REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 332 OF 2001
(From original conviction and sentence in criminal case No. 714 of 2001 of the Chief Magistrate's Court at Nakuru – J. KABURU

P.N.K……..……APPELLANT

VERSUS

REPUBLIC……...…….….RESPONDENT

JUDGMENT

The Appellant, P.N.K, was charged with the offence of rape contrary to **Section 140 of the Penal Code.** The particulars of the offence were that on the 26th of March 2001 at Kiamunyi Farm in Nakuru District jointly with others not before Court the Appellant unlawfully had carnal knowledge of R.N without consent. The Appellant was alternatively charged with the offence of indecent assault of a female contrary to **Section 144(1) of the Penal Code.** The particulars of the offence were that on the same day and at the same place jointly with others not before Court indecently assaulted R.N by touching her private parts. When the Appellant was arraigned before the trial magistrate, he pleaded not guilty to the both counts. After full trial, the Appellant was convicted of the main count of rape. He was sentenced to serve twelve years imprisonment. The Appellant was aggrieved by the said conviction and sentence and has appealed to this Court.

In his Petition of Appeal, the Appellant has faulted the trial magistrate for convicting him after failing to consider the evidence adduced by the Appellant that the Complainant was his friend for the day having agreed to spend the night with him after being paid Kshs 500/=. The Appellant was further aggrieved that the trial court considered the evidence of the prosecution in exclusion of the evidence by the Defence and thus arrived at the erroneous decision convicting him. The Appellant was aggrieved that the trial magistrate did not consider his mitigation before imposing the said harsh custodial sentence.

At the hearing of the Appeal, the Appellant, who was unrepresented urged this Court to allow his Appeal whilst Mr Koech, Learned Counsel for the State supported the conviction and the sentence imposed by the trial magistrate. This Court will consider the arguments made for and against the Appeal after briefly setting out the facts of this case. PW 1 R.N.N (*hereinafter referr ed to as the complainant)* testified that on the material day at about 11.00 p.m. she was at Cheers Pub, Nakuru when she met the Appellant. The Appellant and the complainant agreed to spend a night together. The consideration for the complainant to spend the night with the Appellant was Kshs 500/=. The complainant thought she was going to spend the night with the Appellant in a lodging. The Appellant, however, it seems had other ideas. The Appellant hired a taxi and took the complainant to a house in Kiamunyi area. According to the complainant, the Appellant was accompanied by two other men. When they reached the house, the Appellant forcefully removed the clothes of the complainant and had sexual intercourse with her. His other two colleagues also had sex with her. According to the complainant at the time when she had sexual intercourse with the Appellant, she had withdrawn her consent. The complainant testified that she was

raped by the Appellant and his two colleagues for the whole night in turns.

The following morning, the complainant woke up very early while the complainant and his colleagues were asleep, got hold of a T-shirt and a lesso and went outside the house and managed to get into a matatu which took her to the police station. She reported the rape to PW 2 Police Constable Margaret Kariuki. She was taken to Nakuru Provincial General hospital where she was treated by PW 3 Dr K.K. On examination PW 3 found that the complainant had sustained injuries on her mouth. Her lips were swollen. There were bruises around the vagina. A broken condom was retrieved from her vagina. There were no spermatozoa seen but numerous cocci cells were present. The complainant was treated of the sexually transmitted disease that she had contracted. When he was put on his defence, the Appellant gave the following unsworn testimony, *"I didn't rape the Complainant. We had agreed with the Complainant."*

This is a first appeal. As the first Appellate court in criminal cases, the High Court is mandated to look at the evidence adduced before the trial magistrate afresh, re-evaluate and reassess it and reach its own independent conclusion whether or not to uphold the conviction of the Appellant. In reaching its decision, the High Court is mandated to consider the grounds of appeal put forward by the Appellant and also put in mind the fact that it did not have an opportunity of seeing and hearing the witnesses as they testified and therefore was not expected to make any finding as to the demeanour of the witnesses. (See ***Okeno – versus - Republic [1972] EA 32, Njoroge –versus - Republic [1987] KLR 1***9) .

In the instant case the complainant testified that when she met the Appellant, she agreed to spend the night with him on consideration that she was to be paid Kshs 500/=. The complainant thought that she was to spend the night in a lodging with the Appellant. The Appellant however hired a taxi and took the complainant to a house in Kiamunyi area. The Appellant was accompanied by two other men. When they reached the house, the Appellant forcefully removed the clothes of the complainant and had sexual intercourse with her. According to the complainant the two other men also had sexual intercourse with her in turns. The complainant testified that she did not consent to have sexual intercourse with the complainant as at the time they entered the house at Kiamunyi, she had withdrawn her consent. The complainant testified that even after the Appellant and his two colleagues had sexual intercourse with her, she was not paid the agreed consideration of Kshs 500/=. In his defence, the Appellant testified that the complainant had consented to have sexual intercourse with him.

During the hearing of the Appeal, the Appellant reiterated that the complainant had consented to have sexual intercourse with him for a consideration of Kshs 500/=. He however submitted that when they reached his house and after having sexual intercourse, the complainant insisted that she be paid Kshs 1,000/=. The Appellant submitted that when the complainant left his house, she took his clothes and left her clothes. The Appellant was of the view that the complainant reported him to the police because he had failed to pay the higher amount of Kshs 1,000/= demanded by the complainant. On the other hand, Mr Koech submitted that the complainant was raped by the Appellant and his two colleagues. Mr Koech submitted that the complainant was a honest witness who had admitted that she had agreed to have sexual intercourse with the Appellant for a consideration of Kshs 500/=. Mr Koech submitted that by the time the Appellant and his colleagues had sexual intercourse with the complainant, she had withdrawn her consent.

The issue for determination by this court is whether or not the prosecution established its case beyond reasonable doubt that the Appellant had had unlawful sexual intercourse with the complainant without her consent. On re-evaluation of the evidence adduced by the prosecution and the defence, it is not disputed that the complainant and the Appellant negotiated to have sex when they met at Cheers Pub, Nakuru. The complainant agreed to have sex with the Appellant for the night for a consideration of Kshs 500/=. The complainant was made to believe that she was going to spend the night with the Appellant in a lodging. The Appellant however took the complainant to a house in the Kiamunyi area. According to the complainant, the Appellant then forcefully removed her clothes and had sexual intercourse with her. His two other colleagues also had sexual intercourse with her in turns.

On reassessing the evidence adduced, it is clear that whilst it is true that the complainant had consented to have sexual intercourse with the Appellant when she was at Cheers pub, by the time the Complainant

had reached the house of the Appellant at Kiamunyi, she had already withdrawn her consent. The fact that she withdrew her consent is supported by the evidence that she adduced that the Appellant had forcefully removed her clothes and had sexual intercourse with her. It appears that the Appellant duped the complainant that she would be paid for having sexual intercourse with him, but when the Appellant reached his house, he decided to have sexual intercourse with the complainant without paying her as agreed. Further proof that the complainant had withdrawn her consent is manifested in her subsequent behaviour when she managed to escape from the Appellants house. When the complainant reported the incident to the police, she was virtually naked. She was wearing a T-shirt and a lesso. She did not have any underclothing. It was her testimony that when her clothes were retrieved from the house of the complainant, she was not able to trace her panties. The Doctor (PW 3) testified that the complainant had bruises on her face and mouth. She also had bruises around her vagina. The Doctor's evidence, coupled with the evidence of PW 2 the police officer who received the report made by the complainant proves that the complainant could not possibly have consented to have sexual intercourse with the Appellant.

For the defence of consent to succeed, the Appellant must establish that the complainant has consented to have sexual intercourse with him from the time that he negotiated to have sexual intercourse with her, to the time that he had sexual intercourse with her. If it is proved, as in this case, that the complainant withdrew her consent at anytime before the sexual act, then the Appellant is guilty of the offence of rape, that is, having unlawful carnal knowledge of the complainant without her consent. In the present case, the Appellant had sexual intercourse with the complainant both by false pretences and by force. He duped her into accepting to have sexual intercourse with him while he knew very well that he could not pay for the *"services"*. When the Appellant got her in a place where she could offer least resistance, he raped her. I do find that the prosecution proved its case beyond reasonable doubt. The defence offered by the Appellant does hold any water. The appeals against conviction is thus dismissed.

On the issue of sentence, the Appellant was sentenced to serve twelve years imprisonment with hard labour. The Appellant was also sentenced to receive six strokes of the cane. On re-evaluating the circumstances of this case, it is my view that the custodial sentence imposed upon the Appellant was harsh. I have also considered the mitigation of the Appellant. In the circumstances of this case, I reduce the term of twelve years imprisonment imposed by the trial magistrate to six years imprisonment. The corporal punishment ordered is hereby set aside as the same was declared unlawful by the **Criminal Law (Amendment) Act of 2003**. The said sentence imposed by this Court shall take effect from the 1st of August 2001 when the Appellant was initially sentenced by the trial magistrate. It is so ordered.

DATED at NAKURU this 30th day of November 2004.

L. KIMARU

AG. JUDGE