REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 195 of 2003

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 254 of 2001 - K. KIRUI SRM)

BERNARD KIPKORIR…….....…….APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

JUDGMENT

The appellant, Bernard Kipkorir, was charged with two others, with the offence of rape contrary to **Section 140 of the Penal Code.** The particulars of the charge were that on the 31st of January 2001 at Chepotoi village in Nakuru District, the appellant had carnal knowledge of Janeth Rono without her consent. The appellant pleaded not guilty to the charge when he was arraigned before lower court. After a full trial, the appellant was convicted as charged and sentence to serve ten years imprisonment with hard labour. The appellant was aggrieved by the said conviction and sentence and has appealed to this court against the said conviction and sentence.

In his petition of appeal, the appellant raised four grounds in support of his appeal. He faulted the trial magistrate for convicting him on a defective charge. He was aggrieved that he had been convicted on the evidence of a single witness which evidence was not corroborated. The appellant faulted the trial magistrate for considering the evidence adduced during the trial selectively so that he could arrive at a predetermined conclusion. Finally, the appellant faulted the trial magistrate for sentencing him to a custodial sentence that was manifestly excessive in the circumstances.

At the hearing of this appeal, the appellant, with the leave of the court, presented written submissions in support of his appeal. He further added that he was wrongly convicted for offence of rape. He submitted that he had not raped the complainant. He argued that the charge of rape made against him by the complainant was motivated by the fact that there existed a grudge between the complainant and the appellant. He submitted that the charges were trumped up against him. Mr Gumo, the Assistant Deputy Public Prosecutor supported the conviction and the sentence imposed by the trial magistrate. He submitted that the prosecution adduced overwhelming evidence to prove the charge of rape against the appellant. He urged the court not to disturb the decision of the lower court and order the appeal dismissed. Before considering the arguments made, I will set out the facts of this case, albeit briefly.

On the 31st January 2001, the complainant (PW1) was walking home after visiting her friend called Rachel. The time was about 11.00 pm. According to PW1 there was moonlight. PW1 testified that he was accosted by the appellant and his two co-accused in the lower court. They had a conversation with her. They tried to persuade her to go to the house of one of the co-accused of the appellant called Samuel. The complainant refused to accompany them. The complainant testified that it was then that the appellant hit her on her face with a rungu. One of the appellant's accomplices then held the complainant by the neck and strangled her. The complainant screamed. The appellant with his accomplices then undressed the complainant. They then raped the complainant in turns. The screams of the complainant alerted PW3 Jonathan Kimetto, the Chief of Kiptagich location who was in his house at the time. PW4 also heard the

complainant's screams. PW3 and PW4 went to the rescue of the complainant. PW3 testified that he had a spotlight.

When he reached the scene where the complainant was screaming he found a man raping her. He also saw two other men standing nearby. When the men saw PW3, they ran away. PW3 testified that the appellant fell down. When PW3 reached where the appellant had fallen down, the appellant, thinking that PW3 was his accomplice, told PW3 that they should take the complainant to the house of Samuel – his accomplice. When the appellant realised that he was talking to PW3, he changed his story and sought forgiveness from PW3. PW3 testified that at the time he apprehended PW3, he was naked save for the underpants that the appellant was wearing. PW3 asked the appellant to dress up.

He later took him to Kiptagich police post where the appellant was rearrested by PW2 Corporal Boniface Matheka. PW2 assisted by PW4 Julius Maritim assisted the complainant to be taken to hospital. According to PW3 and PW4, the complainant had been injured during the rape ordeal. The complainant testified that she sought treatment from various hospitals for the injuries that he had sustained during the rape ordeal. PW4 testified that when he went to the rescue of the complainant he saw the appellant. He testified that he had known the appellant prior to the incident and was able to identify him by his voice. Later when PW4 accompanied PW3 he found the appellant at the scene where the complainant was raped. PW4 found the complainant naked and bleeding from a wound on her head. At the scene, the complainant identified the men who had raped her when she talked to PW4. She identified the appellant as being among the men that raped her. The complainant (PW1) was examined by Dr Sittonik who filled the P3 form. He confirmed that the appellant had been raped. The P3 form was produced by PW2 in evidence.

When the appellant was put on his defence he denied that he had raped the complainant. He testified that at the time the complainant was raped he was drinking liquor in a house of his co-accused's father. He testified that he responded when the complainant screamed but when he arrived at the scene, he was instead arrested by PW3, the chief of the area. He testified that he was beaten by the chief and taken to the police station. He denied that he had hit the complainant with a rungu or that he had raped her.

The duty of the first appellate court in criminal cases was restated in the case of **Charles Mwita – versus- Republic C.A. Criminal Appeal No. 248 of 2003 (Eldoret)** (unreported) where the Court of Appeal held that: (at page 5) "In Okeno v R [1972]E.A. 32 at page 36 the predecessor of this Court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957]EA. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, (Shantilal M. Ruwalla –v- R [1957]EA 570) it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."***
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> The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in Gabriel Njoroge v. Republic [1988-85]1 KAR 1134, at page 1136 this Court said:-
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> **"As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v.**

R. [1957] E.A 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law."

In the instant appeal, the issue for determination is whether the prosecution proved beyond any reasonable doubt that it was the appellant who raped the complainant. According to the complainant, she was accosted by the appellant and his accomplices at about 11.00 pm when she was walking to her house after visiting her friend called Rachel. She knew the appellant and his accomplices by name. They were fellow villagers. The appellant and his two accomplices talked to the complainant with a view of persuading her to accompany them to the house of one of the appellant's accomplices called Samuel. The complainant refused to accompany them. According to the complainant, it was then that the appellant hit her on the face with a rungu. The complainant screamed. The appellant and his accomplices forcefully undressed the complainant. They then raped her in turns. PW3 and PW4 found the complainant being raped. When PW4, in the first instance, attempted to come to the aid of the complainant with a view to rescuing her, the appellant turned violent. He threatened PW4.

Later when PW4 and PW3 arrived at the scene of the rape, they saw three men. PW4 again identified the appellant. The appellant and his accomplices ran away. The appellant slipped and fell down. PW3, who had a spotlight, pursued the appellant and reached where the appellant had fallen down. The appellant, thinking that PW3 was his accomplice told PW3 that they should go back and take the complainant to the house of Samuel. The appellant was naked save for his underpants. When the appellant realised that it was PW3 he was talking to he sought forgiveness. PW3 however arrested him and took him to Kiptagich police post. The complainant, who was injured in the rape ordeal was taken to hospital and treated. Dr Sittonik filled the P3 form. He confirmed that the complainant had been raped. The P3 was produced by PW2, the police officer who arrested and later charged the appellant. When he was put on his defence, the appellant denied that he had raped the complainant. He stated that he was a victim of mistaken identity as he was mistakenly apprehended by PW3 when he had responded to the complainant's screams for help.

I have re-evaluated the evidence adduced before the trial magistrate by the prosecution and the defence offered by the appellant. I have also carefully considered the written and oral submissions made by the appellant and the response made to it by the State. In his submission, the appellant is basically saying that he was not properly identified by the complainant and the witnesses who testified that he had raped the complainant. Having re-evaluated the evidence on record, it is not disputed that appellant was at the scene of the rape. The appellant explains his presence in his defence. He states that he was at the scene having responded to the complainant's screams. The complainant's evidence was that the appellant and his two accomplices talked to her before raping her. They were trying to persuade her to accompany them to the house of one of the accomplices of the appellant called Samuel. When the complainant refused, she was hit on her face with a rungu by the appellant. The complainant knew the appellant prior to the rape incident. Infact the complainant and the appellant had drunk traditional liquor at Mama Rachel's house about midday of the same day that the complainant was raped.

The complainant talked to the appellant and his accomplices before she was hit on the head by the appellant in a bid to subdue and sexually assault her. I do not have any doubt that the complainant properly identified the appellant as being among the three men who raped her. The evidence of the complainant is corroborated by the evidence of PW3 and PW4 who responded to the call of distress of the complainant. The two witnesses found the appellant naked. He had only one item of clothing on his body – his underpants. The appellant violently confronted PW4 when he attempted to rescue the complainant. When the appellant saw PW3, he attempted to run away but slipped and fell down. He was apprehended by PW3 who had not lost sight of the appellant as he was running away from the scene of rape. The appellant in fact talked to PW3 thinking that he was his accomplice. The appellant was not yet done with the complainant. He still wanted to take the complainant to the house of Samuel – his accomplice. PW2 produced the P3 form duly filled by Dr Sittonik which confirmed that the complainant had been raped.

Having re-evaluated the said evidence adduced, it is my finding that the prosecution proved its

case beyond any shadow of a doubt. The explanation given by the appellant that he had gone to the scene of the rape in response to the screams for help by the complainant does not wash. If indeed the appellant went to the scene of the rape to assist the complainant who was in distress, there is no explanation why the appellant was found almost naked when he was apprehended by PW3 and PW4. The fact that the complainant was found naked and the appellant naked at the same place within the same time frame establishes that beyond per adventure that the complainant's evidence that the appellant had raped her; The appellant could not have raped the complainant without first undressing his clothes.

The conversation that took place between the appellant and PW3 on the one hand and between the appellant and PW4 on the other hand at the scene of rape proves that the testimony of the complainant that she was raped by the appellant is true. I therefore find no merit in the appeal filed by the appellant against his conviction by the trial court. I further find no grounds to interfere with the sentence meted out by the trial magistrate in this case. The circumstances of the offence merit the punishment. In the premises therefore the appeal filed by the appellant is hereby dismissed.

The conviction and the sentence imposed by the trial magistrate is hereby confirmed. It is so ordered.

DATED at NAKURU this 17th day of June 2005.

L. KIMARU

JUDGE