**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NUMBER 17 OF 2016**

**(From original conviction and sentence in criminal case number 1145 of 2015 of the Principal Magistrate's Court at Kapenguria)**

**CORNELIUS PCHUMBA……..…..……..……. APPELLANT**

**VERSUS**

**REPUBLIC …….……. RESPONDENT**

**JUDGEMENT**

**CORNELIUS PCHUMBA**, the Appellant herein was charged, tried and convicted for an offence in the main count of **Rape, contrary to section 3 (1) (a) of the sexual offences Act No. 3 of 2006.**

The particulars of this offence are that on the 7th day of July, 2015 within West Pokot County, the appellant did intentionally and unlawfully caused his penis to penetrate the vagina of S C T.

An alternative charge had also been preferred against him, of **indecent Act with an adult, contrary to section 11(6) of the Sexual Offences Act No. 3 of 2006.**

The particulars being that on the 7th day of July, 2015 at Chepareria area, within West Pokot County, the appellant intentionally touched the breast and vagina of S C T.

The trial court after hearing the full evidence found the appellant guilty of the offence in the main count and was consequently convicted and sentenced to serve a jail term of 10 years.

The appellant dissatisfied by the said conviction and sentence appealed to this court through the firm of Philip Magal & Company Advocates. The raised grounds of appeal can be summed up into one that the trial magistrate erred in law and fact by finding that the offence of rape was proved against the accused, by the prosecution, beyond reasonable doubt.

The state opposed the appeal.

The evidence adduced in the lower court shows that PW-1, the complainant, was the only eye witness to the alleged incident of rape. Her evidence is that she was then aged 19 years. She was a student at *particulars withheld*. On 7/5/2015 at 1:00 p.m she was headed home from *particulars withheld*. She had been sent by her mother. She was alone. She stopped a Probox Vehicle registration number *particulars withheld*. The vehicle had only the driver. He asked her whether she was headed for Makutano. She said yes. He offered to give her a lift. The vehicle took off towards Makutano but branched off the road into a home. The driver alighted saying he wanted to pick a patient. He opened the door and grabbed PW-1.

There was no one else in the homestead. He pushed her backward on the front seat. He raped her. She screamed but he had raised the windows. He entered his manhood into her womanhood. He went into his house and bathed. He passed her a tissue to wipe herself but she did not.

He drove to Makutano. She informed the bodaboda people. She as well informed other people who took her to Makutano police station. The appellant took off with the car. She had not known him before then. She recorded her statement with the police and was issued with a P-3 form. The said P-3 form was produced by one Simon Madereng, PW-4 in this case. He said he had the P-3 inrespect of O.C.S Kapenguria police station. It was in respect to an offence of rape to a 19 years old person. He said the hymen was open, a sign of positive penetration. The P-3 was signed by Litole his Collegue, the head of department. He was allegedly in Nakuru attending a function.

PW-2 is the owner of Motor Vehicle registration number *particulars withheld*, grey metallic saloon. He gave evidence that the appellant was his reliever and used to give him the vehicle from time to time to do business. On the day the complainant was allegedly raped it is the appellant who was using the vehicle.

Mr. Patrick Chuma Manyonge, the PW-3 in this case is the deputy principal *particulars withheld*. On 7/7/2015 he was in school. The complainant was a student in the said school. On 7th the complainant had been sent home as a disciplinary action. She was in possession of a phone of which was not permitted in school.

PW-5 took over investigation of the case from the investigating officer who was at the time on maternity leave.

At the close of the prosecution case the trial magistrate found that the accused had a case to answer and accordingly placed him on his defence. The magistrate consequently complied with the provision of **Section 211 of the C.P.C.** The appellant indicated he'll give sworn evidence and call no witness. However he was not sworn and gave unsworn testimony. He said he stays at Chepareria and is a driver. The offence was not true. On the material day he used a motor vehicle registration number KBU. He took his young child for operation at 8:00 a.m. He was in hospital till evening. He then proceeded back home.

I have considered the entire evidence afresh and weighed it against the judgment that was passed against the appellant. The trial magistrate in various areas got the facts of the prosecution case wrong. I am not in a position to explain how this could have happened given that he's the one who heard the prosecution evidence and recorded it. In the judgment the magistrate states that the prosecution produced the P-3 form to confirm that complainant was positively penetrated by a male organ.

The evidence of PW-4 and the P-3 form do not disclose that the complainant was penetrated by a male organ.

The judgment also reveals that the complainant said that the appellant pulled her to the back seat; shut the windows of the car and raped her. That she screamed but in view of the fact that the windows were up nobody could hear. The complainant never said that she was pushed to the back seat. She said she was pushed backwards on the front seat and raped.

The trial magistrate in his judgment discloses that when the complainant reported the matter to bodaboda operatives, they helped her arrest the accused person. However complainant never said so. She said she informed bodaboda people but did not disclose of anything they did. It's other people she informed who took her to Makutano police station. She ended up by saying other people did not help her which implies the bodaboda people did not help her.

The judgment in this matter alleges that *particulars withheld* a teacher at *particulars withheld* confirmed that he had sent home the complainant to fetch school fees arrears when the incident occurred. Such is not supported by the evidence of the said teacher. The teacher indicated that he sent her home on a disciplinary issue of having a phone of which is not allowed in school. Its PW-5 who alleged the complainant had been sent to collect school fees. We can't tell her source of such information.

The trial magistrate equally had it wrong in his judgment when he alleged that Simon Madareng was the clinical officer who confirmed the injuries sustained by the complainant after examining her on the 8/7/2015. PW-4, Simon Madareng did not even inform the court about his profession. He did not examine the complainant. Complainant was examined by one Litole who is his colleague and head of the department. He was allegedly in Nakuru office attending a function. This witness did not indicate for how long he had worked with Mr. Litole and whether he was conversant with his handwriting and signature. He did not identify the handwriting and signature on the P-3 form. These gaps can adequately challenge his competence in production of the said P-3 on behalf of the said Litole.

While the trial magistrate was evaluating the evidence he held that the accused drove with the complainant in the same vehicle for a considerable period of time. I cannot find where the said finding was derived from in the evidence. The complainant first said she met the appellant at 1:00 p.m. She never indicated how long they were together or the time they arrived at Makutano. The finding must have been based on an assumption. The court further indicated that the appellant held the complainant, stripped her naked and had carnal knowledge of her. I have found no evidence stating that the complainant was stripped naked. Such is also based on assumption. Further still on page 18, the magistrate held that the testimony of the complainant is to the effect that the accused bounced on her in his car, stripped her naked then raped her. The complainant screamed but that the appellant blocked her mouth and coupled to the fact that the windows were up, nobody could have come to her rescue. There's no evidence that when complainant screamed the appellant blocked her mouth. It's strange where the trial magistrate got these "facts" from.

From the foregoing it's clear that the appellant was convicted on more assumed evidence than just what was actually presented in court in evidence. Putting aside the assumed evidence, one would question the point at which the complainant took the registration number of the vehicle the appellant was allegedly driving and which she was allegedly raped in. she simply gave the number without stating how she got it. She also stated that she had not known the appellant before then but the evidence by the investigating officer (PW-5) and that of PW-4 alleges she was raped by a person known to her. Considering this with her evidence where she only screamed in resistance of the alleged rape and never stated that she was threatened in anyway by the appellant, or raised any other form of hell to resist the rape, and also that no evidence of struggle was presented apart from the statement that she was pushed backward on the front seat, I see a well found possibility that the two had consensual sex. Complainant said after she was raped the appellant went to his house and bathed. If at the time she had been left in the vehicle, one would question why she never escaped to seek help. I also doubt that a rapist would drive a girl to his own house and rape her outside the compound in the vehicle. Such would make the victim trace him easily. The act of driving her upto Makutano Town, and not dropping her in a remote place along the road, raises doubts as to whether it was actually a rape. There's a possibility that what she did with the appellant after she had been sent away from school was discovered or she feared that it will be discovered and hence raised the rape allegation to cover up.

The bottom line is that the trial magistrate built a better case for the prosecution in his judgment than was presented by the prosecution witnesses. If he had weighed the actual evidence adduced in court, most probably than not he would have formed doubts as to whether the alleged sex was consensual or not. Such doubt would have been resolved in favour of the appellant, deserving him an acquittal. I have accordingly done the same. The available evidence does not establish the offence preferred in the main count nor in the alternative count, beyond reasonable doubt. I do therefore quash the conviction, set aside the sentence and put the appellant at liberty unless otherwise lawfully held.

Judgment read and delivered in the open court this 3rd day of November, 2016 in the presence of:-

Mr. Mark Nabuyumbu for the state

Miss Chebet who is holding brief for Mr. Magal who was for the Appellant.

**S. M. GITHINJI**

**JUDGE**