



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

[CORAM: F. AZANGALALA J.]

CRIMINAL APPEAL NO. 78 OF 2010

B E T W E E N

RICHARD KIPROTICH CHESIRE.....APPELLANT

A N D

REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of the Resident Magistrate - B. N. MOSIRIA dated 17th May, 2010 -

in Criminal Case Number 29 of 2009 at Iten Resident Magistrate's Court

JUDGMENT

The appellant, **Richard Kiprotich Chesire**, was charged in count 1, with the offence of rape contrary to section 3 (1) (a) of the Sexual Offences Act No. 3 of 2006, the allegation being that on 26th January, 2009, in Kiyoo District within the rift Valley Province, the appellant intentionally and unlawfully, by use of his sexual organ namely, penis, committed an act which caused penetration to the genital organ namely, vagina of **J.K.S** (hereinafter “**the complainant**”).

In count 2, the appellant was charged with Sexual assault contrary to section 5 (1) (a) (1) of the same Act. The allegation was that the appellant, on the same date, and same place, intentionally and unlawfully, by use of his hand, penetrated the genital organ, namely, vagina of the complainant. The appellant also

faced an alternative charge of committing an indecent act contrary to section 11(6) of the same Act. It was alleged that the appellant, on the same date and same place, internationally and unlawfully committed an indecent act with the complainant by touching her genital organ namely, vagina.

The appellant was charged in the same charge sheet together with **Richard Kosgei Kiptoo** (co-accused) who was the first accused. The latter faced only one count of attempted rape contrary to section 4 of the same Act. In his case, the prosecution alleged that on the same date, and same place, he intentionally and unlawfully by use of his sexual organ, namely, penis, attempted to commit an act which caused penetration to the genital organ, namely, vagina of the same complainant.

The appellant and his co-accused appeared before **B.N. Mosiria**, then a Resident Magistrate at Iten on 28th January, 2009 and pleaded not guilty to the charge. The prosecution called a total of 8 witnesses and after hearing their evidence, the court found that the duo had a case to answer and put them on their defence. Both made sworn statements in which they denied committing the offences. Upon analyzing the evidence of both the prosecution and that of the appellant and the co-accused, the learned Resident Magistrate found that the prosecution had not proved its case against the appellant's co-accused to the required standard and acquitted him. She however found the appellant guilty on count two (2) and after regarding his mitigation, sentenced him to 40 years imprisonment.

The appellant was not satisfied and has appealed to this court against both conviction and sentence. The main complaint is that he was convicted on insufficient and contradictory evidence. When the appeal came up for hearing on 17th March, 2011, the appellant was represented by **Mr. Kiboi** while **Mr. Kabaka** appeared for the state. **Mr. Kabaka** conceded the appeal on the ground that the learned trial magistrate relied on the evidence of P.W.1 in convicting the appellant yet he had disbelieved the same testimony in acquitting the appellant's co-accused. The learned State Counsel further submitted that the testimony of the complainant was not consistent and should not have been a basis for convicting the appellant.

Mr. Kiboi whilst agreeing with **Mr. Kabaka**, added that the findings of the trial court were not supported by the evidence on record. Counsel further submitted that the behaviour of the appellant was not in consonance with that of an offender given that he even assisted the complainant when he found her on the road.

Briefly, the facts were as follows:-

The complainant, at about 6.40 p.m., on the material date left the home of **Thomas Ngetich** (P.W.2) after failing to find him. On the way, she was joined by the appellant and the co-accused. The latter then held her by the shoulder, turned her round and threw her to the ground. He then lied on her chest as he slapped her. She screamed and was again slapped by the co-accused who then covered her mouth. He removed his trousers and when he attempted to have intercourse with the complainant, she held his penis and was again slapped. The co-accused eventually had intercourse with the complainant. When he was through, the appellant removed her pant and also had intercourse with her as his co-accused lay on her chest. When the appellant completed, he started sexually assaulting the complainant using his hand. The complainant then lost consciousness. When she came to, it was at night. She screamed and called out P.W.2 who went to where she was with **J.C** (P.W.3). She was taken to the house of P.W.2 where she was given porridge. She told them that she had been wronged by the appellant and his co-accused. P.W.2 called the appellant who went to his house and stayed with them until the following morning. The appellant offered to look for money for the treatment of the complainant and then left. The complainant was then taken to Iten Hospital and later to Moi teaching and Referral Hospital where she was admitted for over one month. A P.3 form was later duly completed and signed by **Dr. Joseph Imbenzi** (P.W.6) who classified her injury as grievous harm. At the said hospital, she underwent operation twice for the repair of "**perennial tears and reconstruction**". The doctor however could not determine whether there had been penetration. The appellant and his co-accused were arrested and charged as already stated. The Investigating Officer CPL **Wilfred Maroko** (P.W.7) recovered several exhibits which he produced at the trial.

The appellant and his co-accused were also examined by **David Cheruiyot (P.W.8)** then a Clinical Officer at Iten District Hospital. He detected nothing significant and produced P.3 forms he had completed and signed after examination.

On the above facts, the learned Resident Magistrate found that no offence had been proved against the appellant's co-accused. He however found that the offence of Sexual assault had been proved against the appellant as required in Law and convicted him as already stated. In convicting the appellant, the learned Resident Magistrate found that the complainant had said the truth and her testimony was corroborated.

This is a first appeal. I have a duty to analyze the evidence afresh, evaluate it and arrive at my own independent conclusion of course remembering that I have not had the advantage of seeing and hearing the witnesses testify and giving allowance for that. (**See Okeno –vrs- Republic [1972] (E.A.32)**).

The appellant was convicted on the evidence of the complainant who the trial court found truthful. If that was the case, how could the same testimony be discredited as against the appellant's co-accused? It was the complainant's own testimony that both the appellant and his co-accused followed her at the material time and date and that the co-accused held her by the shoulder, turned her round and threw her to the ground. He then proceeded to have intercourse with her. When he was through, the appellant also had intercourse with her and then sexually assaulted her with his hand as his co-accused lay on her chest. In view of that clear testimony, I am puzzled at the conclusion reached by the learned Resident Magistrate. In her own words:-

“From the evidence adduced by the prosecution, it is clear that the accused 1 had no intention to rape the complainant.”

The learned Resident Magistrate also observed as follows:-

“The incident having taken place in a road (public) which P.W.1 said is used by people around there and also the incident having taken place at 6.00 p.m., it can be considered a foolish idea for accused 1 to attempt to rape the complainant while aware that there are people who use that path since it was a public path and that it was during day time and any one could see or find him committing offence”.

The above findings of the learned Resident Magistrate suggest that she did not wholly believe the complainant. They also suggest that she was treating the complainant's testimony in an inconsistent manner.

Further scrutiny of the findings of the learned Resident Magistrate show that she may not have been dispassionate in her treatment of the evidence with respect to both the appellant and the co-accused. In her own words:-

“This is because P.W.1 says Accused 2 came to her one hour later which Court supposes must have been 7.00 p.m. which could be dark as compared to 6 p.m., it means Accused 1 committed the offence when it was still day time whereas it could have been possible that he was trying to assist the complainant who was lying on foot path drunk and exposed to danger, now that the complainant and Accused 1 admit that they are relatives and know each other.

Accused 1 may have been trying to find out and assist his relative that is why he was where complainant was and he had no fear doing this since it was during the day and anyone could see what he was doing”.

The above passage suggests that the learned Resident Magistrate did not accept the complainant's evidence against the co-accused and preferred the testimony of the co-accused. It is significant however that the co-accused had clearly testified that the appellant went to his house at 9.15 p.m. and they commenced looking for the latter's phone only to find the complainant who was drunk on the road. The appellant then called P.W.2 who went to the scene. The co-accused and the appellant then left the complainant in the hands of P.W.2. It is clear that the learned Resident Magistrate accepted only aspects of the co-accused's evidence which appeared to support his case and made unfounded adverse inferences as against the appellant.

With all due respect to the learned Resident Magistrate, she clearly fell into error when she appeared to apply different scales to the evidence which was adduced before her. Having discredited the testimony of the complainant as against the co-accused, there was no logical basis for believing the same testimony against the appellant.

My scrutiny of her judgment shows that she was not even consistent in her findings. After disbelieving the complainant as against the co-accused, the learned Resident Magistrate stated as follows:-

“I do believe the complainant that she is telling the truth since she was sober when she saw accused 2 rape her, she knew accused 2 before the incident and hence can't be said to have mistaken him and that she consistently stated that from the night of incident to following morning, that Accused 2 had raped her. I thus will admit her evidence which can form basis of conviction although not corroborated. This is in line with the provisions of Section 124.”

She then concluded as follows:-

“The evidence of prosecution witness is to be believed since it has been well corroborated and consistently given an account of what happened that day”

This conclusion is surprising in view of what the learned Resident Magistrate had herself stated and in view of her treatment of the complainant's testimony as against the appellant's co-accused.

In view of what I have stated above, I am not surprised that the learned state counsel did not support the appellant's conviction. The learned Resident Magistrate was wrong to treat the appellant differently from his co-accused when the only evidence against the two was given by the same complainant. He could not believe and disbelieve her testimony at the same time.

That being my view of this appeal, I need not consider the other complaints made by the appellant. I allow the appeal, quash the conviction of the appellant and set aside the sentence of 40 years imprisonment imposed upon him. The appellant should be released from prison forthwith unless he is held for some other lawful cause.

DATED AND DELIVERD AT ELDORET THIS 5TH DAY OF MAY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

1. **Mr. Kiboi** for the appellant and
2. **Mr. Oluoch**, Senior Deputy Prosecution Counsel for the State.

F. AZANGALALA

JUDGE