REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA
Criminal Appeal 14 of 2009
(Appeal from original record of BSA PM Cr. No.142 of 2007)

PHILLIP SIRO…….APPELLANT

~VRS~

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant Phillip Siro was charged and convicted by Busia Senior Principal Magistrate of the offence of rape contrary to section 3 (1) (a) of the Sexual Offences Act No. 3 of 2006 and sentenced to ten (10) years imprisonment. Aggrieved by the judgment, he now appeals to this court against both conviction and sentence.

The grounds of appeal precisely are as follows:

a) That there was no positive identification of the Appellant by the complainant.

b) That the Appellant demonstrated his innocence before arrest by escorting the complainant for treatment and moving the police to act on the matter which factors were ignored by the court.

c) That the medical documents were not produced by the maker.

d) That the prosecution evidence was contradictory.

e) That the investigating office was never called to testify.

The state opposed the appeal. Mr. Onderi submitted that the complainant who was the grandmother of the Appellant identified her assailant. It was at 6.00 a.m in the morning and there was daylight. PW2 found the Appellant running away from the scene and knew him well. The medical evidence corroborated the complainant's evidence and the sentence of ten (10) years was not excessive.

PW1 who referred to herself as ***"very old"*** did now know her age. She said she was sleeping around 6.00 a.m on the material day when the Appellant came and strangled her. He removed her pants and had carnal knowledge with her. She called for help after the accused left her house. PW2 came followed by neighbours. It was dark in the room but there was light penetrating from outside in the early hours of the morning.

PW2 heard her mother, PW1 calling for help. She took a torch and ran to PW1's house and met the Appellant running from the complainant's home. She knew the accused before the incident. The Appellant was arrested by members of public and handed over to the police at Bumula Police Base where PW3 re-arrested him.

PW4 produced the P.3 form which showed inflammation and bruises on the complainant's private parts. The degree of injury was assessed as grievous harm. The Appellant in his defence denied the offence. He said that on the material day, he was sleeping in the morning hours when people came to his home alleging that he had raped someone. He was arrested and later charged with the offence.

DW1 the mother of the Appellant testified on how people came to her home and alleged her son had raped someone. The Appellant emerged and denied the offence but was all the same arrested.

DW2 is the wife of the Appellant. She testified on how her husband was arrested on the material morning by many people.

The magistrate found the Appellant guilty after considering the prosecution's evidence and the defence of the

Appellant. He said that the complainant saw and recognized the Appellant. She even describe the clothes the Appellant was wearing. PW2 who saw the Appellant running away from her mother's house confirmed PW1's evidence. PW4 further corroborated the evidence of PW1 by tendering medical evidence showing that there was forced penetration which left the complainant severely injured in her private parts. He assessed the injury as grievous harm. The court found that the defence did not challenge the prosecution's evidence during cross-examination.

I have carefully scrutinized the prosecution's evidence. The incident took place at around 6.00 a.m. It was in January when day light normally comes earlier than other times of the year when the sun is at the equator. PW1 said that she saw the Appellant assisted by light penetrating in her room from outside. She further said it was daylight. Her daughter, PW2 lived 50 metres away and she heard her mother scream. She came immediately and met with the Appellant outside as he left her mother's house. She is the one who alerted neighbours who arrested the accused in his house. PW1 was injured and in pain and could not walk at that time. The Appellant was found in his house. The defence of the Appellant was a mere denial. He called his mother and wife as defence witnesses. All they said was how the accused was arrested in his house around 6.00 a.m. None of them said whether he had left the house earlier and returned or affirmed that he never left at all at the time of the incident. Their evidence was not helpful to the appellant. I agree with the court in its judgment when the magistrate said that the appellant did not challenge the prosecution's evidence during cross-examination.

In his grounds of appeal, the Appellant presents new facts which are not in his defence. He says he is one of those who took the complainant for treatment together with other relatives. This story is not supported by the evidence of both the prosecution and the defence. He accompanied PW1 and the people who arrested him to the dispensary just because he was under arrest. He was also taken for medical examination by his assailants although the police did not produce the medical evidence. It is therefore not true that he was taking the complainant to hospital together with others. If he did so, he would have told the court so during his defence. This is new evidence which was not given in the lower court. There is no basis that has been laid for introducing new evidence.

The medical evidence corroborates PW1's evidence on penetration and injuries inflicted in the process. The act of the having carnal knowledge with the complainant was unlawful in the circumstances.

The failure of the Investigating Officer to testify is not fatal to the case. PW3 who re-arrested the Appellant testified and this evidence is sufficient to support the fact that the case was investigated by police and the Appellant charged accordingly.

It is my finding that the offence of rape was proved beyond any reasonable doubt against the Appellant. The Appellant was rightfully convicted by the magistrate.

On sentence, section 3 (1) (a) provides for an imprisonment sentence of ten (10) years which can be enhanced to life imprisonment. Considering the advanced age of the complainant, the grievous injuries inflicted and other relevant circumstances, this case calls for enhancement of sentence.

However due to the fact that the accused was a first offender I will leave the sentence undisturbed. The sentence is neither harsh nor excessive.

The appeal is therefore unsuccessful. I hereby uphold the conviction and the sentence imposed.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Busia this 3rd day of February 2010. In the presence of appellant and the state counsel Mr. Onderi.