

The area chief, **Mackenzie Emathe (PW7)**, directed that the complainant be taken to hospital and thereafter dispatched a team of police reservist to fetch the appellant.

The reservist included Ewalan (PW5) and **Ewoi Ibeyi Ekidor (PW2)**. They traced the appellant but in the process of arresting him, he resisted arrest thereby causing a gun shot to be fired accidentally from a firearm in possession of Ewaton (PW5). The shot injured the appellant on his back.

A herdsman, **Francis Lotaboi (PW3)**, was present during the attempted arrest of the appellant. He confirmed that Ewalan (PW5) and the appellant were engaged in a struggle over a firearm and in the process a shot was fired injuring the appellant.

The information reached the area chief (PW7) who reported to the D.O. And the O.C.S. Lodwar Police Station accordingly.

A clinical officer, **Hosea Kiplangat Kiringi (PW6)**, examined the complainant and compiled the necessary report on the P3 form. The report indicated that the complainant had sexual contact with a man and was infected with a venereal disease.

P.C. Shelmith Wanjiku (PW8), investigated the case after it was reported to her at the Lodwar police station. She was told that the appellant had raped the complainant. She issued the necessary P3 form and later charged the appellant with the present offence. She confirmed that the appellant had been shot and injured during his arrest and that she re-arrested him after his discharge from hospital. She said that he (appellant) had a gunshot injury on his shoulder and that an inquiry file was opened at the police station to determine how he was shot.

The appellant was placed on his defence after the close of the prosecution case. He exercised his right to remain silent.

The trial court after having considered the evidence against the appellant arrived at the conclusion that the prosecution had discharged its burden of proving beyond reasonable doubt that the appellant committed the offence.

In this court's opinion, the evidence by the complainant (PW1) coupled with that of the clinical officer (PW6) proved that the complainant was indeed sexually offended. She clearly indicted that the act committed against her was unlawful as she did not consent to it. She suggested that she was ambushed while sleeping under a mosquito net outside her house and raped.

The clinical officer indicated that it was most likely than not that the complainant was raped and in the process was infected with a venereal disease. The clinical officer did not examine the alleged culprit if only to establish that the disease came from him. Nonetheless, the presence of a venereal disease may only be a corroborating factor so that even if the alleged culprit was not medically examined for the disease the fact of rape could still be established by other evidence which in this case was the evidence of the complainant and the clinical officer. In any event, the fact of rape was herein not disputed. The dispute was centered on the identification of the offender.

The appellant denied responsibility and was not under any obligation to say anything further. It was therefore within his rights to remain silent when placed on his defence. He had no obligation to establish his innocence. The burden to establish his guilt lay with the prosecution and in that regard, the complainant's evidence was most vital with regard to the alleged identification of the appellant as the offender. The evidence has shown that the offence occurred in the hours of darkness thereby presenting difficult circumstances for identification. However, the complainant stated that there was bright moon at the material time which made it possible for her to see and identify the appellant whom she had previously known.

The bright moon provided favourable circumstances for identification and the fact that the complainant had previously known the appellant rendered his identification to be by recognition thereby minimizing

the possibility of mistaken identity.

Nonetheless, the complainant's evidence of identification against the appellant in difficult circumstances had to be treated with great caution in the absence of corroboration. The fact that the learned trial magistrate warned himself of the danger of relying on the sole evidence of identification by the complainant was a clear indication that he treated the evidence with extreme caution and found that it was credible enough for a finding that the appellant was responsible for raping the complainant.

This court must also find that the appellant was positively identified as the person who raped the complainant on that material date and time. His conviction by the learned trial magistrate was therefore proper and lawful. The sentence imposed upon him was also lawful but since he was a first offender the same is hereby reduced to ten (10) years imprisonment. Otherwise, the appeal is dismissed.

[Delivered and signed this 21st day of January, 2014.]

[In the presence of appellant and Mr. Kimanzi – State Counsel.]

J.R. KARANJA.

JUDGE.