SEXUAL OFFENCES

MEDICAL EVIDENCE

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. OF 327 OF 2009

PAUL KIBET ROTICH……..……...……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.3976/2009 by Hon W. Kagendo, Senior Resident Magistrate, dated 26th November, 2009]

JUDGMENT

The appellant was charged with having carnal knowledge of his wife of many years against the order of nature contrary to **section 162(a)** of the **Penal Code.** According to the prosecution evidence on record, the complainant and the appellant who have four children had lived a normal marital life until February, 2009.

On 15th February, 2009, the appellant assaulted the complainant who made a report to the police and the former was arrested but released without being charged after the two reconciled. On 11th June, 2009, the appellant without the complainant's consent had anal intercourse with the latter. He repeated the ordeal on 17th June, 2009. The complainant sustained anal injuries and made a report to the area chief and his assistant who in turn reported to the police. The complainant was examined nearly one month later, on 20th July, 2009 by Dr. Samwel Onchere who noted that there was protrusion of the rectal muscles. But there was no discharge and no fresh injuries.

In his sworn defence, the appellant denied committing the offence with which he was charged and maintained that their marital problems started when he excluded the complainant from the management of a family shop and instead employed a certain lady for that purpose; that the complainant suspected the lady to be the appellant's new wife. He moved her (the lady) from the shop and got her accommodation elsewhere. The complainant reported him to the chief and made the allegations of sodomy simply because of this.

The learned magistrate (W. Kagendo, Senior Resident Magistrate) considered the evidence presented by both sides and found the complainant an honest witness and was persuaded by both her evidence and the medical report that she was indeed sodomised by the appellant. Upon convicting the appellant, the learned magistrate sentenced him to ten years imprisonment.

Being aggrieved, the appellant has brought the present appeal challenging both the conviction and sentence on the following condensed grounds:

i) that the P3 form relied on by the trial court was of no evidential value;
ii) that there was no conclusive proof that the injuries noted on the complainant by the doctor were inflicted by the appellant;
iii) that the learned magistrate failed to appreciate that there was bad blood between the appellant and the complainant;
iv) that the appellant's defence and mitigation were not considered and;
v) that the sentence was harsh and oppressive.

Learned counsel for the respondent supported the conviction and sentence, saying simply that the complainant was consistent and the doctor confirmed the offence.

Having duly considered the appeal and the foregoing submissions, I reiterate that the complainant was (or still is) the appellant's wife. They have lived as such for between 12 and 14 years and are blessed with 4 children aged between 5-12 years. It is also on record that the couple had marital problems beginning February, 2009 over the management of the family shop and the appellant's involvement with a certain lady. As a result of these differences, the appellant was arrested for assaulting the complainant. The latter forgave him and the charges were

dropped. There is medical evidence that the complainant suffered bruises and protrusion of the rectal muscle.

Before the trial court, the main question was whether the bruises and protrusion of the rectal muscles on the complainant was caused by the appellant in the course of a forced anal sexual inter course. In the normal course of things, there will be no independent witnesses in a situation such as is obtaining in this matter involving husband and wife in their bedroom. It remains the word of the victim against that of the suspect.

The complainant gave, in my considered view, very clear account of the events leading to the incident in question. The appellant turned hostile after the assault case was reported against him by the complainant. He began by excluding her from the running of the shop, bringing into their marriage a third party, followed by a strange request on 11th June, 2009 – that of anal sex. When she expressed reluctance, the appellant resorted to the use of force and violence ripping the complainant's petty coat and underpants and forcing his manhood in the complainant's anus, injuring the complainant in the process. The appellant repeated this on 17th June, 2009 as the complainant continued to bleed from the anus.

As a result of this, she moved to their daughter's bedroom. The appellant confirmed that the complainant indeed relocated from their matrimonial bed to the children's room.

The complainant has sufficiently explained why she did not make a report of the incident or seek medical treatment immediately. She respected the marriage, the appellant had threatened her not to tell anyone, she resorted to first aid in the first instance, she had no money and the appellant destroyed the first P3 form. I may also add that, although the complainant appeared to persevere her abusive husband, the proverbian straw that broke the camel's back was when after being kicked out of the shop, the appellant brought some girl not only to the family shop but also to the family home.

The kind of injuries noted by the doctor could not have been self inflicted. The complainant need not have gone this far simply to incriminate the appellant. But more significantly the learned trial magistrate was persuaded that the complainant was an honest witness. I have been urged to find that since the doctor examined the complainant one month later, the conclusion reached was not accurate. Even without the medical evidence, the complainant laid a firm case against the appellant. Following the amendments to **section 124** of the **Evidence Act**, it is no longer necessary to look for corroborating evidence in sexual offences so long as the court is satisfied that the victim is a truthful witness. The section provides that:

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The Court of Appeal in **Kassim Ali** Vs. **Republic,** Criminal Appeal No.84 of 2005 following the decision in **Ongweya** Vs. **Republic** (1964) EA 129 said in a case similar to this appeal follows:

"So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

I reiterate that the learned trial magistrate found the complainant truthful. The 10 years sentence imposed is within the law as the sentence provided for in **section 162** is 14 years.

For all these reasons, the appeal fails and is dismissed.

Dated, Delivered and Signed at Nakuru this 15th day of June, 2011.

W. OUKO
JUDGE