



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

Criminal Appeal 79 of 2010

**TIOKO EKOROT.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence by T. Nzioki – SRM in Criminal Case No. 34 of 2008 delivered on 21<sup>st</sup> October, 2009 at Lodwar)*

**J U D G M E N T.**

1. The appellant, **TIOKO EKOROT** was charged with the offence of rape contrary to section 3 (1) as read with section 3 (3) of the Sexual Offences Act 2006. The information of the charge stated that on the 13<sup>th</sup> day of January, 2008 in Turkana Central District within Rift Valley Province, intentionally and unlawfully caused penetration of genital organ of **N.L.** without her consent. The appellant was also charged with an alternative charge of Indecent Act with an adult contrary to section 11 (6) of the Sexual Offences Act 2006. The information of the charge stated that on the 13<sup>th</sup> day of January, 2008 in Turkana Central District within Rift Valley Province, committed an indecent act to an adult namely **N.L.** by touching her private parts. The appellant pleaded not guilty to the charge and was convicted and sentenced to fifteen (15) years in prison.

Being aggrieved by the conviction and sentence, the appellant has appealed, he relied on the following grounds of the appeal.

- (1) **THAT**, the learned trial magistrate erred in law and facts when he failed to observe that my constitutional rights under section 72 (3) of the constitution was violated.
- (2) **THAT**, the learned trial magistrate erred in both law and facts when he considered the medical report which revealed that the girl was raped and infected with STD and the magistrate failed to observe that I the appellant was not examined by any medical expert to prove the alleged offence.
- (3) **THAT**, the learned trial magistrate erred in law and facts when he convicted I the appellant and yet there was no any exhibit including the complainants inner pants was not produced before the court of law.

The appellant put in written submissionsto support his grounds of appeal

The state counsel opposed the appeal and supported the conviction on the following basis;

That the appellant was positively identified by the complainant as the two were neighbors.

In his defence the accused person chose his right to remain silent

The trial court found the appellant guilty and sentenced him to serve 15 years imprisonment. The trial court based the conviction on the fact that the incident occurred during day time and that the accused and the complainant spend so much time together.

That the victim's evidence was corroborated by a medical report. That the sentence was reasonable given the circumstances. She urged the court to uphold both the conviction and sentence

This being a first appeal, the court has a duty to re-appraise the evidence, subject it to exhaustive examination and reach its own findings. The court, however, appreciate that the trial learned magistrate had the advantage of seeing and hearing the witnesses. The court further appreciate that because of that advantage, the trial magistrate is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (see **Republic vs. Oyier [1985] KLR 353**. This has been restated in the case of **GABRIEL KAMAU NJOROGE vs REPUBLIC (1982 -1988) KAR 134** where the court held that:-

***“It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision both on the question of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make allowance for this neither seen nor heard the witnesses and make allowance for this”.***

The issues that need to be determined are; whether the learned magistrate failed to observe the violation of the appellants constitutional rights under section 72 (3) of the constitution. Whether failure to consider the medical report which revealed that the girl was raped and infected with STD was fatal to the case, whether failure on the part of the magistrate to observe that the appellant was not examined by any medical expert to prove the alleged offence was fatal to the case. That the learned trial magistrate erred in law and facts when he convicted the appellant and yet there was no any exhibit including the complainants inner pants was not produced before the court of law. Was the charge sheet properly drafted and whether the evidence sufficient to sustain a conviction?

The appellant has raised the issue that he was not examined despite the complainant having tested positive for an STD. this would have been further evidence to corroborate the already existing evidence but failure to put in the same did not negate the prosecution evidence in any way. There was a lot of evidence based on identification that left no possibility of doubt as to who the assailant was. The appellant from the evidence on record walked with the complainant for the entire night. This and the nature of the offence and the proximity and contact given the nature of this offence, gave the complainant ample time to easily identify the appellant. The complainant stated that the appellant raped her thrice.

Medical evidence also confirmed that indeed the complainant was accosted.

The 4<sup>th</sup> ground of appeal that underpants were not produced is not material evidence. The same would only have supported the evidence that already exists. This is so given the fact that the complainant may or may not have had the said form of attire. The same had no material contribution in the commission of the offence. It is on the basis of the immediate foregoing that the court finds this ground of appeal not plausible.

The appellant further amended his grounds of appeal under section 350 of the CPC. The new grounds were that the charge sheet was defective. That the case was not proved beyond reasonable doubt, that there were contradictions that key witnesses did not testify.

Was the charge sheet defective?

It was not defective. The correct provision that creates the offence was cited. The correct Act creating the offence was cited. The particulars were cited there is nothing therefore that offends the provisions of sections 134 and 137 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya that outlines what is to be taken into account when drafting a charge sheet.

There were no material contradictions that went to the core of this case. The evidence was consistent.

With regard to ground of Appeal no 4 it is not clear who the key witness who was yet to be called was. In any event the evidence as it stands is sufficient to sustain a conviction.

The sentence was lawful and reasonable given what transpired during the offence. Where the complainant on top of being raped was made to walk with the appellant the whole night.

It is on the basis of the foregoing that the court finds that the conviction and sentence were merited and safe and the conviction and sentence is upheld.

READ, DATED & SIGNED IN THE OPEN COURT THIS 24TH DAY OF NOVEMBER 2011

**SIGNED**

**S. M. MUKETI**

**JUDGE**