



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL CASE NO. 21 OF 2017

FESTUS LOMERII.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant herein, one Festus Lomerii was charged in the lower court with a main count of Rape, contrary to section 3(1)(a) c (3) of the Sexual Offences Act No. 3 of 2006. The particulars of this offence are that on the 14th day of August, 2017 at [particulars withheld] Village, in Pokot Central Sub-County within West Pokot County, the appellant intentionally caused his genital organ to penetrate the genital organ of S.L by use of force.

In the alternative, he faced a charge of committing an Indecent Act with an adult, contrary to section 11 (A) of the Sexual Offences Act No. 3 of 2006.

The particulars hereof are that on the 14th day of August, 2017 at [particulars withheld] village, in Pokot Central Sub-County within West Pokot County, the appellant intentionally touched the genital organ of S. L. with his genital organ, against her will.

The prosecution case is that the complainant in this case, who offered evidence as PW 1 was by then aged 41 years and is a wife to PW2. On 14.8.2017 at around 5.00 p.m the complainant was on her way home from the shopping centre. She decided to follow a short cut. Suddenly someone emerged from the nearby bushes and blocked her path. The person was the appellant herein whom she knew very well as her neighbour, called Mngat. She asked him why he was obstructing her. He did not answer but grabbed her arm. He hit her on the head with a fist. He then picked a stone and assaulted her with it on the head. He pushed her to the ground and sat on her. He unleashed a knife and stabbed her on the face. He ordered her to undress. Out of fear she did so and he raped her. He did it twice and by that time she was bleeding profusely from the face and could not even see clearly. The appellant then left. Complainant remained at the scene for a while before she stood and started walking home. Along the road she met with good Samaritans who rushed her to a nearby dispensary. The dispensary could not manage her condition and referred her to Sigor District Hospital. She was taken there where she was admitted overnight. The cut wound was stitched.

PW2, her husband was called by C, a boda boda operator, who informed him that his wife was admitted at Sigor District Hospital in a critical condition. He could not get means at the time to the hospital and he slept till the following morning when he went to the hospital. He found the wife admitted. Her face was swollen, her voice hoarse and the face was bandaged. She reported the appellant stabbed her with a knife, hit her with a stone, strangled her and raped her. She was discharged and they together reported the case at Marich Police Station, to PW4. PW4 booked the complaint and issued the complainant with a P-3 form. The said P-3 form was filled by PW3 at Sigor Hospital. The history was that she was sexually abused on 14.8.2017 by a person well known to her who accosted her on her way home at 5.00 pm. She had deep cut wounds on the head and the neck was paining. Chest pains were also reported. She had minor bruises on the left hand and both knees. The said injuries were about 3 hours old and probable weapon used was blunt.

The degree of injury was assessed as harm. In relation to Sexual assault, it was observed that the external genitalia was clean, no bruises were noted, flom scar present, the vaginal wall was wet, the cervix moist with some fluids in it. Cervix was closed and hymen broken. There was however no presence of discharge, blood or venereal infection noted. Pregnancy test was negative and no spermatozoa were seen.

The police were looking for the appellant who had gone into hiding. He was later arrested at Chapareria by members of the public. He was taken to the AP's Camp and was later charged.

The appellant's defence is that on 14.8.2017 at 6.00pm. he was at home. His mother was also there. The complainant visited the place and had a cut wound in the head which was bleeding. She requested the appellant who had warmed water to milk a cow, to assist her with some warm water to clean the wound. He assisted her. He left her there consuming alcohol. She urged him to sleep with her but he declined since she was older than him and did not know of her HIV status. She offered him some alcohol of which he took. He as well made supper of

which they ate together. Later, on 1.9.2017 he was arrested by KPR officers at Chepareria. He was taken to court and charged with offences of which he denied.

The trial court evaluated the evidence, found him guilty of the offence in the main count and sentenced him to serve 10 years imprisonment.

Dissatisfied with the said conviction and sentence he appealed against both to this court on the grounds that:-

1. That there were no enough grounds to warrant a finding of guilty.
2. That his defence was rejected without offering cogent reasons for it.
3. Investigations were improper as the scene of crime was not visited.
4. The evidence of the prosecution was inconsistent and contradictory.
5. He was not allowed enough time to prepare defence witnesses.
6. The postmortem report and evidence of prosecution witnesses were not collaborative.
7. Prosecution did not prove the case beyond reasonable doubt.

I have evaluated the evidence on record for each side, the judgment of the lower court, raised grounds of appeal and submissions by both sides. Before I move on, I wish to observe that the grounds of appeal raised in this matter may have been adopted from a murder trial without changes as ground 6 talks of postmortem report which is mostly applicable in murder trials, rather than the P-3 form or PRC form of which are applicable in a case of this nature.

The evidence of the complainant leaves no doubt that she knew the appellant well before then as a neighbour. It was at about 5.00pm, during the day. She could not therefore have made a mistake of him. The appellant was therefore well recognized as the culprit and disclosed to PW-2 and the police, by the complainant.

The complainant was by then aged 41 years and married. She therefore knows what sexual intercourse is all about. When she says the appellant raped her, though used a technical term, the lower court was in order in finding that she meant her sexual organ was penetrated by the appellant, using his sexual organ. The medical evidence corroborated her evidence to the extent that she had taken part in a sexual activity.

The complainant's evidence shows vividly that she was coerced into having sex, she was hit to the ground, sat on, attacked on the head and stabbed with a knife before she was ordered to undress. Medical evidence shows she had such head, neck and chest injuries. This shows there was use of force and she did not consent to having sexual intercourse.

The foregoing is clear in that all the ingredients for the offence of rape were established by the prosecution beyond reasonable doubt.

The appellant did not shake the prosecution case in his cross examination of the witnesses and in his defence. During cross-examination he suggested he had sexual intercourse with her and that she had consented. In his defence he abandoned that line by denying having had sexual intercourse with her. He however indicated they met at the material night at his home and had supper together. He does not say what happened thereafter.

The defence must be an afterthought and was correctly dismissed. I accordingly do find that the offence against him was proved by the prosecution beyond reasonable doubt. He was therefore rightly convicted and sentenced to serve 10 years imprisonment for the offence. The appeal lacks merit and is hereby dismissed.

Judgment read and signed in the open court in presence of the appellant, state prosecutor (Madam Kiptoo), this 20th day of June, 2018.

S. M. GITHINJI

JUDGE

20.6.2018