**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCRA NO. 119 OF 2017**

**(FORMERLY ELDORET HCCRA NO. 99 OF 2017)**

**JIMMY KIPRUTO.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

***[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 319 of 2012 delivered on the 29th day of July, 2015 by Hon. R. Yator, SRM]***

**JUDGMENT**

1. This is an appeal from the conviction and sentence of the Appellant for 10 years for the offence of rape contrary to section 3 (1) read with section 3 (3) of the Sexual Offences Act particulars of which are that *"on 21st day of March 2012 in Koibatek district within Baringo County, did intentionally and unlawfully caused his penis to penetrate the vagina of IK without her consent."* He also faced an alternative charge of indecent act with a **woman** contrary to section 11(1A) of the Sexual Offences Act (sic), the particulars of which are *"on the 21st day of March 2012 in Koibatek District within Baringo County, did unlawfully and indecently caused his penis to come into contact with the vagina of IK without her consent."*

2.The appellant faced a second count of assault contrary to section 251 of the Penal Code with particulars that he had *"on the 21st day of March 2012 in Koibatek district within Baringo County unlawfully assaulted IK thereby occasioning her actual bodily harm."*

3. The trial Court found the appellant guilty as charged in count I without making any finding in count II, as follows:

> *"I am therefore convinced by the overwhelming prosecution evidence that indeed accused herein did intentionally and unlawfully rape the Complainant herein. As such he is hereby convicted under section 215 Criminal Procedure Code."*

On sentencing, the Court said:

> *"I note the accused's mitigation however I note that the kind of offence is rampant and has to be deterred and as such accused is hereby sentenced to serve 10 (ten) years imprisonment with a right of appeal."*

4. Being dissatisfied with the judgment, the Appellant filed a Petition of Appeal on 4th August 2015 and the grounds of Appeal are as:

> *a) That, I was not accorded a fair hearing by Court because I have lined up my defence consisting of 5 members who were not given a chance by the Court to testify. The Court kept postponing the hearing dates hurriedly and judgment passed the same day and the judgment was passed in the absence of my lawyer.*
>
> *b) That the trial Honourable Magistrate based on a doctor's report that was delivered by another doctor not the one who did the rest and were not conclusive beyond reasonable doubt that I was really the one who committed the crime i.e it did not contain factors like DNA results.*
>
> *c) That the trial Magistrate relied upon conflicting evidences in the passing of his judgment from the Complainant and her witnesses.*
>
> *d) That trial Magistrate erred in law by convicting me based on Complainants evidence and her witnesses which were not corroborated.*

5. With leave of Court, the Appellant filed an amended grounds of appeal on 25th August 2016 and listed the grounds as:

*a) That the learned Magistrate erred in law and in fact in failing to consider the Appellant's evidence in defence.*

*b) That the learned Magistrate erred in law and in fact in failing to find the evidence tendered by the prosecution witness was inconsistent.*

*c) That the learned Magistrate erred in law and in fact in failing to appreciate that the prosecution did not prove its case beyond reasonable doubt.*

*d) That the learned Magistrate erred in law and in fact in failing to find that the evidence tendered by the Prosecution was unreliable.*

*e) That the learned Magistrate in law and in fact in failing to appreciate the fact that the Prosecution failed to conduct proper investigation and that of Identification of witness.*

***Submissions***

6.The Appellant filed Submissions on 23th November 2016, which Counsel highlighted at the hearing and the Respondent's Counsel replied in oral submissions as follows:

*"**Mr. Sambu for appellant***

*Appellant was convicted and sentenced for 10 years imprisonment for offence of rape contrary to section 3 (1) (3) of the Sexual Offences Act on 29/7/15.*

***Petition of appeal dated 25/8/16***

*Article 50 (2) (b) of Constitution proof of case beyond reasonable doubt. I refer to* ***Woolington v. DPP.***

***First Appellate Court duty is to evaluate evidence.***

*Proof of Alibi: The appellant raised an alibi. Evidence of Dw2 corroborated the alibi. The trial Magistrate at page 8 of proceedings shifted the burden to the accused person for not calling the witness.*

***In (1968) EA 365 Ssentele v. R on proof of alibi.***

*Appellants (Dw1) evidence was corroborated by the Chief of the area Pw2 that the appellant used to wear a cap and could not know whether appellant used to comb his hair.*

***Whether appellant identified***

*Pw1 said that she did not know the appellant but she told the doctor that she was raped by someone she knew. She told the Chief that she did not know the person who raped her. The complainant went round seeing people and she pointed out the appellant. She said she identified the appellant by his clothes and plaited hair. Pw2 the Chief said that the appellant was wearing a Marvin.*

***Abdalla Wendoh v. R** case where dealing with the identification evidence. I also refer to the **Wamunga v. R** (1989) KLR 424 and cases cited therein.*

*The appellant was not properly identified by the complainant Pw1.*

***Prosecution witnesses not credible***

*Pw1 the complainant at page 5 said she was raped by a person whom she knew but in evidence she said she did not know the person and would identify him if she saw him.*

***Age of the complainant***

*At page 5 the complainant said she did not know the year she was born, she told doctor she was 20 years old. She contradicted herself. She was not a credible witness. Her evidence should not have been relied on by the trial Court.*

*Pw2, the area Chief largely corroborated the appellant's evidence. Pw3 the Clinical Officer was hearsay as he was not the one who examined Pw1 but he filled the P3 form. I rely on section 62 and 63 of the Evidence Act on oral evidence.*

*Pw4, the Investigating Officer said that at page 18 that she or the one who took the photograph of the appellant but later said that she was not the one who took the photograph. Jose who took the photograph was not called as a witness.*

*There was no corroboration. The conviction of the appellant was not based on sufficient evidence.*

*The appeal should be allowed.*

***Miss Kitilit***

***Identification of the appellant***

*It was during the day at around 4 p.m. complainant was able to see the accused person properly. There was a struggle and Pw1 showed out marks on the neck and face and also indicated that she fought off her assailant and scratched him. The Court observed that the marks. Both accused and complainant had scratch marks that were healing during the hearing.*

*Page 16 line 16 – complainant states that she had given the accused marks on the forehead and the Court record that marks are still there.*

*She said that the accused had plaited hair. Page 19 when she went to report to Chief at page 20 line 8, she said that a person had plaited hair. The Chief corroborates these in evidence. The Chief said he had his hair in woolen cap. The complainant said that if she saw the assailant she would identify him.*

*Pw1 identify the appellant the following day after the incident.*

***Credibility of Prosecution witnesses***

*Act of rape is done in secrecy. The complainant was clear that there was no other witnesses at the river. She however told P and the employer who advised her to see the chief the following day.*

*Evidence was corroborated by the Chief and the Medical Officer. There were bruises on her private parts.*

***Age of Complainant***

*Complainant not certain of her age and kept shifting. The issue of age in case of rape is not material. She only need to be over 18 years. I rely on Omuroni v. Uganda (2000).*

***Proof of alibi***

*Alibi was raised by the defence during the defence hearing. It was not raised at the trial even though the appellant was represented by advocate. There was no issue whether the appellant was working throughout or left at 4 p.m. The prosecution should be given opportunity to rebut the alibi which ought to be given earlier.*

***Photographs***

*Photographs were taken by someone invited by the Investigating Officer and forwarded to the scene of crime which were certified and certificate produced before the Court. There was no prejudice suffered by the appellant.*

*Accused was charged with rape and assault. Trial Court only determined the case on the rape and failed to mention the 2nd count. I urge the Court as provided under Criminal Procedure Code 382 direct itself and use its discretion to give a finding on the 2nd count.*

*The appeal should be dismissed."*

**Determination**

7. The issues for determination herein are:

1) Whether the offences of rape and or indecent act and assault causing actual bodily harm were proved; and if so,

2) Whether the appellant was the perpetrator and s there proper identification

***Age of the complainant***

8. The Court takes note that there were discrepancies on the age of Pw1 and she accepted that she did not know her age. She however produced a medical card from Eldama Ravine District hospital indicating that she was 20 years, same age was indicated on the P3 form. In Court, she indicated she was 21 years and at some point indicated that she was born in 1989 and thus she was 23 years old. On the charges of rape and assault causing actual bodily harm the proof age of the victim is unnecessary. The alternative charge of indecent act is against a *'woman'* not child as provided for under the section of law cited in the charge sheet as section 11(1) of the Sexual Offences Act. In addition, that the complainant did not know the exact date of birth does not make her a liar; it is just a mark of her disadvantaged circumstances consistent with her station working as a house-help, but entitled to equal protection of the law.

***Identification of the appellant***

9. The Court warns itself of the danger of convicting on the identification evidence and takes the caution in ***Wamunga v. R*** (1989) KLR 424 citing ***Turnbull*** and ***Abdullah bin Wendo*** cases, that:

> *"Where only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."*

10. In this case, having found that she was an adult having, despite not had the privilege of seeing the witness as the trial Magistrate, I would find that as an adult this is a person who could positively identify her assailant where the conditions during the day were favorable for positive visual identification. Pw1 asserted that the incident took place at around 4.00 pm. This time it is still daylight and there is no possibility of any inability of the victim seeing her assailant. Further, Pw1 also informed Pw2 *"the way the man looked like [and] he said he would help me trace the man"* and was able to identify the appellant from his plaited hair and scratch on the forehead, the very next day when memory was still raw fresh. She had inflicted the assailant with a scratch on the forehead. These two descriptions I find to be sufficient identification. It is highly unlikely as to be beyond reasonable doubt that there would be more than one person in small village with plaited hair and a fresh scratch on the forehead, as described by the complainant and observed by the trial Court during hearing. This circumstantial evidence of the plaited hair and scratches on the forehead corroborated the complainant's evidence of identification of the appellant.

***<u>Alibi</u>***

11. The Appellant called one witness in his defence to support his alibi on his whereabouts on the 21/3/2012. However, Dw1 clearly states that she saw the Appellant at around 1.00 pm and went back home only to see them later at around 5.00 pm or 6.00 pm. She admitted that she would not be in a position to ascertain what transpired at 4.00 pm when the incident was alleged to have taken place.

12. Most importantly, although the accused who raises an alibi does not thereby assume the burden of proof of the alibi, when it is raised late at defence hearing without its ever being mentioned earlier by an accused who is represented by counsel, the Court is justified to consider it merely an afterthought.

***<u>Proof of rape, indecent act and assault causing actual bodily harm</u>***

*Medical evidence*

13. The complainant's evidence of assault causing actual bodily harm is supported by the medical evidence of scratches on the neck and face and the pulled out hair. However, the sexual assault in the pubic region and presence of spermatozoa is indicated negative according to the original medical treatment chits on which the witness PW3's conclusion in the medical examination report P3 were allegedly based. On scrutiny of the two pieces of documentary evidence it was clear to this Court as a first appellate Court re-evaluating evidence that the purported corroboration of the evidence of sexual assault and penetration was not supported by the medical findings on examination carried out on the 21/3/2012 the day of the assault. The purported confirmation of sexual assault by the P3 completed one week later on 28th March 2012 is unacceptable in view of obvious attempt to change the evidence.

14. PW3, PW3, Lazarus Kiprono, then Senior Clinical Officer at Eldama Ravine District Hospital testified on the complainant's P3 form which he had completed as follows:

> *"I am Lazarus Kiprono senior [clinical] officer at Eldama Ravine District Hospital. P3 form MFI1 identified. I filled it on 28.33.2012 from IK age 20 years old. She came to our facility alleging to have been strangled and raped by a known person while she was driving cattle home. The rape was under panga point. She sustained scratch marks on her neck with difficult breathing. She was already pregnant at time of examination L.M. P was 15.1.2012. Lab test showed positive pregnancy, HIV negative, HVS epithelial cells present. Spermatozoa was seen. VDRL non-reactive. H&N bruised front of face and swelling marks on neck and some hair pulled off. Age of injuries approximately 2 hours. Offence rape. There were bruises on pubic region and laceration of labia majora. Spermatozoa was seen. MFI 1 now exhibit 1 MFI 2 (a) referred. It is from Eldama Ravine District Hospital for Irene Konga dated 21/3/2012. I relied on it when filling P3 from. MFI 2 (a) is now exhibit 2 (a). MFI 2 (b) is a continuation of MFI 2(a)… now exhibit 2 (b)."*

15. On cross-examination, PW3 conceded that he had not examined the complainant and only relied on the record of the examination colleague who had seen the complainant on the very day of the alleged rape:

> *"I filled P3 form 1 week after patient was examined. I examined her physically. I saw there were healed scars on pubic region and pulled hair on back of the head. I relied on exhibit 2 (a) & 2 (b) and on my physical examination. Page 3 of P3 form lacerations of labia majora is reflected in exhibit 2(a). "*

16. It does appear that the witness PW3, Lazarus Kiprono, then Senior Clinical Officer at Eldama Ravine District Hospital may have altered the result of his colleague in the medical treatment chit dated 21/3/12 (EX 2a) which clearly indicated ***"No bruises noted on pubic region"*** and ***"No pus, T.V., Spermatozoa seen."*** While the P3 dishonestly records ***"Bruised Pubic hair Lacerated labia region",*** the treatment chit is itself clearly subsequently altered to indicate ***"(Spermatozoa - Seen)".*** The exhibit 2 (a) has no reference on lacerations on labia, which the P3 documents. There was a clear case of trying to fix the appellant to a charge of rape which depended evidence on penetration.

17. While section 77 of the Evidence Act does allow the production of official reports by officers other than the ones who make the report,

the glaring alterations of examination findings of the examining officer is criminal and unlawful. A document produced by *ex post facto* doctoring cannot corroborate any evidence of the matters set out therein and subsequently altered.

18. The Court, therefore, rejects medical evidence of the PW3 regarding the presence of injuries and spermatozoa in the private parts of the complainant. For this reason, the Court does not find proved the charges of rape and indecent act, c/s respectively section 3(1) (3) and 11A of the Sexual Offences Act.

19. The offence of Assault causing actual bodily harm is, nonetheless, proved on the evidence.

**Orders**

20. Accordingly, for the reasons set out above, the conviction of the appellant for the offence of rape c/s 3(1) (3) of the Sexual Offences Act is quashed and the sentence of imprisonment for 10 years imposed on the appellant therefor set aside.

21. For the same reason of unreliability of the medical evidence, the offence of indecent act is not proved, and the appellant is acquitted of the alternative charge of indecent act c/s 11A of the Sexual Offence Act.

22. The appellant is, however, convicted of the offence of assault causing actual bodily harm c/s 251 of the Penal Code and sentenced to an imprisonment term of **three (3) years** from the date of conviction and sentence in the trial Court.

23. **As the appellant has been in custody serving sentence since 29th July 2015, the appellant has already served in full the sentence of imprisonment for 3 years, and there shall, therefore, be an order directing his release forthwith unless he is otherwise lawfully held.**

**Further Orders**

24. Taking cognizance of the apparent forgery and uttering of the medical treatment chits from the Eldama Ravine Hospital to *doctor* the findings thereon to reflect bruises in the pubic area and the presence of spermatozoa, this Court shall refer this matter to the DPP for further investigation and prosecution of the culprits, if appropriate.

*Order accordingly.*

**DATED AND DELIVERED THIS 8TH DAY OF APRIL 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Sambu, Advocate for the Appellant.

Ms. Kitilit, Prosecution Counsel for the Respondent.