REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Appeal 55 of 2004

(An appeal against the judgment and sentence of Mr. K.S. Ombaye, [SRM] and J.K. Ng'eno [PM] delivered on the 29th of June 2004 in Kericho PMCCriminal case No. 2387 of 2002).

DANIEL KIPNGETICH SANG…….....……APPELANT

VERSUS

REPUBLIC…….....…….RESPONDENT

JUDGMENT

The appellant, Daniel Kipngetich Sang was charged with the offence of **rape contrary to section 140 of the penal code**. The particulars of the offence were that on the 13th of August 2002 at ***[Particulars withheld]*** in Kericho district, jointly with others not before court the appellant unlawfully had carnal knowledge of EC without her consent. The appellant was alternatively charged with **indecent assault of a girl contrary to section 144 of the penal code**. The particulars of the offence were that on the 13th of August 2002 at ***[Particulars withheld]*** village in Kericho district, the appellant indecently and unlawfully assaulted EC by touching her private parts. The appellant pleaded not guilty to the charge and after a full trial was convicted as charged on the main count of rape. He was sentenced to serve life imprisonment. He was aggrieved by his conviction and sentenced and has appealed to this court.

In his petition of appeal, the appellant raised seven grounds of appeal challenging the decision of the trial magistrate in convicting and sentencing him. He was aggrieved that he had been convicted by the trial magistrate based on insufficient evidence adduce by the prosecution witnesses. He faulted the trial magistrate for convicting him based on hearsay, uncorroborated, and contradictory evidence adduced by the prosecution witnesses. He was further aggrieved that the trial magistrate had convicted him against the weight of evidence and after misdirecting himself on the evidence adduce. He was further aggrieved that he had been sentenced to a harsh and excessive custodial sentence which was not justifiable in the circumstances.

At the hearing of the appeal, I heard the submissions by Mrs Oange on behalf of the appellant and by Mr. Koech on behalf of the State. Where as Mrs. Oange submitted that the evidence adduce in the trial could not support a conviction on the charge, Mr. Koech insisted that the prosecution had adduced sufficient evidence which enabled the trial court convict the appellant. I shall revert back to the arguments made in this appeal after briefly setting out the facts of this case.

On the 13th of August 2002, PW1 EC who claimed that she was aged 15 years at the material time was going to her grandmother's house at ***[Particulars withheld]***. It was about 7.00 pm. While on the way, she claimed that she was confronted by two men known as David Kipkemoi and William Kipyegon. The

two men dragged her to the house of one ***[Particulars withheld]*** where they raped her in turns. She testified that she was also raped by a man called Bernard Kiptoo and the accused. The complainant testified that she knew all the men who raped her because they were her neighbours. She claimed that she was raped continuously and in turns upto 4.00 am when she was abandoned. She testified that she was injured on her private parts. After withstanding the rape ordeal, she went to her grandmothers house and informed her what had transpired.

She was taken to Ainamoi hospital where she was treated and discharged. She reported the incident to the police who issued her with a P3 form which was filled by a Mr. Mulei, clinical officer based at Kericho. The P3 form was produced on his behalf by PW5 Wilson Kirwa, a clinical officer also based at Kericho District Hospital. He testified that the said report indicated that the complainant had been sexually assaulted and defiled. He however confirmed that there were no blood stains or tears on the clothes of the complainant. There was no evidence that there was penetration. There was further no indication in the P3 form how many people had sexually assaulted the complainant.

PW2 JK, the grandmother of the complainant testified that she was at her house at 4.00 am in the morning when the complainant went to her house and informed her that she had been raped by David Kipkemoi, the accused and one Kipyegon. She testified that she examined the private parts of the complainant and indeed confirmed that she had been raped. She also saw that the complainant's clothes were tainted with sperms. She denied that she had had any quarrel with the parents of the accused who were her neighbours. She testified that the complainant told her that she had been raped by nine men. Sometimes thereafter, the father of the accused went to PW2 and pleaded with her to persuade the complainant not to proceed with the case. The accused had accompanied his father when they sought forgiveness from PW2. PW3 Joseph Sawe and PW4 APC Samuel Bore arrested the accused on the 19th of August 2002 and handed him over to the police.

When the accused was put on his defence he denied that he had raped the accused. Other than explaining the circumstances of this arrest, he did not offer any testimony touching on the evidence that was adduced against him by the prosecution witnesses. He denied that he had anything to do with the rape of the complainant.

This being a first appeal, this court is mandated to re-consider and to re-evaluate the evidence adduced before the trial magistrate by the witnesses and reach its independent determination whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it never saw the witnesses as they testified and therefore cannot be expected to make any comments as to the demeanor of the witnesses (see **Njoroge vs. Republic [1987] KLR 19).** In this appeal, 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 me by the parties to this appeal. I have also carefully re-evaluated the evidence that was adduced by the witnesses before the trial magistrate's court.

During the hearing of the appeal, the appellant complained that he had been charged with the offence of rape instead of defilement. He claimed that the evidence that was adduced by the complainant established that she was 15 years old and therefore could not be raped as she was under the age of 16 years. I find no merit with this submission. Whether the appellant was charged with rape or defilement, the issue that was placed for determination before the trial magistrate is whether the complainant, with others, had sexual intercourse with the complainant. In this case it was established to the required standard of proof that indeed the complainant was sexually assaulted because according to the P3 form which was produced by PW5 the complainant had bruises on her labia majora and labia minora.

The complainant testified that she was raped in turns by several men who she could identify by name as they were known to her prior to the rape incident. Immediately after she was released by the men who raped her, she went to her grandmother's house and told her what had happened. Her grandmother (PW2) examined her private parts and confirmed that indeed the complainant had been raped. The complainant told her grandmother that she had been raped by the appellant and other men. She identified the appellant by name. It was therefore immaterial whether the appellant was charged with the offence of defilement

or rape. In both instances, the complainant established that she was unlawfully sexually assaulted. In the case of defilement, it is no defence that the complainant had consented to the sexual intercourse. The appellant did not raise such a defence in his defence.

Having carefully re-evaluated the evidence adduced, it is clear that the evidence of the complainant was corroborated by the testimony of PW2, her grandmother. Immediately after undergoing the rape ordeal, the complainant told her grandmother that she had been raped by the appellant and other men. PW2 examined the private parts of the complainant and confirmed that she had indeed been sexually assaulted. PW2 saw spermatozoa on the clothes of the complainant. Immediately thereafter, PW2 took the complainant to the hospital where she was examined by a clinical officer who formed the opinion that indeed the appellant had been sexually assaulted. I found no merit with the argument of the appellant that the clinical officer was not qualified to prepare the P3 form and present it to the court as evidence. A clinical officer is a qualified medical practitioner. Indeed in several courts of appeal decisions, the court of appeal has upheld convictions of appellants where clinical officers testified and produced the P3 forms.

Further, it is clear that after the rape incident the appellant and his father went to the house of PW2 and pleaded with her to intercede on their behalf with the complainant so that she could withdraw the complaint which she has made against him. The appellant could not have pleaded to be forgiven if he had indeed not participated in the rape of the complainant. I found the evidence of the prosecution to be cogent, consistent and a truthful narration of the events as they took place on the material night. Taking into account the totality of the evidence adduced, it is clear that the prosecution proved its case on the charge of rape to the required standard of proof beyond reasonable doubt. The testimony of the appellant in his defence did not dent the otherwise overwhelming evidence that was adduced by the prosecution. I therefore dismiss the appeal by the appellant on conviction.

On sentence, the appellant has complained that he was sentenced to serve a harsh and excessive custodial sentence. It is trite law that when a magistrate sentences an accused person, he is exercising discretion. This court can only interfere with the exercise of the said discretion if it is established that the trial magistrate wrongly exercised the said discretion by putting into account irrelevant considerations. This court will also interfere with the sentence if it is proved that the said sentence was unlawful since it was not provided by the law. In the circumstances of this case, the appellant was sentenced to serve life imprisonment. In my considered opinion, the said sentence was neither harsh nor excessive taking into account the fact that the appellant participated in the rape of the complainant in a group of other men who according to the complainant numbered nine men.

The complainant underwent trauma, both physical and mental, which would last her lifetime. The appellant should similarly reflect on his unlawful action for the rest of his life. I find no compelling reason to make this court interfere with the said exercise of discretion in the sentencing of the appellant by the trial magistrate. The sentence meted on the appellant was lawful. The upshot of the above is that the appeal against conviction and sentence is dismissed. The conviction and sentence imposed on the appellant by the trial magistrate is hereby confirmed. It is so ordered.

DATED at **KERICHO** this 25th day of July 2006.

L. KIMARU

JUDGE