



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: CHUNGA, C.J., TUNOI & LAKHA, JJ.A.)**

**CRIMINAL APPEAL NO. 116 OF 2001**

**BETWEEN**

**MUSA KIPSONGOK .....PPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, **Musa Kipsongok**, was convicted on 27th February, 2001 by the Senior Principal Magistrate, Nakuru, of rape contrary to **Section 140** of the Penal Code and sentenced to 20 years imprisonment with hard labour together with six strokes of the cane. His conviction was upheld on appeal by the High Court of Kenya at Nakuru, Rimita, J. on 11th May, 2001 but the sentence was reduced to 8 years.

Briefly, the facts are as follows. In the evening of 15th July, 2000, the complainant, **N.C.**, and her friends **S (PW2)** and **R**, decided to go to [particulars withheld] Hotel for a drink. There they met two gentlemen who appeared familiar with **R**. One of them known as **Ngetich** told the ladies to relax and have drinks and not to worry about transport home because his friend, the appellant, had a car and would drop each of them home. Having been guaranteed of this, the three ladies and the two gentlemen had beer in [particulars withheld] Hotel and went on a further drinking spree in at least two other bars. At about 1:00 a.m. the ladies desired to retire. True to **Ngetich's** word, they were driven to their respective homes. The complainant was the last to be dropped.

The complainant testified that instead of the appellant dropping her home, he took her to [particulars withheld] where he raped her. After the ordeal the appellant drove her home and went away. Shortly thereafter at about 6:00 a.m. the complainant made a report to the police and subsequently the appellant was arrested and arraigned on a charge of rape.

At the trial, the appellant vehemently denied the offence. He gave evidence on oath and testified thus:-

***"I had met N.C on Friday. We agreed to meet on Saturday at 9 p.m. She came with 3 others. We drunk up to 11.30 p.m. She said she was not satisfied. We went to another bar and drunk. We agreed I drop the others first so that we can talk. When I dropped her last friend I asked her if there was a place in her house. She said there was no place. We agreed and she agreed to have sex with me. We disagreed because of Shs.200/=. That is all."***

The record of appeal laid before us shows that the prosecutor did not at all crossexamine the appellant on

the above testimony given in chief. This is indeed quite strange bearing in mind that this piece of evidence is pivotal to the conviction or otherwise of the appellant.

The two courts below in very short judgments and lacking in evaluation of the evidence presented at the trial disbelieved the appellant and termed his testimony a fabrication.

**Mr. Onyango**, Senior Principal State Counsel, for the Republic, concedes the appeal and does not support the conviction and sentence, a position he also held during the first appeal in the High Court. He submitted that the evidence of the doctor does not show that there was violence meted out on the complainant. Moreover, Mr. Onyango argued that her clothes were left at the police station and were never shown to the doctor. He contended that the lack of consent to the sexual intercourse by the appellant had not been proved.

The issue of consent or no consent was an important one in the trial and deserved serious consideration. In the case of Abasi Kibazo v Uganda [1965] EA 50 7 the predecessor of this Court held that in every charge of rape the fact of non-consent must be proved beyond all reasonable doubt before convicting.

In the case before us we observe that the testimony of the appellant was not challenged by the prosecution. In the circumstances it would appear that the trial court placed a far greater reliance on the contradictory evidence of the complainant than was desirable despite the lack of medical evidence.

We agree with Mr. Onyango that it is unsafe to allow the conviction to stand. We therefore allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

**Dated and delivered at Nakuru this 18th day of October, 2002**

**B.**

**CHUNGA**

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**CHIEF JUSTICE**

**P.**

**K.**

**TUNOI**

.....

**JUDGE OF APPEAL**

**A.**

**A.**

**LAKHA**

.....

**JUDGE OF APPEAL**

**I certify  
a true copy of the original.**

**that**

**this**

**is**

**DEPUTY REGISTRAR**