REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO 55 OF 2019

SAMSON KIPYEGON CHEPKUTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original judgement and sentence of Hon J Nthuku, SRM, dated 28th March 2019 in Criminal Case No 08 of 2016 in the Principal Magistrate's Court at Eldama Ravine, Republic v Samson Kipyegon Chepkuto)

JUDGEMENT

The appellant has appealed his conviction and sentence of ten years imprisonment in respect of the offence of rape contrary to section 3 (1) (a) as read with 3 (3) of the Sexual Offences Act No. 3 of 2006.

In his petition to this court, the appellant has raised four (4) grounds of appeal.

In ground 1 the appellant has faulted the trial court both in law and fact by failing to note that the witnesses' evidence was contradictory and inconsistent and could not support the conviction.

In ground 2 the appellant has faulted the trial court both in law and fact by failing to appreciate the doctor's findings in the medical evidence which exonerated the appellant from any wrong doing.

In ground 3 the appellant has faulted the trial court both in law and fact by failing to appreciate that the allegation only cropped up after a family feud concerning the ownership of a land.

In ground 4 the appellant has faulted the trial court both in law and fact by failing to appreciate that the prosecution did not prove its case beyond any reasonable doubt.

This is a peculiar appeal in that part of the trial was conducted in the absence of the appellant. Secondly, the judgement was also delivered in the absence of the appellant.

It is important to point out that the appellant had been granted bail pending his trial. The prosecution had called four witnesses in which the appellant participated fully. The case was then adjourned for hearing on 25/06/2018 and the record of the proceedings shows that the appellant was absent. Before this trial date the appellant had previously attended court on 24/01/2018 when the trial was fixed for hearing on28/02/2018. On 28/02/2018 the appellant failed to attend court. The court then issued a warrant of arrest. The court then kept on mentioning the case and extending the said warrant to remain in force until 9 months later on 06/09/2018 when the court ordered the trial of the appellant to continue in his absence on 05/10/2018. The court made this order of continuing with the trial in absentia pursuant to article 50 (f) of the 2010 Constitution.

On that date Pw 5 namely No. 91605 PC Emanyi Serem of Mogotio police station testified in the absence of the appellant.

The prosecution then closed its case.

The trial court then fixed the case for ruling on 11/10/2018. On 11/10/2018, the court ruled that the appellant who was absent had a case to answer and proceeded to place him on his defence.

Thereafter on 28/03/2018 the court delivered the judgement in which it sentenced the appellant in absentia to ten (10) years imprisonment.

Thereafter again the court convened on 04/19/2018 and now it was in the presence of the appellant. This was after his arrest. It is recorded in the proceedings that:

> "COURT.
>
> The accused to start serving his ten (10) year sentence today."

The record further shows that only Pw 5 testified in the absence of the appellant. And further that the judgement was delivered in his absence.

Issues for determination.

I have considered the procedure adopted by the trial court in conducting the trial in absentia. The said procedure raises two weighty issues of law**;** which are clear from the foregoing grounds of the appellant's appeal.

1. Whether in calling Pw 5 and delivering judgement in the absence of the appellant was fair.

2. Whether I should order a re-trial of the appellant.

Issue 1

The trial court called Pw 5 who proceeded to give evidence in the absence of the appellant. This was done because the appellant had absconded from attending his trial. The delivery of the judgement was also done in the absence of the appellant. When the appellant was arrested the trial court summarily ordered him to go and serve his ten years' sentence of imprisonment.

Having sentenced the appellant to ten years imprisonment, the court could not conduct an enquiry as to whether the abscondment of the appellant was deliberate (or willful); or whether it was involuntary due to illness or some other similar cause.

The foregoing enquiry was necessary because in his grounds of appeal the appellant has raised weighty issues of law.

An enquiry was necessary before the trial court exercised its powers under the provision of article 50 (2) (f) of the 2010 Constitution of Kenya, which guarantees to each accused fair trial rights. The said provision reads as follows:

> "to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;"

In that regard, I am guided by Jones (No 2) (1972) 1 WLR 887 in which the court observed that where an accused is on bail pending his trial voluntarily fails to turn up for his trial, the judge has a discretion to complete the trial in his absence including convicting him. If the trial has taken long the discretion to order for a new trial may be refused if his absence was deliberate. If on the other hand, the absence of the accused is for reasons beyond his control, the trial may not continue in his absence unless he consents. See Blackstone's Criminal Practice, Ninth Edition, 1999 at pages 1349 and 1351.

I find that in the circumstances, the trial court should have conducted an enquiry before proceeding with the trial and delivering judgement in the absence of the appellant. This I find is a condition precedent to invoking the constitutional provisions of article 50 (2) (f) of the Constitution. For to deny a person the right to cross examine or to confront his accusers would amount to a draconian measure; since the right to cross examination and to adduce evidence in one's defence is also guaranteed by the Constitution in article 50 (2) (k); which provides that an accused has a right to:

> "to adduce and challenge evidence."

The trial court would have conducted an enquiry by calling the police officer who arrested the appellant and if necessary the sureties. The appellant himself would also be called upon to explain his absence from court; since he was on bail.

In the premises, I find that the procedure followed by the court was fundamentally defective for it violated the fair trial rights of the appellant.

In the premises, I find that the fair trial rights of the appellant were violated.

The appellant's appeal succeeds with the result that the conviction and sentence are hereby quashed.

Issue 2

I find that the evidence on record if believed by the trial court might lead to the conviction of the appellant. This is a major ground for ordering a re-trial. See Braganza v R (1957) EA 152.

In the premises, I hereby order a re-trial of the appellant before another magistrate of competent jurisdiction in terms of section 354 (3) (a) (i) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

In the interim period the appellant will remain in custody until he is produced in the court of the chief magistrate as soon as practicable for trial purposes.

I therefore find that it is moot or academic to singly consider in detail the grounds raised by the appellant in view of the foregoing findings.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI VIDE VIDEO CONFERENCE THIS 10TH DAY OF DECEMBER, 2021

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua, court assistant.

The appellant.

Mr. Mong'are for the Respondent