



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 311 OF 2004

FRANCIS TIKANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in

Criminal Case No.2635 of 2003 -H. Wasilwa {P.M.})

JUDGMENT

The appellant, Francis Tikani was charged with **Rape contrary to Section 140 of the Penal Code**. The particulars of the offence were that on the 7th December 2003 at Topoti village in Nakuru District, the appellant had unlawful carnal knowledge of Tipina Kitele without her consent. The appellant was 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, the appellant unlawfully and indecently assaulted Tipina Kitele by touching her private parts. The appellant pleaded not guilty to the charge. After full trial, he was convicted as charged on the main charge. He was sentenced to serve fifty one years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he was convicted on the basis of insufficient evidence adduced by the prosecution witnesses. He faulted the trial magistrate for not properly evaluating the evidence adduced by the prosecution witnesses and thereafter reaching a decision that was unfavourable to him. He was aggrieved that the trial magistrate had misdirected herself when assessing the evidence adduced and thereby reached an erroneous decision that the charge was established to the required standard of the law. He faulted the trial magistrate for failing to consider the medical evidence which had exonerated him from the offence he was charged. He was finally aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances.

At the hearing of the appeal, the appellant presented to the court written submission in support of his appeal. He urged the court to allow his appeal. Miss Opati for the State opposed the appeal. She submitted that the prosecution had established the charge of rape to the required standard of proof. She urged the court not to interfere with the conviction and sentence of the trial magistrate. She submitted that the appeal ought to be dismissed.

Before setting out the reasons for the judgment of this court, it is imperative that the facts of the case

be set out, albeit briefly. On the 7th December 2003, PW1 Tipina Kitele (*the complainant*) was herding cattle at Topoti village. It was about midday. She was approached by the appellant. She testified that she had previously seen the appellant but did not know him by name. According to the complainant, the appellant told him that he wanted to fight her. The complainant kept quiet. The appellant then threw the complainant to the ground and raped her. He hit the complainant on the head with a stick. The complainant lost consciousness. When she regained consciousness, she went to a house of a neighbour where the injury that she had sustained on her head was cleaned and first aid administered.

The complainant reported the incident to Mau Narok Police Station. She was taken to Nakuru Provincial General Hospital where she was treated and later discharged. She recalled that at the hospital, her head was x-rayed. PW2 Kaiwi Margaret corroborated the testimony of the complainant in so far as it related to the evidence of what transpired after the said alleged rape and assault incident. According to PW2, she had earlier on the day, at about 11.00 a.m., met with the appellant at the stream where she had gone to draw water. She testified that the appellant requested to be served with drinking water. She acceded to the request and served the appellant with water. She saw the complainant driving cattle to the stream to drink water. Later, at about 1.00 p.m. she saw the complainant with an injury on her head. The complainant told her that she had been assaulted and raped by the appellant.

The complainant was on 9th December 2003 examined by PW3 Dr. Aduro at the Nakuru Provincial General Hospital. He testified that the clothing and the skirt of the complainant were torn and had dry blood stains. The complainant had difficulty in talking and was bleeding from an injury on her head. She had a bruise on the forehead that measured 3 cm x 4 cm. There was swelling on the left temporal region of the skull. X-ray of the skull revealed that there was a fracture of the parietal bone. The complainant had weakness of the right facial nerve. She had difficulty in speech because of the head injury. She had no other injuries. His examination of the genitalia of the complainant revealed no evidence of rape. There were no spermatozoa but bacteria were seen. HIV test was performed. It was positive. Dr. Aduro was of the opinion that the HIV infection was not caused by any recent contact. He produced the P3 form as *Prosecution's exhibit No.1*. Dr. Aduro made the following observations on vaginal examination of the complainant;

“Normal labia majora, normal labia minora, normal cervix and vagina. No tears seen. No fresh tear of hymen seen. Conclusion; No evidence of traumatic vaginal sex. Yellow vaginal discharge noted.”

When the appellant was put on his defence, he denied that he had assaulted or raped the complainant. He testified that he was not within the locality where the complainant claimed she was raped.

This being a first appeal, this court is mandated to re-evaluate and 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 as regard the demeanour of witnesses (*See **Okeno –vs- Republic [1972] E.A. 32***). The issue for determination by this court was whether the prosecution proved to the required standard of proof beyond reasonable doubt that the appellant raped the complainant.

Having carefully considered the submission made before this court on this appeal, and also re-evaluated the evidence adduced before the trial magistrate's court, it was clear that the prosecution failed to establish the charge of rape to the required standard. The complainant was seen by PW3 Dr. Aduro immediately after she was allegedly raped. Dr. Aduro examined the complainant and established that there was no evidence of traumatic sexual intercourse. The testimony by the complainant was not therefore supported by medical evidence. The charge of rape could not therefore prove in the absence of evidence corroborating the complainant's testimony that she was sexually assaulted.

The prosecution however established that the appellant assaulted the complainant. The complainant testified that she was hit on the head by the appellant using a piece of stick. The appellant was seen at the scene of the attack by PW2 moments before the complainant was assaulted. The appellant was known to the complainant. He was also known to PW2. The testimony of the complainant and that of PW2 on

identification of the appellant was that of recognition. The two witnesses recognized the appellant. The appellant's denial that he was not present at the scene was therefore without foundation. His testimony in his defence did not dent the otherwise strong evidence adduced against him by the prosecution. The complainant could have been confused as a result of her assault. She testified that she lost consciousness when she was hit on her head. That could be the reason why she thought that the appellant had raped her.

The upshot of the above reasons is that the appeal against conviction on the charge of rape is hereby allowed. The custodial sentence imposed by the trial magistrate is hereby set aside. The evidence adduced before the trial magistrate's court disclosed an offence of grievous harm. According to the P3 form which was produced as *prosecution's exhibit No.1*, the assault of the complainant by the appellant caused the complainant to sustain injuries whose degree was assessed as grievous harm. The complainant fractured her skull. The injury to her head caused her to temporarily lose the power of speech. The injury affected her facial nerve. The right side of her face was paralysed. In the premises therefore, I will convict the appellant for the offence which the evidence disclosed. I convict the appellant for **causing grievous harm** to the complainant which is an offence contrary to **Section 234** of the **Penal Code**. The offence of **grievous harm** is cognate to that of **rape**. The appellant is sentenced to serve ten years imprisonment. The said sentence shall take effect from the 5th November 2004 when the appellant was convicted by the subordinate court.

It is so ordered.

DATED at NAKURU this 20th day of December 2007

L. KIMARU

JUDGE