



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO.43 OF 2012**

**(An Appeal Arising out of the conviction and sentence of E.H. Keago delivered on 3<sup>rd</sup> April 2012 in Busia criminal No.343 of 2011)**

**JACOB WESONGA ONG'ONDO .....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA .....RESPONDENT**

**J U D G M E N T**

1. It had been alleged that S A had been Gang raped on 20<sup>th</sup> March 2011 at [particulars withheld] in Busia County. That act is not only morally unacceptable but also criminalised by Section 10 of The Sexual Offences Act No.3 of 2006. After trial, the Appellant herein was convicted for the offence and sentenced to a prison term of 10 years. Being aggrieved with that decision, the Appellant has preferred this Appeal.
2. S was first of the six (6) prosecution witnesses who testified. She is a widow residing at [particulars withheld] On the night, of 20/3/2011, she was at her house with her children B A (PW5), M A (PW2) and P A. PW2 was at the time of trial (23/09/2011) aged 15 years and PW5 aged 13 years. At about 11.00p.m. PW5 went out of the house to pour water only to find two people at the door. These were the Appellant and one Victor Oramit hereinafter (Victor).
3. The two made their way into the house and one of them went to the bed of S. That person was the accused who was well known to the complainant. In fact both persons were known to her. That two asked S to accompany them to the village elder. She told them that she was sick and requested that she be excused. Her request fell to deaf ears and so she had to go with them. An infant child on her back.
4. About 100 metres away from her home, the two persons turned on her and raped her in turns. Victor was the first and thereafter the accused. Later, they were to move to the kitchen of Victor's house where they continued to rape her in turns up to about 3.00a.m when they released her. As they did so they threatened her not to raise an alarm.
5. When she returned home in the early hours, her daughters PW2 and PW5 saw her crying. Later that morning, at about 7.00a.m, S reported the incident to the Sub Chief of Mabunge sub location, a Mr. Bonventure Somba who directed her to Nambale Police Patrol Base. She later visited Nambale Health Centre for treatment. It was in the same clinic that she was examined at the request of the Police and a Police Form 3 duly completed by Benjamin Chebon (PW4).
6. Later on the same day (21/3/2011) at about 10.00p.m, the Appellant and some other person returned to the home of S. They asked S to open for them. But her children, amongst them PW5 started to scream in distress. Neighbours heeded their call and arrested the Appellant. The other suspect escaped. Although it is unclear whether he was involved in the arrest, Joseph Ojiambo Okoki (PW3) was amongst those who escorted the Appellant to the Sub Chief. The Appellant was re-arrested and escorted to Nambale Police Patrol Base.

7. Evans Barasa (PW6) is a Police Officer attached to Nambale Police Patrol Base. He received the complaint from S on the morning of 21/3/2011. She was later to record her statement on 22/03/2011 by which time the Appellant had revisited the victim's home and had been arrested. Alongside P.C. Winnie Omondi, PW6 visited both the home of the complainant and the scenes of the ordeal. At the home, PC Winnie Omondi recovered a cap said to belong to Victor. At the time of trial, Victor was at large.
8. The Appellant gave a sworn statement in defence. He denies committing the offence or knowing the Victor. He does not know why he has been connected with the crime but thinks that because he has a boundary dispute with the complainant.
9. In the Petition of Appeal, the Appellant raises 6 Grounds. Basically the Appeal challenges the quality and sufficiency of the evidence. In his submissions the Appellant characterizes the evidence as "lethargic, flimsy and fallacious." In opposing the Appeal, the State Counsel urged me to find that the evidence was overwhelming. In addition I was asked to enhance the sentence to a life imprisonment.
10. This is a first Appeal. This Court is under an obligation to relook at the evidence afresh, re-evaluate it and reach its own conclusions. In doing so, the Court must be minded that unlike the Trial Court, it did not hear and see the witnesses testify. (see **Okeno –vs- Republic [1972 ] E.A 32**).
11. It is true that the complainant, PW2 and PW5 belong to the same family. The complainant is the mother of PW2 and PW5. It was their testimony that they were all at home on the night of 20/3/2011 when two men visited that home. PW2 and PW5 say that they were able to recognize the two men as there was light from a tin candle. The two men led the complainant out of the house. The two men, it is said, spent considerable time with the complainant. This was from about 11.00p.m to 3.00a.m.
12. The complainant was sure that one of the men was the Appellant as he was an in-law. The Appellant was also recognized by PW2 and PW5. Was the story of rape made up as alleged by the Appellant? Perhaps not the incident because PW6 found some knee marks at the scene. That would be consistent with the tale of rape.
13. In addition, although the children never saw the ordeal unfold, they give cogent additional evidence of how two men led out their mother on the night and how she returned in early hours of the morning. On her return she was in tears. She was in distress. Her state seemed consistent to a person who had just gone through a horrifying episode. The story of rape may not have been made up.
14. There is also clinical evidence that suggests that the complainant had suffered forceful penetration to her vagina. The medical examination carried out by PW4, a day after revealed that her vaginal wall was lacerated. The Clinical Officer returned an opinion that the patient had been penetrated by force. That evidence is inconsistent with a made up story.
15. Then there is the telling events of the following evening. Two people again visited the home of the complainant. They asked her to open her house to them, menacingly. They were armed with a panga. The complainant was able to recognize the voice of the complainant who called her by the name "N". When the complainants daughters screamed, members of the public sympathized with their distress call and came to the scene where they arrested the Appellant. Lucky for him, Victor made away and was not arrested then or after. But his cap fell. The neighbours recognized the cap as belonging to him. It was well known to them.
16. On my evaluation both Victor and the Appellant visited the home of the complainant on the night of 20/03/2011 and again on 21/03/2011. They were seen and recognized by the complainant and her two children. They led the complainant out of her home and raped her in turns. On one of the scenes, there were knee marks evidencing some activity. The medical evidence supported the evidence by the complainant that she had been raped. I have to believe, like the Trial Court, that one of the people who raped her was the Appellant. Just like the Trial Court, I reach the conclusion that the prosecution discharged its onus and proved its case beyond reasonable doubt. The Appeal on conviction is without merit.
17. On sentence an offence under Section 10 attracts a minimum punishment of a jail term of not less than 15 years and a maximum of imprisonment for life. There was evidence that the Appellant committed the offence of rape in association with, and with the common intention of Victor. The sentence of 10 years meted by the Trial Court was therefore unlawful. The State asked me to

enhance the sentence. They laid a basis for it by giving notice of that intention in writing and in advance of the hearing of the Appeal. Notwithstanding that notice, the Appellant pressed for the hearing of his Appeal. He was taking a risk. And he knew it. The Trial Court was in error in passing an unlawful sentence. That I must set aside, which I hereby do. I, instead sentence the Appellant to a jail term of 15 years. The term commences from the date of his conviction. Those are my orders.

**F. TUIYOTT**

**J U D G E**

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 23<sup>RD</sup> DAY OF JANUARY, 2014.**

**IN THE PRESENCE OF:-**

**KADENYI .....COURT CLERK**

**.....FOR APPELLANT**

**.....FOR RESPONDENT**