REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

Criminal Appeal 56 & 57 of 2004

(From original conviction and sentence of the Principal Magistrate's Court at Kericho in Criminal Case No. 3998 of 2003 – S,K.OMBAYE [S.R.M.] & B. OJOO [R.M])

ABRAHAM KIPNGETICH BII……..…….…1ST APPELLANT

CHARLES KIPKOECH CHERUIYOT…….….2ND APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

JUDGMENT

The appellants, Abraham Kipngetich Bii (*hereinafter referred to as the 1st appellant*) and Charles Kipkoech Cheruiyot (*hereinafter referred to as the 2nd appellant*) were separately charged each with one count of **Rape contrary to Section 140 of the Penal Code**. The particulars of the offence were that on the 7th December 2003, at Kericho District, the appellants, in turn, had unlawful carnal knowledge of G C without her consent. The appellants were each alternatively charged with the offence of **Indecent assault on a female contrary to Section 144(1) of the Penal Code**. The particulars of the offence were that, on the same day, and in the same place, each of the appellant unlawfully and indecently assaulted G Cby touching her private parts (*vagina*). The appellants pleaded not guilty to the charge. After a full trial, the appellants were convicted of the main charge of rape. They were each sentenced to serve fourteen (14) years imprisonment. The appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

At the hearing of the appeals, the two separate appeals were consolidated and heard together as one. The appellants raised similar grounds of appeal against their conviction and sentence. They were aggrieved they had been convicted based on inadmissible evidence of the prosecution witnesses. They were further aggrieved that the trial magistrate had considered extraneous matters when she arrived at the decision convicting them. They were aggrieved that the trial magistrate had convicted them after shifting the burden of proof from the prosecution. They faulted the trial magistrate for convicting them based on the contradictory and unsatisfactory evidence of the prosecution. They were aggrieved that the trial magistrate had failed to weigh the evidence adduced, including the evidence which was adduced by the appellants in their defence, before she arrived at the decision convicting them. They were finally aggrieved that the trial magistrate had sentenced them to serve a custodial sentence that was harsh and excessive in the circumstances.

At the hearing of the appeal, this court heard the submissions made by Mr. Motanya, learned counsel for the appellants. Mr. Motanya reiterated the contents of the grounds of appeal and submitted that there were contradictions in the evidence that was adduced as to the circumstances in which the alleged rape occurred. He took issue with the manner in which the prosecution witnesses allegedly identified the appellants at the scene of crime. He submitted that the trial magistrate had not put into consideration the fact that one of the critical witnesses in the case *i.e*. PW5 John Kipngetich Rotich, the area chief of the location where the offence took place, is a brother to the complainant. He urged the court to ignore the evidence of PW2 N L K who allegedly identified the 1st appellant as the person he had seen running away from the tea plantation after the complainant had emerged from the said tea plantation while she was crying and complaining that she had been raped.

Mr. Motanya submitted that the appellants had not been examined by a medical doctor to determine whether or not they had indeed raped the complainant. He submitted that the clothes which the alleged rapists wore were not produced in court as exhibits yet one of the prosecution witnesses had testified that the 1st appellant had allegedly removed his shirt as he was running from the scene after the complainant had been raped. Mr. Motanya urged the court to consider the totality of the evidence adduced and reach an appropriate determination that the prosecution had not established its case against the appellants to the required standard of proof beyond reasonable doubt.

Mr. Koech for the State conceded to the appeal. He submitted that the conviction of the appellants was unsafe as it was based on the evidence of identification that was allegedly made by the complainant when she was raped. He submitted that the complainant was not known to the appellants prior to the said rape incident. Her alleged identification of the appellants was not therefore corroborated by the evidence of a police identification parade which ought to have been conducted immediately the appellants were arrested by the police. He submitted that the trial magistrate erred when he relied on the evidence of PW2 to convict the appellants when in fact the said witness had not witnessed the appellants rape the complainant. He further submitted that there were contradictions in the testimony of the complainant and that of PW3 L C as to the circumstances leading to the said rape of the complainant. He therefore submitted that the evidence of identification adduced by the prosecution witnesses was wanting and was not sufficient to sustain the conviction of the appellants.

This being a first appeal, this court is mandated to re-evaluate and to re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding in regard to the demeanour of witnesses (*See* **Okeno –vs- Republic [1972] E.A. 32**). The issue for determination by this court is whether the prosecution proved its case on the charge of rape against the appellant to the required standard of proof beyond reasonable doubt. I have considered the submissions made before this court by Mr. Motanya on behalf of the appellants and by Mr. Koech on behalf of the State. I have also re-evaluated the evidence that was adduced before the trial magistrate's court.

The facts of this case are disputed. Whereas it was the prosecution's case that the appellants had been identified by the complainant and PW2, it is the appellants' case that they were not sufficiently identified by the said prosecution witnesses. What are the facts of this case as narrated by the prosecution witnesses during the trial in the trial magistrate? PW1 G C, (*hereinafter referred to as the complainant*) a girl then aged 17 years was walking along a road that passed through a tea plantation. She testified that it was about 3.00 p.m. at the material time. She further recalled that it was about to rain. As she was walking along the said path, she was confronted by three men, two of whom she later identified to be the appellants. She recalled that the three men tackled her to the ground, dragged her to the tea plantation, and then raped her in turns. She testified that during the rape ordeal, she was assaulted and injured on the mouth. Her clothes were torn. After the rape ordeal, the three men ran away. The complainant then put on her soiled and torn clothes and walked to where her sister PW3 was sheltering from the rain in a tea weighing shed. She narrated to PW3 what had transpired. PW3 returned to the scene of the rape and collected the torn pants of the complainant which she had left behind. The items of clothing that the complainant wore at the time of the rape ordeal were produced in evidence as exhibits by PW8 PC Lucy Okumu.

The said path through the tea plantation passed through the AGC church. At the material time, PW2 Pastor Ngetich Lucas Kipkoech was walking from the church with one DN towards the direction of his home. He saw the 1st appellant running from the tea plantation while wearing his long trousers. After a short while, he saw the complainant emerge from the tea plantation. PW2 identified the 1st appellant because the 1st appellant was known to him prior to the incident. He knew the 1st appellant by appearance. He made a report to the chief (PW5), who mobilised the administration police officers, who soon thereafter arrested the 1st appellant. It was the 1st appellant who gave the information that led to the arrest of the 2nd appellant. Both appellants were then taken to the hospital where the complainant had been taken for treatment. She was able to positively identify the two as the persons who had raped her.

PW4 Joseph Koros, a clinical officer based at Kericho District Hospital examined the complainant on the 8th December 2003 (*a day after the rape incident*) and confirmed that the complainant had indeed been raped. He observed that the right cheek of the complainant was swollen. She had a cut inside her mouth. Her neck was swollen. She had injuries on her thighs. The labia majora was swollen. There were bruises on the labia minora. There was a vaginal discharge which was foul smelling. When a high vaginal swab was performed, pus cells were seen. The P3 report was produced by PW4 as an exhibit in the case.

Upon re-evaluation of the evidence adduced by the prosecution witnesses, it was clear that the prosecution proved to the required standard of proof beyond reasonable doubt that the complainant was indeed raped. The evidence of PW4 established that the complainant was raped. The injuries that she sustained were consistent with injuries sustained by rape victims. The issue for determination by this court therefore is who raped the complainant. The complainant testified that she was raped by the appellants. The rape ordeal took approximately twenty minutes according to the testimony of the complainant. During the said ordeal, the complainant was assaulted and injured. She testified that she did not know the appellants before the said rape ordeal but was able to positively identify them when the two appellants were taken to the hospital where she was being treated. I agree with the submissions made by Mr. Koech, on behalf of the State, that the ideal procedure which ought to have been followed by the police was for an identification parade to be held immediately after the arrest of the appellants by the administration police officers. Unfortunately, the complainant was exposed to the appellants thus negating the necessity of such police identification parade. In the hectic circumstances of the rape, it could be ruled out that the complainant could have been mistaken in her identification of the rapists.

In that regard, her testimony in respect of her identification of the appellants must be corroborated. PW2 testified that he positively identified the 1st appellant when he emerged from the tea plantation shortly after he had heard a woman screaming in the tea plantation. The 1st appellant was putting on his trousers. The complainant emerged from the tea plantation and complained that she had been raped. The 1st appellant was known to PW2 prior to the said rape incident. In the circumstances of this case, I do hold that the evidence of identification by the complainant was corroborated by the testimony of PW2 as regard the identification of the 1st appellant. I therefore hold that the 1st appellant was positively identified as being among the three men who raped the complainant. Although the 1st appellant adduced alibi defence, in which he testified that he was elsewhere when the said rape incident occurred, the said alibi defence did not exonerate the 1st appellant from the said offence. Two witnesses placed the 1st appellant at the scene of crime. In the circumstances therefore, I hold that the prosecution did establish beyond reasonable doubt that it was the 1st appellant, jointly with others, that raped the complainant. His appeal against conviction therefore lacks merit and is hereby dismissed.

As regard the 2nd appellant, although the complainant testified that she had identified the 2nd appellant during the rape ordeal, her evidence of identification was not corroborated. This court hesitates to convict the 2nd appellant based on the sole evidence of identification by the complainant which was made in circumstances that raises doubt that indeed the complainant was positive that she had identified the 2nd appellant. The police messed up the prosecution's case when they exposed the 2nd appellant to the complainant before a police identification parade could be held. This court has also taken into account the fact that the 2nd appellant was arrested on the basis of the information given to the police by the 1st appellant. That information was incriminating evidence of an accomplice. No evidence was adduced to corroborate the evidence of identification by the complainant and the accomplice evidence adduced by the 1st appellant as regard the circumstances of the arrest of the 2nd appellant. I think the evidence adduced by prosecution against the 2nd appellant raises reasonable doubt that he was indeed involved in the said rape of the complainant. The said doubt will of necessity be resolved in favour of the 2nd appellant. I therefore hold that the prosecution failed to prove its case as against the 2nd appellant to the required standard of proof beyond reasonable doubt. The appeal filed by the 2nd appellant is therefore allowed. He is acquitted of the charge of rape.

As regard to the sentence meted out to the 1st appellant, no grounds have been placed before this court to

interfere with the sentence of the trial magistrate. The said sentence was lawful. The circumstances of the rape demanded that such a deterrent sentence be imposed. The appeal by the 1st appellant against both conviction and sentence is hereby dismissed. The said conviction and sentence is hereby confirmed. As regard the 2nd appellant, having been acquitted of the charge of rape, he is hereby ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED at KERICHO this 24th day of August 2007

L. KIMARU

JUDGE