



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 23 OF 2012**

**NICKSON KIPCHIRCHIR.....APPELLANT**

**VS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the Chief Magistrate, Kitale dated 26<sup>th</sup> May 2011 in Criminal Case No 176 of 2011)**

**JUDGMENT**

**Introduction**

The Appellant, NICKSON KIPCHIRCHIR was charged with attempted rape contrary to Section 4 of the Sexual Offences Act No 3 of 2006, the particulars of the charge being that on the 14<sup>th</sup> Day of January 2011 at about 0045 hours, in *[particulars withheld]* Village within Elgeyo Marakwet County, the said NICKSON KIPCHIRCHIR intentionally and unlawfully attempted to cause his penis to penetrate the vagina of S J K without her consent.

The facts of the case as recorded by the trial court are that on 14<sup>th</sup> January 2011 at 12.40 am, the Complainant was asleep alone in her house when the Appellant sneaked into her bed and attempted to rape her. The Complainant told the trial court that she identified the Appellant who was her neighbor by the light of the Appellant's torch. The Complainant reported the incident at Kapcherop Police Station where the Appellant who had managed to escape had also made a report that he had been assaulted by the Complainant's husband, E K. The Appellant faced an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No 3 of 2006. He was tried and convicted on the main count and sentenced to five (5) years imprisonment.

**The Appellant's Appeal**

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 14<sup>th</sup> February 2012, raising the following Grounds of Appeal:

- a. That the learned trial Magistrate erred in law and fact by convicting the Appellant on the evidence of blood witnesses (PW 1 and PW 2);
- b. That the learned trial Magistrate erred in law and fact by convicting the Appellant in the absence of conditions favouring a positive identification and recognition;
- c. That the learned trial Magistrate erred in law and fact by ignoring and rejecting the Appellant's

defence without giving cogent reasons;

- d. That the learned trial Magistrate erred in law and fact in finding that the case against the Appellant had been proved beyond reasonable doubt notwithstanding material contradictions in the evidence of prosecution witnesses;
- e. That the learned trial Magistrate erred in law and fact in ignoring the Appellant's mitigation.

The appeal was heard on 16<sup>th</sup> October 2013 with the Appellant appearing in person and Mr. Konga appearing for the State. The Appellant expounded his Grounds of Appeal by way of written submissions.

### **Opposition by the State**

In opposing the appeal, Mr. Konga learned State Counsel submitted that the Complainant was able to identify the Appellant, who was a neighbour and well known to the Complainant by the light of a torch in the Appellant's hands. There was also moonlight and since the Complainant struggled with the Appellant to the door, she was able to identify him.

### **Findings and Determination**

This appeal hinges on identification of the Appellant by the Complainant. The Complainant told the trial court that the Appellant who was her neighbour was well known to her and she was therefore able to recognise him. The Appellant did not controvert the Complainant's evidence in this regard.

Identification by recognition has a high probative value. In the case of *Anjononi and Others Vs. Republic* [1981] KLR. 594 p. 60 the Court of Appeal stated that:

*“recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”*

From the evidence on record, the Complainant struggled with the Appellant to the door and aided by the Appellant's torch and moonlight, she was able to recognize him.

I therefore find that the Appellant was positively identified by the Complainant and find no reason to interfere with the conviction by the trial court. Since the Appellant was handed the minimum sentence for the offence of attempted rape, I have no room to interfere with the sentence. The conviction and sentence by the learned trial Magistrate are therefore confirmed and the Appellant's appeal is dismissed in its entirety.

**DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2013**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT KITALE THIS 6<sup>TH</sup> DAY OF NOVEMBER 2013**

**J.R KARANJA**

**JUDGE**

**In the Presence of:**

.....Appellant

.....**Respondent**