



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
Criminal Appeal 42 of 2005

1. Criminal Law.

2. **Offence:-**

i) Rape contrary to **section 140** Penal code.

ii) Grievous Harm contrary to **section 234** Penal code.

Alternative charge

iii) Indecent assault on female contrary to section 144(1) penal code.

3. **Plea – not guilty**

a. Accused male adult aged 20 years old in 2004.

b. Trial before Principal Magistrate Court.

c. Convicted after trial to

i) 20 years imprisonment for rape.

ii) Grievous Harm – 7 years imprisonment. Sentences to run concurrently.

4. **Appeal to High Court**

a) Maintains a plea of not guilty

b) Trial magistrate depended on evidence of witness PW1, 2 and 3 which was inadequate.

c) Injuries to head of complainant may have been sustained elsewhere.

5. **During hearing of appeal**

a. Appellant prayed that the sentence be reduced and appeals against sentence only.

b. Implied that complainant was drunk.

6. **The State in reply**

a. The appellant was examined and found to have infected complainant with diseases.

b. May not have been tested for HIV test.

c. That the sentence remain.

7. **Held**

a. Offence of rape and greivous harm conducted and finalised under the penal code and before the commencement of Sexual Offence Act, 2006.

b. That conviction on both counts upheld.

c. Appeal dismissed.

8. **Case Law** – Nil

9. **Advocates**

R.K. Koech Senior State Counsel instructed by the Attorney general for the state.

Appellant in person – present

JAPHET KIPKURUI CHEPKWONY APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

I: Procedure

1. The appellant, Japhet Kipkurui Chepkwony was charged in the Principal Magistrate’s Court at Kericho with the offence of

i) ***Rape contrary to Section 140 of the penal code***

ii) ***Grevious Harm contrary to Section 234 of the penal code.***

Alternatively to No.1

iii) ***Indecent assault on female contrary to Section 144(1) of the penal code.***

2. **The particulars of offence being that;**

Count I- *On the 14 day of August, 2004 at Singoronik village Iraa location in Kericho District within Rift Valley Province unlawfully did greivous harm to RCM.*

Count II- *On the 14th day of August, 2004 at Singoronik village Iraa location in Kericho District within Rift Valley Province unlawfully did greivous harm to RCM*

Alternative charge to count I

On 14th day of August, 2004 at Singoronik village Iraa location in Kericho District within Rift Valley Province, unlawfully and indecently assaulted RCM by touching her private {part}

3. When these charges were read to the appellant, he pleaded guilty on 7th September, 2004, the trial magistrate entered a plea of not guilty because the appellant mentioned he was drunk. During the trial though he never raised the defence of being drunk and with the evidence before him the trial magistrate convicted the appellant and sentenced him to a term of imprisonment as follows;

Count I – rape

20 years imprisonment

Count II – Grevious Harm

7 years imprisonment.

That both sentences to run concurrently.

4. I pause here to state that at the time this case was heard and concluded the new **Sexual Offence Act of 2006** had not come into effect. It was therefore the law under the penal code that was in force.

5. The appellant being dissatisfied with the conviction and sentence of the Subordinate Court filed an appeal petition to this High Court of Kenya at Kericho on 30th May, 2005. The appeal was admitted for hearing on 26th September, 2005 but it is unclear why for four years, the appeal had never been listed for hearing.

II: Facts.

6. The appellant had been walking with the complainant (a forty year old woman who had ten children of her own but would at the same time be of assistant to the appellant and his siblings who were orphaned), went through a maize plantation. The complainant was suddenly held by the neck and knocked down. He the appellant caused injury to her head, eye and eyelid. Then he tore her underwear and clothes and raped her. The complainant raised an alarm.

7. PW4 came to the response of the screams but the appellant ran away. He left behind his jacket and hat. In his memorandum of appeal he wished to state that it was someone else and not he who was actually to blame for the incident.

8. During the appeal, the appellant actually wished for the sentence to be reduced. He implied that the complainant was drunk.

9. In reply, the state counsel informed the court that the accused had a sexually transmitted infection diseased. He was not tested for HIV Aids as suggested by the clinical officer.

III: Opinion

10. The opinion herein is that the conviction is accordingly upheld on both counts. I dismiss this prayers and claim on conviction. An offence of Rape and Grevious Harm was committed.

11. As to the reducing of the sentence I would not interfere with the first count 1. I would nonetheless reduce the offence of Grevious Harm from 7 to 5 years imprisonment.

Namely, Count I – 20 years imprisonment.

Count II – 5 years imprisonment.

The sentence to run concurrently.

12. The appeal is otherwise dismissed.

DATED this 25 day of March, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

R.K. Koech senior state counsel instructed by the Attorney general for the state.

Appellant in person – present