REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET
APPELLATE SIDE
CRIMINAL APPEAL NO. 126 OF 2001

(From the Original Conviction and Sentence in Criminal Case No. 1107 of 2001 of the Resident Magistrate's Court at Iten by D. M. Ochenja Esq. R.M. of 9/11/2001)

STEPHEN KEMBOI KIPYEGO ……..……. APPELLANT

V E R S U S

REPUBLIC …….…….....……..… RESPONDENT

J U D G M E N T

STEPHEN KEMBOI KIPYEGO was originally arraigned before the Resident Magistrate at Iten on 8/11/2001, where he was charged with two counts, namely, rape contrary to section 140 of the Penal Code, and alternatively indecent assault on a female contrary to section 144(1) of the same Code, and also with the offence of assault causing actual bodily harm contrary to section 251 of the same Code.

The particulars of the offence in the 1st count were that on the 4th day of November 2001 at Bugar forest in Keiyo District within Rift Valley Province, he had carnal knowledge of a female without her consent, while the particulars of the alternative charge were that on the same day, and at the same forest, he unlawfully and indecently assaulted the same female by tearing her underpants.

The particulars of the 2nd count were that on the same day, at the same forest he unlawfully assaulted the same female thereby occasioning her actual bodily harm.

He was convicted of the main count in the first charge and also of the second count and sentenced to serve 7 years and 2 years imprisonment respectively. The Magistrate also ordered that 'sentence to run concurrently and will be coupled with 4 strokes of the cane'. That was in the year 2001 before the amendment of the Penal Code, but though both offences were punishable by strokes, it was not clear from the sentence, whether it was for each or both or for which of the two counts, the sentence of the strokes would apply.

Be that as it may, being dissatisfied with the convictions and the sentences, Kipyego who I shall now refer to as 'the appellant', has now preferred this appeal which was originally based on seven grounds, one of which, his counsel opted to abandon.

As is expected of me, I have had to re-evaluate the manner in which the proceedings were conducted which is an issue in this appeal, and the evidence on record, with a view to establishing whether the same was proper, and therefore whether or not, this appeal is meritorious.

First and foremost, I will disregard the issue of his age, as he had not pleaded that he was a minor, at the

time of the trial in the subordinate court.

The records reveal that the charges were read out and explained to the appellant on 8/11/2001. From the manner in which the proceedings were recorded, it would appear that the charges in both main counts were read and explained consecutively, after which he was then required to plead, and at which point he pleaded guilty to both counts. He was therefore not called upon to plead to the alternative count, a procedure which was right, as having pleaded guilty to the main count he could not have been required to plead to the alternative charge.

It is interesting to note that after the pleas of guilty were entered, the prosecution did not narrate the facts soon thereafter, and the matter which was not finalized on that day, was adjourned for a day.

When the appellant appeared in court on 9/11/2001, the charges were read out to him again, in a manner similar to that of 8/11/2001. He pleaded guilty again to the two counts. The prosecutor then narrated the facts of the case, after which the appellant admitted that the facts were true.

It would however appear that the prosecution combined the facts of both the offences into one, which should not have been the case as, in my humble opinion the appellant would not have known what particular offence he was required to plead to in the instance, which I find, proved prejudicial to him, and I can only but conclude that it amounted to a grave miscarriage of justice, for in as much as is trite law, that *'it is good practice for the trial court to record a plea on each count separately'*, as it *"necessary so that the accused understands and applies his mind to each count when he makes his plea"* (Ombena v Republic C.A. (Ksm) No. 36 of 1981), then it cannot be gainsaid that it is only fair that the accused be made aware of the facts of each count individually, so that he can know what particular facts are being narrated to him and also what he is required to plead to.

It is for the above reasons that I find that both the convictions were improper as they arose out of a mistrial and therefore, this appeal is meritorious. I allow it and therefore quash the convictions and set aside the sentences.

I do however, find that it having been a mistrial, and in view of the gravity of the charges, it is only proper that I order that there be a retrial by the Resident Magistrate at Iten.

Dated and delivered at Eldoret this 31st day of January 2005.

JEANNE GACHECHE

JUDGE

Delivered in the presence of: