REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. 28 OF 2015

LOMORU IYAPAN...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence in Criminal Case No.37 of 2015 of the

Principle Magistrate's Court at Marsabit by T.M Wafula– Resident Magistrate)

JUDGMENT

The appellant, **LOMORU IYAPAN**, was convicted on the alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act **.** He was then sentenced to ten years imprisonment the minimum penalty. This was after he was acquitted on the substantive offence he had been charged with.

The particulars of the offence were that on 14th January 2015 at Fur area in North Horr within Marsabit County, intentionally touched the vagina of **Y.B**, a girl aged 14 years.

The Appellant raised two grounds of appeal as follows:

1. That the evidence of the clinical officer did not link him to the offence of rape; and

2. That he was not in a position to understand the proceedings.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

Briefly the facts of this case were that the complainant was looking after their goats. The Appellant who was not known to her before, went and beat her until she became unconscious. When she regained consciousness, she found the Appellant defiling her. Her defiler then left and went away. The Appellant in his defence contended that he did not commit any offence. He said he was arrested on 14.1.2015 by the relatives of the complainant who informed him that he had defiled their daughter.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as

follows:

> **“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”**

When the Appellant was taken to court for plea on 20.1.2015 he informed the trial magistrate that he only understood Turkana language. I have perused the record and noted that the court dutifully provided him with Turkana interpreters. The court engaged three different Turkana interpreters who were native Turkana speakers. These were Angela Lukas, Elimlim and Lomong Loyapan. his contention that he was not able to follow proceedings does not have any basis.

The evidence of a medical expert does not necessarily identify a culprit of a sexual offence though in some instances it may pin down such a culprit. This depends on the circumstances of each case. In the instant case, the examination on the complainant was meant to establish whether she had been defiled or not.

After the complainant was examined by **Dr Imbusi Mark (PW3)** he formed an opinion that she was sexually active. This was informed by the absence of hymen and or any evidence of any injuries to the genitals. The only observation that he made was a whitish discharge. He however qualified this finding and said that in a girl of 13 years this was normal for she has started to have menses.

The medical evidence by **Dr. Imbusi Mark (PW3)** raise a red flag on the credibility of the prosecution case. The complainant told the court that the Appellant assaulted her until she became unconscious. She also said that she bled from her genitalia. Although she was examined six days after the alleged incident, he would have observed some telltale signs of the violence on the genitalia, her neck or any other part of the body. Although **Gababa Galgalo (PW2)** testified that he saw the complainant on the material day, and saw her swollen face, I am suspicious about this contention. My suspicion is bolstered by the evidence of the investigating officer **(PW4).** This witness testified that the complainant informed him that her assailant slapped her severally undressed her and defiled her. She screamed and a passerby rescued her. She never informed him that she was unconscious at any time during the time of the alleged offence.

In view of the contradictions I have observed hereinabove, my finding is that the evidence of the prosecution does not add up. This is why the trial court acquitted the appellant on the substantive charge. This brings to mind the decision of the Court of Appeal in the case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

> **"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."**

This case revolve around the issue of identification. The complainant testified that she had not known the Appellant before. In the celebrated case on issues of identification, **Lord Widgery CJ** in **Turnbull & Others vs. Republic [1976] 3 ALL ER 549,550** said:

> **"Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the**

judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. Provided that the warning is in clear terms, no particular words need be used. Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made"

In the instant case, the trial court ought to have interrogated as to how the complainant was able to identify the culprit. The record does not show how she was able to do this. The evidence of the complainant is silent on how the Appellant was arrested.

The evidence of **Gababa Galgalo (PW2)** is that they followed some footsteps to a manyatta and looked for the culprit for three days before they arrested the Appellant at a water point. It is not clear how he was linked to the footsteps or the offence perpetrated against the complainant. According to this witness, the complainant identified the Appellant from several people taken to her. He however did not say how this was done especially when we know that the complainant did not testify that she had observed any feature on the culprit which she would later use to make a positive identification. It was not safe to base a conviction on the evidence on record. I therefore quash the conviction and set aside the sentence meted out.

The Appellant is therefore set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 8th day of December 2015

KIARIE WAWERU KIARIE

JUDGE