REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 47 OF 2012

DANIEL KIPLIMO CHERONO :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

(An appeal arising from the original conviction and sentence in Criminal Case No. 253 of 2011 in the Senior Principal Magistrates court at Iten – Hon B.N.Moseti (SRM)

JUDGMENT

1. The appellant ***Daniel Kiplimo Cherono*** was charged before the Senior Resident Magistrate's Court at Iten with the offence of Rape Contrary to ***Section 3(1)(3)*** of the ***Sexual Offences Act.*** The particulars of the offence alleged that on the 17th day of April 2011 at about 5.30 p.m, in Marakwet West district within Rift Valley province, the appellant intentionally and unlawfully committed an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of ***BJC*** without her consent.

In the alternative, the appellant was also charged with the offence of committing an indecent act with an adult Contrary to ***Section 11 (A)*** of the ***Sexual Offences Act.*** In the alternative count, it was alleged that on the same date and place, the appellant committed an indecent act with ***B JC*** by unlawfully touching her private parts namely vagina and breasts.

2. After a full trial, the appellant was convicted of the principal count of rape and was sentenced to serve twenty (20) years imprisonment. He was aggrieved by the conviction and sentence. He filed a petition of appeal in person on 15th March 2012 but when he later engaged an advocate to represent him in the appeal, leave to file an amended petition was sought and obtained by his advocate Mr. Mwinamo on 15th October 2013. In his amended petition of appeal, the appellant challenged his conviction and sentence on the following grounds:-

a. ***The Learned Trial Magistrate erred in fact and or in law in convicting the Appellant.***
b. ***The Learned Trial Magistrate erred in fact and or law in failing to find that the medical evidence was not corroborated and could not sustain the charge of rape.***
c. ***The Learned Trial Magistrate erred in fact and or law in failing to find that the medical evidence was contradictory so as to sustain the conviction.***
d. ***The Learned Magistrate erred in law and in fact in imposing a twenty (20) years sentence when the same was harsh and excessive.***
e. ***The Learned Trial Magistrate erred in fact and or law in failing toconsider the Appellant's mitigation.***

3. The appeal was prosecuted before me on 28th October, 2014 by way of oral submissions.The gist of the submissions made by Learned Counsel Mr. Mwinamo on behalf of the appellant is that the trial magistrate erred in convicting the appellant while the medical evidence presented by the prosecution was contradictory and did not support the offence of Rape. According to Mr. Mwinamo, if the complainant had been raped by the appellant, she would have contracted the sexually transmitted disease the appellant was found to have been suffering from when he was medically examined but according to the P3 Form filled in respect of the complainant, the complainant had no injury on her private parts and the whitish discharge noted by the doctor was not linked to the appellant. He also casted doubt on the validity of the identification parade in which the complainant physically identified the appellant as the person who had raped her on the material date. Lastly, Mr. Mwinamo submitted that the sentence imposed on the appellant was manifestly excessive and ought to be reduced considering that he had been in custody for the entire duration of the trial. He urged the court to allow the appeal.

4. The state through learned prosecuting counsel Mr. Mulati opposed the appeal. In his submissions, Mr. Mulati disputed the appellant's submission that the medical evidence produced by the prosecution did not support the offence of rape. He submitted that the evidence adduced by the doctor (PW4) confirmed that PW1 had a strangulation mark on her neck which was proof of use of force and that the absence of any indication in the complainant's P3 form that she had contracted a sexually transmitted disease was not proof that the appellant had not committed the offence or infected her with such a disease considering that the complainant had been examined twenty four (24) hours after the commission of the offence and as such, the disease could have been in incubation and the doctor may not have been in a position to detect it.

On Sentence, Learned Counsel asserted that the sentence of twenty years imprisonment was not excessive as the offence of rape on conviction attracts a minimum sentence of ten years imprisonment and a maximum of life imprisonment. Counsel invited the court to uphold the conviction and sentence.

5. Briefly, the prosecution case according to the trial court's record was as follows:-

The complainant, ***BCC*** testified as PW1 and claimed that on 17th April 2011, she was walking home alone at around 5.30 p.m on a foot path in a forest after attending a funeral. She found a man who she identified as the appellant herein standing on the foot pat. She noted that he was armed with a bow and arrows which were in a quiver and after a short conversation, the appellant grabbed her by the neck and threw her down. He then tore her underpant, removed his trousers and proceeded to have carnal knowledge of her without her consent.

When he was done with her, he ordered her to carry the quiver and accompany him to go and marry him. She complied and as they were walking, they came across ***Edwin Sang*** (PW2) a person she knew before. On seeing Edwin, the appellant snatched the quiver from PW1 and ran away.

6. According to the evidence of PW2, he knew the appellant prior to that date and as he was about 5 metres away from him before he ran off, he was able to see him clearly and recognize him. PW1 ran to him and alleged that the appellant had raped her. PW1 then called her husband who came together with his brother and took her away. He organized for the appellant to be arrested on the following day and he was handed over to PW4 ***APC Paul Tunai*** at Kimnai police station.

7. On her part, PW1 recalled that on 18th April, 2011 she reported the incident at Kapsowar police station. PW5 P.C ***Joseph Asugo*** who received her report recalled that in her report, PW1 claimed that she could identify her assailant by appearance. He organized for an identification parade which was conducted on the same day by PW3 Chief Inspector ***Elijah Ouma***. In that parade, the appellant was identified by the complainant as the person who had sexually assaulted her on the previous day.

On the same day, PW1 was examined by PW6 ***Wilfred Kimosop,*** a doctorat Kapsowar Mission Hospital. He completed her P3 form which he produced as exhibit 4.

The torn underpant which the complainant had allegedly wore on the material date was exhibited in court

together with a bow and quiver (Exhibit 1 – exhibit 3) though it was unclear how the bow and quiver were recovered.

8. In his defence, the appellant elected to give an unsworn statement in which he denied having committed the offence as alleged. He raised an alibi claiming that on the material date, he left his house at noon and went to a centre (probably referring to a trading centre) until 8 p.m when he was arrested and taken to a police station. He was surprised to hear the charges that were preferred against him.

9. This being a first appeal, this court has a legal obligation to re-examine and re-evaluate the evidence adduced before the trial court in order to form its own independent conclusion regarding the validity or otherwise of the appellant's conviction and sentence. In re-assessing such evidence, the court should bear in mind that unlike the trial court, it did not have the advantage of seeing or hearing the witnesses – See: ***Pandya vs Republic (1957) EA 336***, ***Kiilu and another vs Republic (2005) KLR 175*** and ***Kinyanjui vs Republic (2004) 2 KLR 364.***

10. After carefully considering the evidence on record and the submissions made by learned Counsel for both the appellant and the state, I find that PW1's evidence that she had been raped by the appellant on 17th April 2014 was not corroborated by any other evidence since PW2 though claiming to have seen the complainant and the appellant together at around 6 - 6.30p.m on the same day did not claim to have witnessed the incident. He did not also indicate what the appellant and the complainant were doing when he saw them or the state the complainant was in when she allegedly ran to him, for instance, the state of her clothing, whether she was crying or terrified as would be expected of a person who had undergone a traumatizing ordeal like rape.

11. But the evidence which most fundamentally destroyed the prosecution's case was the evidence of PW4, the doctor who examined the complainant within twenty four hours of commission of the alleged offence.

In his oral evidence before the court and in his findings detailed in the P3 Form (exhibit 4), the doctor was not able to conclusively determine whether PW1 had been involved in any sexual activity prior to his examination. In his evidence in chief, he stated that he noted a whitish discharge oozing from the complainant's private parts; that an analysis of a vaginal swab taken from her was negative for spermatozoa. The doctor then proceeded to state as follows on Page 3 Line 8 to 13.

"My conclusion penetration could not be ruled out since it was adult issue of lacerations or tears is hard to come by. I did rely on samples to government chemist for analysis. If the white substances were semen we could have seen sperm since it was within 24 hours of incident. It could be probable PW1 had pelvic infection which may have led to that. The discharge occurs if patient has fungal infection like fungititis, if there was penetration still could be there".

12. From the above evidence, it is clear that the doctor was doubtful whether there had been penetration or whether PW1 had been engaged in any sexual intercourse on 17th April, 2011 as alleged. For the offence of rape to be proved, the prosecution must adduce evidence which proves beyond doubt that the accused person caused penetration of his genital organ into the genital organ of the victim without her consent. And though there can be penetration without complete sexual intercourse and proof of sexual intercourse is not always necessary to prove the offence of rape given that the offence is complete if penetration is proved, where a complainant was emphatic that the penetration took the form of complete sexual intercourse like in the present case, the prosecution bears the burden of proving beyond doubt that indeed the victim had engaged in sexual intercourse on the date alleged.

Such proof can only be availed to the court through medical evidence confirming that the victim had engaged in sexual activity at the time the offence is alleged to have been committed alongside other evidence. In the present case however, the medical evidence relied upon by the prosecution as shown above did not conclusively prove that the complainant had engaged in any sexual activity on the date she alleged the appellant raped her.

13. In my view, the medical evidence adduced in this case created a reasonable doubt whether or not the appellant had committed the offence as alleged especially because the complainant did not claim that she had taken a shower after her ordeal or undertook any activity that may have diminished the possibility of detection of spermatozoa in the discharge noted by the doctor from her private parts on the following day.

I am in the circumstances inclined to agree with the submission made by Mr. Mwinamo that the evidence on record did not establish beyond any reasonable doubt that the appellant had infact committed the offence for which he was convicted and sentenced. The law requires that any doubt arising in the prosecution case must be resolved in favour of an accused person and therefore, the learned trial magistrate ought to have given the appellant the benefit of that doubt.

14. In view of the foregoing, I am satisfied that the appellant's conviction was unsafe and it cannot be sustained. Accordingly, I find merit in this appeal and I hereby allow it. The appellant's conviction is consequently quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF NOVEMBER, 2014.

In the presence of:-

The Appellant

Mr. Mulati for the state

Mr. Mukabane holding brief for Mr. Mwinamo for the

Appellant

Mwende Court clerk