Counsel submitted that a blood stained jacket used in the ordeal was found in the possession of the appellant. It was the contention by the learned State Counsel that the appellant’s defence was a mere denial and that the evidence against him was strong. He was therefore properly convicted and the sentence imposed against him was lawful.

The foregoing submissions have been considered. The role of this Court is to re-visit the evidence and draw its own conclusion bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution’s case was that on the material date at about 2.30 p.m., the complainant **K.C (PW1)**, was heading home from a shopping centre and at about 4.30 p.m. she spotted the appellant ahead of her. Without saying a word, the appellant shoved her to the ground, lifted up her dress, held her throat and proceeded to rape her. She blacked out for a while and when she regained her senses, the appellant had fled. He used a jacket to cover her face and tore her clothes in the process of the rape. She was rescued by people and taken to hospital where she was examined by a clinical officer **MOSES SUSWA (PW5)**, who filled and signed the necessary P3 form showing that she was assaulted and raped.

JOSHUA CHEBOR (PW2) and **PHILEMON CHEBON (PW3)**, were together on the material date at 7.30 p.m. when they arrived at a river and heard a person groaning. They checked and saw the appellant next to the complainant, with his trousers pulled downwards. The complainant was half naked. Her blood stained clothes were nearby. They (PW2 and PW3) assisted the complainant even as the appellant fled on seeing them.

The appellant was later traced and apprehended. He was found with a blood stained jacket. He was eventually handed over to the police and received by **P.C. JOHN KOECH (PW4)** of Kabarnet Police Station who charged him accordingly.

On being placed on his defence, the appellant made an unsworn statement and stated that he did not commit the offence and was arrested at his home. Nothing was found in his possession.

The defence was considered by the learned trial Magistrate together with the evidence adduced by the prosecution witnesses. In the end, the learned trial Magistrate concluded that the offences against the appellant had been proved beyond reasonable doubt. The appellant was thus convicted of both counts.

Having considered the entire evidence presented before the learned trial Magistrate, this Court is also satisfied that offences were committed against the complainant. This was established without dispute by the evidence of the clinical officer (PW5).

This Court is also satisfied that the appellant was positively identified as the person responsible for the offences. He was clearly seen by the complainant who had previously known him. The offences occurred in broad daylight. This facilitated the recognition of the appellant by the complainant. Besides, the appellant was previously known by PW2 and PW3. They found him with the complainant with his trousers pulled halfway downward. He was thus caught **“with his pants down”**. He managed to escape but was later apprehended and handed to the police. His defence was a denial but was unsustainable in the light of the very strong evidence against him.

In the circumstances, this Court finds that the appellant’s conviction by the learned trial Magistrate was proper and lawful. The same is hereby upheld.

With regard to the sentence, this Court is of the view that a twenty (20) years imprisonment sentence for a first offender was rather excessive although it was intended to be different and an expression of the Court’s displeasure with the appellant’s conduct of sexually assaulting an elderly lady.

At most, the appellant ought to have been handed down the minimum sentence of ten (10) years for rape.

In the end result, the appeal is dismissed. However, the sentence of twenty (20) years imposed by the learned trial Magistrate is hereby reduced to ten (10) years imprisonment. In addition, the appellant will serve two (2) years imprisonment for the second count of assault causing actual bodily harm. The sentences will run concurrently.

Ordered accordingly.

J. R. KARANJA

JUDGE

[Delivered and signed this 15th day of March 2011]

[In the presence of the appellant in person, Mr. Kabaka the State Counsel and Mr. Andrew the Court Clerk)