REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 20 OF 2015

(From original conviction and sentence in criminal case number 1203 of 2015 in the Principal Magistrate's Court at Kapenguria)

(Formerly Kitale HCCRA 39 of 2015)

MARTIN KIBET KORIR::APPELLANT

VERSUS

REPUBLIC ::RESPONDENT

JUDGEMENT

MARTIN KIBET KORIR, the appellant herein, was charged, tried, convicted and sentenced for an offence of **Rape, contrary to Section 3(1)(a) of the Sexual Offences Act No. 3 of 2006.**

The particulars of the offence are that, on the 17th day of August 2014 in West Pokot County, the appellant intentionally and unlawfully did cause his penis to penetrate the vagina of AL.

The appellant also faced an alternative count of **Indecent Act with an adult, contrary to section 11(6) of the Sexual Offences Act number 3 of 2006.**

The particulars of it being that on the 17th day of August 2014 in West Pokot County, the appellant intentionally and unlawfully touched the genital organ, namely vagina of AL.

The prosecution case of which was explicitly offered and equally recorded by the trial court is that by the time of the alleged offence, that is on 17th August 2014, the complainant who offered evidence as PW-1 was aged 66 years. She was living with her husband, the PW-2 in this case at [Particulars Withheld] area, near [Particulars Withheld]. She was selling firewood to eke a living. On the material day she went very early in the morning to Kabolet Forest to collect firewood. She did so and when she felt she had enough fastened it together and commenced going back home. She had a panga in hand. On the way she met a young man, the appellant in this case. He took her panga and held her. She dropped the firewood she was carrying. The appellant placed her between his legs. He threw her to the ground and had sexual intercourse with her. After he was done he took some faeces in his hand and put it in her mouth. The complainant could not tell whether the faeces was from her or from him. She tried to scream but was restrained by him. The appellant was in a black cap. After he was through he released her to go home. She walked home in a lot of pain, leaving behind the firewood. Upon reaching home she did not find PW-2. PW-2 had gone strolling within Kabolet forest. It started raining which prompted him to go to where he thought she was. At the place he did not find her. He found fastened firewood and a black cap. He left the items and proceeded home where he found his wife (the complainant herein) crying. He asked

her what the problem was and she replied that she had been raped by a certain young man. She described the alleged young man and PW-2 knew right away that it was the appellant. He went back to the scene and collected the firewood and the cap. The following day he started looking for the appellant who was living with another man called Simba. He also reported the matter to the police at Kapenguria Police Station who commenced investigations. There was information that the appellant had gone to Kaibos. On 26.7.2014 he was arrested and taken to Kapenguria Police Station.

PW-4 investigated the case. The complainant and her husband went to the police station and the appellant was positively identified by the complainant as the culprit. The cap recovered at the scene was given to him. He kept it as an exhibit. Complainant was issued with a P-3 form. PW-3 filled it on 26.8.2014. He noted that she was sober and had not used drugs or alcohol. She was sick looking. He examined her 9 days after the alleged incident. There were no injuries on the labia majora and minora or on the cervix. Urinalysis revealed presence of pus cells, leucocytes and proteins. The presence of proteins, pus cells and leucocytes are an indication of penetration. He concluded that penetration had taken place. He thus filled the P-3 form. The appellant was then charged as earlier on indicated.

The appellant gave a brief unsworn statement in his defense. He informed the court that he lives at Kablei, near Karibos in West Pokot. He is a farmer. He denied commission of the alleged offence, saying on the material day he was looking after cows. Kenya Police Reservists went and arrested him.

The trial court evaluated the evidence, found the main count proved by the prosecution beyond reasonable doubt, convicted the appellant and sentenced him to serve 20 years in prison.

The appellant dissatisfied with the said conviction and sentence, appealed to this court against both on the grounds that:-

1. He pleaded not guilty at trial.

2. He was convicted on uncorroborated evidence.

3. Prosecution did not prove their case to the required standard.

4. Evidence by prosecution witnesses was evasive and not forthright to form basis of conviction.

5. Key witnesses were not called to clear doubts.

6. His defence was not properly analyzed.

7. Medical evidence was inconclusive.

The appellant made no submissions in support of the appeal. The state prosecutor opposed the appeal on conviction but was of the view that the sentence of 20 years in prison was excessive given that the appellant is a first offender, mitigated and the minimum sentence for the offence is 10 years. She is okay with reduction of the sentence to the minimum of 10 years in prison.

I have considered all the points raised in the appeal. While all the other ingredients for the offence of rape were properly evaluated by the trial court, there is one where there is a shortfall and that is, identification or recognition of the appellant as the culprit.

The complainant who is the key prosecution witness in this case is an elderly woman. Regarding her age she said, "**My husband knows my age**." This implies that she was too old to remember her age. Her memory is poor due probably to advanced age. What also relates to this is where she said the appellant took some faeces in his hand and put it in her mouth. She was however unable to tell whether she is the one who had passed the human waste or the appellant. This indicates a serious lapse of memory. In relation to identification or recognition of the appellant as the culprit she stated,

> "**He was a young man who was wearing a black cap**. **The incident happened in broad daylight. I saw and identified the accused. He is someone I used to see in that area. I did not know his name but I knew his face. He talked to me as he did the heinous act to me."**

From the foregoing quotation, it is vivid that the assailant was wearing a black cap of which to some extent is likely to inhibit clear facial vision. PW-1 said she used to see him in that area. She did not disclose which area she meant and probably for how long she had seen him and in what circumstances. One would wonder whether she used to see him in a cap or without. If she used to see him in a cap probably it would have been easy to recognize him with it, but if without, it would have been hard to recognize him in one. Such details ought to have been given to enable the court arrive at a correct decision on the issue of recognition or identification. She further said she did not know his name but his face. She however gave no description of how his face looked like. The description she gave to her husband was that she was raped by a certain young man. Young men, surely, are many.

The husband said she described the said young man and he knew right away that it was the appellant. The said description of which he was given by the complainant, of which allegedly fitted well to the appellant, were not disclosed by himself, and nor were they by the complainant. The big question is how can the court safely conclude that the described person is the appellant in this case? The court has no way of doing so. Description given by the complainant ought to have been disclosed in details to a level that would enable the court ascertain that it's the real culprit who was arrested and charged.

PW-4 did not investigate the case properly. This was a good case where he should have conducted an identification parade to ascertain the allegation that the complainant knew the appellant, but he did not. He did not attempt to connect the recovered cap to the suspect by finding evidence that the cap was his. He as well did not try to connect him to the offence through forensic evidence. The alleged faeces if passed by him, and was collected from the scene and examined, probably would have connected him to the offence. The clothes the complainant and the alleged culprit were in during the incident probably if examined would have had something to connect the appellant to the offence.

Having failed to do all that, the investigating officer relied on weak evidence of identification or recognition of which he did not even pursue by way of proper investigation to arrive at a reliable position. In ***Amolo versus Republic [1991] KAR 254***, the court held that:-

> "***Following Gabriel Njoroge versus Republic [1987]1 KAR 1134 visual identification must be treated with the greatest care and ordinarily a dock identification alone should not be accepted unless the witness has in advance:-***
>
> ***a) Given a description of the assailant***
>
> ***b) Identified the suspect at a properly conducted parade."***

It's of no doubt that the claimed recognition and or identification of the appellant by PW-1, as the assailant, is not free of danger of mistaken identity. It poses reasonable doubt as to whether the appellant is the real culprit. This doubt, if the lower court had correctly evaluated the issue, would have been resolved in his favour. I hereby do so, find the appeal on the said ground merited and consequently quash the conviction and the sentence imposed against him. He is accordingly set free unless otherwise lawfully held.

Judgment is read and signed in open court in presence of the appellant and Madam Kiptoo, the state prosecutor, this 31st day of January, 2018.

S. M. GITHINJI

JUDGE

31.1.2018