REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 139 OF 2010

A. K …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal arising from the Judgment of Hon. C. G. Mbogo (Chief Magistrate) in Eldoret Chief Magistrate's Court Criminal Case No. 6664 of 2005 delivered on 16th September, 2010)

JUDGMENT

The Appellant, A. K was charged with the offence of attempted rape contrary to Section 141 of the Penal Code.

Particulars of the charge are that on the 20th day of September, 2005 in Uasin Gishu District of the Rift Valley Province attempted to have carnal knowledge of H.C.R without her consent.

Judgment of the trial court was delivered on 16th September, 2010 and the Appellant was sentenced to life imprisonment.

He has appealed against this Judgment and raises eight grounds of appeal, as per the amended memorandum of appeal filed on 25th April, 2013, namely;

1. That the professional report by the medical practitioner was not in support of the charges against the Appellant vide page 45 line 7 where the doctor stated in his testimony that there was no evidence of attempted rape.

2. That the age of the complainant which has a direct bearing on the sentence was not recorded on the charge sheet hence rendering it defective. The age of the complainant in this case was not proved beyond any reasonable doubt e.g. there was no birth certificate, age assessment card or immunization card.

3.That the trial Magistrate erred in law by not citing that the medical report, which is the P3 form was not compiled/included in documents in the Record of Appeal served upon the Appellant.

4. That the prosecution's evidence was contradictory and inconsistent.

5.That the investigation of the case was shoddy.

6.That the prosecution failed to call essential witnesses.

7.That there was questionable delay in reporting the offence and arresting the Appellant.

8.That the sentence was excessive and unreasonable in the circumstances.

The appeal was canvassed before me on 25th April, 2013. The Appellant relied on written submissions which he filed in court on 25th April, 2013. The prosecuting Counsel, Mr. Mulati, responded by way of oral submissions.

It is now settled principle that an appellate court's duty is to re-evaluate the evidence tendered before the trial court afresh and come up with its own findings as if it had not heard or seen the witnesses.

Under ground 1 of appeal, the Appellant argues that there was no medical evidence tendered in support of the charges facing him. He submitted that the medical expert's evidence, on whose basis he was convicted, was that there was no attempt to rape the complainant.

The medical officer was a clinical officer who testified as PW6. He worked at [Particulars withheld]. He testified that the complainant presented herself on allegation of attempted rape and assault against her. That at the time of examination, she complained of headache, backache and chest pains.

PW6 formed the opinion that there was no evidence of attempted rape. He however classified the degree of injury as harm and the probable type of weapon used as blunt.

So the question arises; what are the injuries the medical officer classified? The P3 form was produced by PW6 as P. Exhibit 1. Unfortunately I am not able to locate it both in the record of appeal and lower court proceedings/file. Be that as it may, what was recorded as evidence of PW6 is sufficient in aiding the court to come up with an objective finding.

The charge facing the Appellant was one of attempted rape and not rape. Therefore, physical injuries inflicted on the complainant needed not take the form of sexual assault. The court would make a finding of guilt based on the complainant's testimony and any other corroborative evidence.

The evidence of PW1 (complainant) was that on the fateful day (22nd September, 2005) at about 7.00 p.m., she was walking home from [Particulars withheld] when she saw a man following her. The man grabbed her shoulders and knocked her to the ground. She said that it was not yet dark and was able to recognize the Appellant who was her neighbour who lived one kilometre from her home. That the Appellant also talked to her in the words "**leo umepatikana. Utanipatia hiyo kitu yako**" which in English is "**today you have been found. You will give me that thing of yours**."

She testified that as the Appellant knocked her down, she resisted physically by shoving the Appellant but the latter overpowered her and sat on her chest. That the Appellant strangled her and pulled her pant to the feet even as she called for help.

She said that one W passed by but the Appellant ordered him to leave which he did. A second man came who pulled away the Appellant as he separated her legs. She said that this man was joined by the Appellant's mother who took away the Appellant.

She said that she reported the matter at [Particulars withheld] Station on 24th September, 2005. She was issued with a P3 form. She said she sustained bruises on the face, hands and back as she tried to fight back the Appellant.

In corroborating the evidence of PW1, PW2, R. W stated that on 22nd September, 2005 at about 7.00 p.m. he was at home in R farm when he heard a woman calling for help. That when he went out of the house he heard more screams and went towards the sounds and found the Appellant sitting on PW1, H. That PW1 was still calling for help but the Appellant ordered him to leave. That he left but went and informed a co-worker, Mr. B. K.

PW2 testified that it was not very dark and he knew both the Appellant and PW1 as neighbours.

The said B. K testified as PW3. He corroborated the testimonies of PW1 and 2. He stated that he heard a lady calling for help about 300 metres away. That he started walking towards the direction the screams were coming from and that is when he met with R. W who told him that it was H and the Appellant who were fighting.

He stated that on arrival at the scene, he found the Appellant sitting on PW1's stomach. The latter's pants were on her feet and the Appellant was trying to open her legs. That PW1 told her that the Appellant was trying to rape her.

He said that he pulled the Appellant away but the latter started fighting him. PW1 then got a chance to run away. He said that the Appellant's mother arrived at the scene and took him (Appellant) away. He said that he reported the matter to the Chief on the next day. It was also his testimony that both PW1 and the Appellant were known to him.

The evidence of PW2 and 3 leaves no doubt that the Appellant was caught red-handed attempting to rape PW1. The two witnesses did not in any way contradict themselves or the evidence of PW1. Their testimonies was not rebutted on cross-examination of the Appellant.

It is the injuries that PW1 sustained as she fought back the Appellant that were treated at [Particulars withheld] Health Centre. They are definitely the injuries PW6 treated and examined PW1 on and classified them as harm. In my very considered view, even if there was no medical report, the testimonies of PW1, 2 and 3 would be sufficient in demonstrating that indeed the Appellant attempted to rape PW1. This is not a case of rape or defilement that a medical report must prove the offence. The actions of the Appellant, of removing PW1's pants, trying to forcefully open up her legs so that "**he could be given that thing**" and the loud screams of PW1 seeking help against the enemy were sufficient indicators that the Appellant was determined to rape PW1.

It was the complainant's (PW1's) persistent call for help that rescued her; thanks to PW2 and 3 heeding to hapless cries.

Further, PW1 well knew the Appellant as a very close neighbour. PW2 and 3 too also knew the Appellant and PW1 as neighbours, hence no doubt it is the Appellant who was caught attempting to commit the heinous crime.

I do accordingly dismiss his first ground of appeal as lacking in merit.

On the second ground, he argues that the age of the complainant, which determines the sentence was not proved. The Appellant submitted that no birth certificate or birth card or age assessment document was produced in court to prove the age of PW1. He submitted that the fact that the age of PW1 was not indicated in the charge sheet rendered the charge sheet defective.

It is factual that the age of PW1 was not indicated on the charge sheet. I have also confirmed that PW6, the clinical officer who examined PW1 did not also state the age of PW1 in his evidence. However, the testimony of PW1 leave no doubt that she was an adult. Firstly, she was sworn before she took the oath. Secondly, although, the mere fact of taking oath may not necessarily place her as an adult, her testimony was;

"I am a housewife. I reside in Simatwa ….."

This obviously places her age to adulthood. Thirdly, the charge against the Appellant was brought under the then Section 141 of the Penal Code. This section, alongside sections 139, 140, 142-145 were repealed by the 2nd Schedule of the Sexual Offences Act No. 3 of 2006.

Section 141 of the Penal Code read;

"**Any person who attempts to commit rape is guilty of a felony and is liable to imprisonment with hard labour for life, with or without corporal punishment**.

Although S. 141 of the Penal Code was repealed, paragraph 2 of the First Schedule of the Sexual Offences Act No. 3 of 2006 provides that "**any proceedings commenced under written law or part thereof repealed by this Act shall continue to their logical conclusions under those written laws**."

Therefore, the charge sheet, having been drafted under the repealed section of the Penal Code, remains valid by virtue of paragraph 2 of the 1st Schedule of the Sexual Offences Act No. 3 of 2006.

Section 141 of the Penal Code did not make it mandatory that age of a complainant should be specified. From the testimony of PW1, as noted above, it is clear that she was an adult at the time the offence was committed. I am certain that, if the trial court was in doubt as to her age it would have expressed these doubts and ordered a remedy. This was never the case. Be that as it may though, by dint of the then Section 141 of the Penal Code, the age of the complainant needed not be specified so long as the investigators were convinced she was an adult.

Under the third ground of appeal, the Appellant states that the trial court erred in both law and fact by not citing that the medical report was incomplete by virtue of the same not being included in copy of the certified Record of Appeal. He submitted that the failure to include the medical report in the record of appeal, notwithstanding that the same was produced as an exhibit,vitiates PW1's evidence that he attended any medical check up.

I have herein above already given candid reasons why, even if PW1 did not visit a medical facility for treatment or examination, sufficient direct evidence of PW2 and 3 corroborates that of PW1, that indeed the Appellant attempted to rape PW1. This ground of appeal cannot therefore stand or bail out the Appellant.

I will combine grounds of appeal numbers 4, 5 and 6. The Appellant submits that the evidence of the prosecution witnesses was contradictory and inconsistent, that the failure to call the investigating officer rendered the prosecution's case fatal and that by virtue of crucial witnesses not being called and exhibits not being produced, the trial magistrate ought to have acquitted him.

I have already analysed the evidence of PW1 – 3 and noted that the same was consistent and water tight against the Appellant. PW4 was the arresting officer who re-arrested the Appellant from members of the public. He said that the Appellant was taken to [Particulars withheld] Station by members of the public on allegations that he "**had defiled a child**" but that upon re-arresting him, he booked him with the offence of attempted rape. This then vindicates PW1, 2 and 3 that indeed the Appellant was arrested and charged with offence of attempted rape. The evidence of PW4 therefore, did not contradict that of PW1, 2 and 3 in any way.

That of PW6 only added more weight to the preceding evidence, that indeed the complainant sustained bodily injuries as she tried to fight off the attacker (Appellant). I must note at this juncture that PW5 was stood down by the prosecutor. She had come to court to produce the P3 form on behalf of its maker. As she began to testify in chief, she stated that she did not know one M, who had filled the P3 form. It is at this juncture, that the Prosecutor applied to stand her down. Her failure to complete her testimony has not in any way vitiated the prosecutions evidence, as the maker of the P3 form subsequently testified as PW6 and produced the P3 form as an exhibit. I opine that the latter may have been inadvertently misplaced. I have already found elsewhere in this Judgment, that the failure to include the P3 form in the compiled Record of Appeal has not in any way negated a fair finding by this court in this appeal.

It must be noted that, an appellate court re-evaluates the evidence of the trial court and will not normally admit fresh evidence. The P3 form was produced as P. Exhibit 1. The trial court noted what was recorded in it in line with the testimony of PW6. I have re-evaluated the evidence of PW6 accordingly vis-a-vis the tesimonies of other witnesses. I hold, once more that no prejudice has been occasioned to the Appellant in the appeal by the mere absence of the P3 form in the Record of Appeal.

I do also hold that, although the investigating officer did not testify, the evidence already on record of PW1, 2, 3, 4 and 6 is concrete to found a case against the Appellant. M, the absence of the investigating officer's evidence is well supplemented by that of the arresting officer, PW4. It does not always follow that the failure to call the investigating officer renders the prosecution's case fatal. Such a finding would only be arrived at if, on the whole, the combined evidence of other witnesses leaves a gap that would only be adequately filled by the testimony of the investigating officer. This scenario does not obtain in the instant case for reasons I have given in the foregoing. That is to say, that the testimonies of the prosecution witnesses who testified sealed the Appellant's case in favour of the prosecution.

With respect to ground of appeal number 7, the Appellant submits that the learned magistrate did not address himself as to why PW1 took long to report the matter to the police. He submits that this may prompt the complainant to tender cooked-up evidence. He also submits that no explanation was given as why it took up to to four days to arrest him.

The prosecuting counsel submitted that the delay of only two days was not inordinate.

The offence was committed on 22nd September, 2005 and the report was made on 24th September, 2005. The decision to make the report to the police squarely lies with the complainant. It must not be lost in the mind of the court that the offence impacts humiliation on the victims. It may take time for the victim to gather the courage to make it public what she underwent. Court would in the circumstances evaluate the evidence tendered and make a finding on whether the charge was proved beyond any reasonable doubts. Court would also hold any delay occasioned before making the report as inordinate if it is of the view that, in the interlude, it negated the evidence likely to be tendered by way of interference or damage.

This position does not obtain in this case. The witness who saw what the Appellant did were candid. They hold no grudge against the Appellant. They only acted as good samaritans when they went to rescue PW1 who was loudly screaming for help.

The Appellant was arrested on 26th September, 2005. It must be noted that the act of arresting a suspect comprises the process of investigations. Police may not rush to arrest a suspect merely because a report has been made. They must crystalize the evidence upon recording statements and make an opinion of charging the suspect.

The Appellant was arrested only two days after the report was made. This did not in any way negatively affect the prosecution's case against the Appellant. I do accordingly dismiss this ground of appeal.

Lastly, under ground of appeal number 8, the Appellant states that the sentence meted on him was excessively harsh and inappropriate. He submitted that he is a family man and eldest son in a family of 5 children. That his mother is widowed and the entire family solely depends on him. He urges court to reduce the sentence so as to enable him go back to continue fending for the family.

The State Counsel on the other hand submitted that the sentence should not be reduced as per the law prescribes.

The then Section 141 of the Penal Code provided that, "**any person who attempts to commit rape is guilty of a felony and is liable to imprisonment with hard labour for life, with or without corporal punishment**."

May I note that corporal punishment has since been repealed by Act No. 5 of 2003. Therefore the Appellant would be liable to life imprisonment upon conviction. I hold that the prosecution proved its case against the Appellant beyond all reasonable doubts and therefore the conviction was based on sufficient evidence tendered before the trial court.

As for the sentence, the word "**liable to**" implies that the court has the discretion to impose such a sentence ranging from a minimum number of days, months and years but should not exceed life

imprisonment.

The Concise Oxford English Dictionary, Twelfth Edition defines the word liable as follows:-

(1) Responsible by law; legally answerable.

(2) Likely to do something.

(3) Likely to experience something (something undesirable)

In the layman's language, I understand the word liable to mean "the possibility of likelihood to experience something". Hence, the courts would, depending on circumstances and mitigating factors reduce the life imprisonment to what it deems fit.

Under the Sexual Offences Act No. 3 of 2006, now revised to the year 2010 Edition, Section 4 thereof provides that "**Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.**"

The circumstances under which the Appellant committed the offence were heinous. He way laid PW1 on the road, at a time he thought no one would stumble on him. He knocked her down to the ground and using so much force wrestled her and started removing her pants. He failed to heed to loud screams of PW1 who was calling for help. By the time PW2 and 3 arrived at the scene, the Appellant had pulled PW1's pants to the feet. The Appellant had also immobilized PW1 by sitting on her stomach. Had PW2 and 3 ignored the cries and screams of PW1, the Appellant would have executed his mission, of raping PW1 save for the help PW3 in particular offered of fighting off the Appellant.

In these circumstances, the Appellant deserves no mercy. I am not certain he has mitigated a good case why this court should be lenient on him. He has not portrayed the picture a father and a family head should offer to his family. He deserves to be removed from the society as he is a danger to it.

However, it is not lost in the mind of this court, that punishment should be given as a deterrent measure. It should not be so harsh, unless for useful purposes, so as to harden the offender. I would therefore reduce the sentence only for purposes of offering an opportunity to the Appellant to amend his character, and hopefully he will learn his lesson for the period he serves in prison.

Effectively, the Appeal succeeds only in part. I uphold the conviction. I set aside the sentence of life imprisonment and substitute it with one of fifteen (15) years. The Appellant will therefore serve fifteen years imprisonment unless he is otherwise lawfully set free. Such sentence will run from the date of conviction by the subordinate court.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 4th day of July, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Mulati for the State/Respondent