



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.57 OF 2010**

**S.K.T.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An Appeal from original conviction and sentence in Eldama Ravine SNR. R. M. CR. C. NO.325/2008 by Hon. D. M. MACHAGE, Resident Magistrate, dated 27<sup>th</sup> January, 2010]**

**JUDGMENT**

The appellant, **S.K.T**, was charged, first with **rape** contrary to **section 3(1)(a)** of the **Sexual Offences Act** and secondly with **assault causing grievous harm** contrary to **section 234** of the **Penal Code**.

After a full trial, the court found the appellant guilty of both offences and upon conviction sentenced him to serve life imprisonment for rape and 14 years imprisonment for grievous harm with the two sentences ordered to run concurrently.

The appellant has challenged the finding of the trial court arguing that the learned trial magistrate erred by convicting him when the charges were not proved beyond any reasonable doubt; that the charges were defective and that the conviction was based on uncorroborated evidence. The appellant further relied on written submissions.

Learned counsel for the respondent opposed the appeal and submitted that the appellant was positively identified by the complainant and that in view of the serious injuries he inflicted on the complainant, the appellant deserved a life sentence.

Before I consider these arguments, it is the duty of this court being the first appellate court to re-evaluate the evidence on record afresh in order to arrive at its own independent conclusion, of course being alive to the fact that the witnesses were only heard and seen by the trial court. The prosecution case was that the appellant who is a cousin to the complainant went to his uncle's home where he found the complainant alone. After a brief chat, the appellant went away only to return shortly armed with a *panga*. Without talking to the complainant, he began to cut her all over with the *panga* as she screamed for help. The appellant dragged her towards the banana *shamba* where he removed her clothes.

As he did so, the complainant lost consciousness and only gained her memory one week later when undergoing treatment at the Kenyatta National Hospital. **James Chesaro** found the complainant half naked and soaked in blood where she had been left by the attacker. The news of her attack quickly spread and her uncle, **J.C.C** rushed to the scene and arranged for transport to take the complainant to the

hospital. The matter was reported to the area assistant chief who went to the scene where he recovered some clothes said to belong to the appellant and the complainant.

**Dr. Christopher Kemboi** examined the complainant and noted multiple injuries to the head, face, upper and lower limbs, which included a fracture of the left tempo parietal bone. The doctor also noted that the complainant had been sexually assaulted. The appellant was arrested and charged.

In his sworn defence, the appellant recalled that he got to his uncle's home at about 6.00 p.m. well after the complainant had been attacked. As he went to see her in the hospital, he was arrested and did not understand why. The appellant has raised an *alibi* defence. The only question that fell for determination at the trial and which is also the main ground in this appeal was whether the appellant was positively identified as the person who attacked the complainant. The question is critical as the only direct evidence linking him with the attack was presented by the complainant, being evidence of a single witness.

In such a situation, the court must approach the case with caution and be satisfied that the identification was free of any error and therefore safe to rely on to convict. The appellant and the complainant are cousins. There is also no doubt that the appellant went to the uncle's home where the incident took place. While he maintains that he got there at 6p.m., several hours after the complainant has been attacked, the prosecution case is that he actually attacked the complainant at about 1p.m.

**P.W. IV, Wesley Kipngetich Chepkonga** confirmed that on the fateful day at about 11a.m., he drove the appellant in his motor vehicle from Kabimoi to the appellant's uncle's home at Solian. Before the journey, the appellant had told **P.W.8, Francis Mukoko Luseno** that he was going to harm C, a brother of the complainant, who was at the time with the complainant at their uncle's home. I am convinced from the totality of the evidence that the complainant was attacked at about 1p.m. But more significantly, the complainant and the appellant are cousins. (and are therefore well-known to one another).

Secondly, the attack was in broad daylight at about 1p.m. When the appellant first appeared at the scene, he talked to the complainant seeking to know who else was at home. He stood 3 yards away. The complainant observed that he appeared angry. She was frightened and planned to flee. Before she could do so, she saw the appellant returning. He was only 5 meters away and armed with a *panga*. He began to cut the complainant as he strangled her at the same time. From these events, I come to the conclusion that the complainant had sufficient time and opportunity to recognize the appellant. The evidence presented is overwhelming that the appellant made up his mind to harm a member of the family, surveyed the home, confirmed that the complainant was alone, armed himself with a *panga* and struck without any provocation. That evidence displaced the *alibi* defence and placed the appellant at the scene. The injuries inflicted were severe amounting almost to a case of attempted murder. The offence of grievous harm was proved beyond any reasonable doubt.

Regarding rape, the complainant's evidence was to the effect that the appellant dragged her to a nearby banana *shamba* where he removed her clothes, the skirt. Thereafter she could not recall anything else until after one week. The doctor on examining her on 6<sup>th</sup> January, 2009 nearly six months after the alleged rape, found bruises on the walls of the vagina and numerous pass cells without signs of spermatozoa. The doctor concluded from the abrasions that the complainant had been raped as there had been penetration.

First, it is noted that the complainant was first rushed to Eldama Ravine District Hospital before being transferred to Kenyatta National Hospital. There is no report from Eldama Ravine District Hospital. The reports from Kenyatta National Hospital are silent on the issue of rape.

Finally, it is strange that Dr. Kemboi was able to conclude that the complainant had been raped on the day of her attack, 6 months later! That evidence lacked credibility in view of the fact that the complainant herself was not able to say what happened to her after she was dragged to a banana *shamba* and her skirt removed. This is a criminal trial and the standard of proof remains beyond any reasonable doubt and not suspicion. The learned trial magistrate therefore erred in finding without sufficient evidence, that the appellant raped the complainant.

For those reasons, the appeal in respect of the first count (rape) is allowed. His appeal in respect of the second count (grievous harm) is dismissed as the conviction was based on sound evidence and the sentence was both lenient and lawful.

**Dated, Delivered and Signed at Nakuru this 7<sup>th</sup> day of March, 2011.**

**W. OUKO  
JUDGE**