



JOHN CHERUIYOT KIPTOO APPLICANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant John Cheruiyot Kiptoo faced the charge of rape contrary to section 4 of the sexual offences Act, 2006, that on the 12th day of May, 2007 at T Division in Baringo District within the Rift Valley he unlawfully had carnal knowledge of LD without her consent. He faced an alternative charge of indecent assault of a female contrary to section 144 of the Penal code. The alternative charge was quickly disposed off by the trial magistrate as the law it was preferred under had been repealed and hence the offence did not exist. The appellant was however convicted on the main charge of rape and sentenced to serve twenty years imprisonment. He is aggrieved and has filed this appeal. He bases it on the grounds that he did not plead guilty at trial and the trial magistrate erred in law and fact in meting out a heavy sentence on the evidence of a single witness; there was no medical evidence to prove the offence and the defence evidence was not considered.

The prosecution called four witnesses. The complainant a teacher at a primary school was on 12/05/2007 at about 4 p.m. coming from a posho mill at Illiagat where she had gone to mill. She was walking home with her grandmother when the appellant appeared from the rear and passed the two and walked ahead. Complainant and the grandmother walked on. He stopped the two at a stream ahead and asked the complainant what she had been telling one Chepsergon. The accused slapped the complainant once and on the second slap she fell down and he hit her on the head with a panga that he was carrying. Accused kept telling complainant that he would teach her a lesson. Accused warned the grandmother not to scream. He told complainant to move fast. The grandmother could not keep up with the speed and she was left behind. When they reached an area with some bushes the accused told the complainant to sit down. He pushed her to the ground and tore her underpant away from her body and threw them aside. Complainant testified that the accused then raped her four times and when he finally lay by her side she got an opportunity to escape after collecting her torn pants and spent the night at one K house. The following day she went back home and reported the matter to the police and the accused was arrested. On cross examination she said that there were no other people on the path at the material time and she could not scream as the accused held her throat.

PW2 was the complainant's grandmother TK. Her evidence was that she and her granddaughter were walking home when the accused who had a panga appeared and grabbed the complainant and together they walked ahead leaving the witness behind. The witness never caught up with the accused and the complainant. The complainant came home the following day and said she had been raped by the accused. The matter was reported to the police and the accused was arrested.

PW3 Ezekiel K K was the clinical officer who examined the complainant nine days after the incident at Kabarnet District Hospital. His testimony was that the complainant came to hospital late and had changed clothes. No injuries were seen and he filled the P3 form which he produced in court. He also examined the accused and filled his P3 form which he also produced in evidence. PW4 Julia Morop received the accused from another police officer from the D.O's office. She took the accused's statement and that of the complainant and issued them with P3 forms.

The trial magistrate believed the evidence of the complainant whom he described as a honest witness. He said that evidence was corroborated by that of her grandmother and although there was not conclusive medical evidence as to rape, the complainant having been examined nine days after the alleged incident the magistrate convicted the accused after disbelieving the accused's evidence.

It is now this court's turn to re evaluate the evidence. The evidence of PW1 is graphic as to what happened. She produced in evidence her torn underwear, dress and petticoat which she said were torn by the appellant when he raped her. She knew the appellant well as he was her neighbour whom she described as a man feared in the village. Her evidence was not shaken by the accused in cross examination and the accused did not raise the issue of the grudge between them over some land as he stated in his defence. This was his chance to establish the so called grudge. He squandered it. There was no eye witness to the rape PW2's evidence went to prove that the appellant dragged her granddaughter away but she did not witness the rape. She was told what happened by the complainant the following day. Medical evidence was lost when the complainant did not report immediately to a doctor. Nine days was too long to wait before a medical examination. All spermatozoa would have died by that time. However, the magistrate believed the evidence of the complainant and gave the reasons for so believing her. He said he listened to her in court. She came across as an honest witness who gave evidence that was forthright and without any contradiction. He described the complainant's behaviour of seeking refuge in a nearby homestead in torn clothes as consistent with that of a woman who had gone through a traumatic experience. The magistrate then proceeded to warn himself of the danger of convicting on the evidence of the complainant in the absence of medical evidence but stated that he believed the complainant. The trial magistrate directed himself most properly. That was a conviction based on very safe and sound grounds. That is what was laid down in the cases of **Nyanamba .V. R. [1983] KLR 599 and Mukungu .V. R. [2002]2EA 482.**

For the reasons given above the court finds that this appeal is completely devoid of merit and the same is dismissed.

It is so ordered.

DATED AT ELDORET THIS 27TH DAY OF MAY, 2009

P.M. MWILU

JUDGE

DELIVERED AT ELDORET THIS 28TH DAY OF MAY, 2009.

M.K. IBRAHIM

JUDGE

In the presence of;

Court Clerk

Appellant

Counsel for the State