



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 24 OF 2011.

ANN EKIMAT.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence of T. Nzyoki – SRM

in Criminal Case No. 459 of 2010 delivered on 2nd March, 2011 at Lodwar.)

J U D G M E N T.

The appellant, **Ann Ekimat**, appeared before the Senior Resident Magistrate at Lodwar charged with defilement contrary to section 8 (1) read with section 8 (4) of the Sexual Offences Act in that on the 19th July, 2010, at Lodwar town Turkana Central District, unlawfully caused her sexual organ to be penetrated by the sexual organ of K.E, a boy aged sixteen (16) years.

After a full trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment but being aggrieved by the conviction and sentence preferred the present appeal on the basis of the grounds contained in her petition of appeal filed herein on 11th March, 2011.

At the hearing of the appeal, the appellant appeared in person and relied on her written submissions in support of her case.

The Learned Prosecution Counsel, **Mr. Chelashaw**, opposed the appeal on behalf of the state respondent. He submitted that the complainant (PW1) was aged sixteen years at the time that he was defiled by the appellant. That, he (PW1) described how he was called and threatened by the appellant before being defiled. That, PW3 and the doctor (PW2) gave corroborative evidence. The learned Prosecution Counsel contended that the prosecution proved its case and that the appellant was properly convicted. Therefore, the appeal lacks merit and ought to be dismissed.

Having considered the submissions by both sides, the duty of this court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In that regard, the case for the prosecution was briefly that on the material date, at about 1.30 p.m., the complainant, K.E (PW1), was at the Bishop Mahon Centre in Lodwar when he was called by the appellant whom he knew by the name Mama Alex. She took him to her house where she served him tea before being joined by another woman. The two women threatened him with knives. They beat him up and in the process, the appellant got hold of his male genital organ (penis) and inserted it into her female genital organ (vagina). He put up a struggle as the other woman wanted to rape him. He ran away and

went to a hospital before reporting the matter to the police. He was given a medical examination form (P3 form) which was filled after he was examined at the hospital.

A clinical officer at the Lodwar District hospital, **Shadrack Lokopur (PW2)**, examined the complainant and completed the P3 form indicating that there were no bruises on the complainant's penis but there was presence of vagina fluid and smell. He also examined the appellant and completed the necessary P3 form indicating that her genitalia was normal with presence of vaginal discharge indicative of sexual penetration and intercourse.

Paul Kang'ole (PW3), confirmed that the appellant went to Bishop Mahon Centre and called the complainant. The two left together and on the following day the complainant told him (PW3) that the appellant had raped him while being threatened with a knife by another woman.

Esther Ewoi (PW4), indicated that she pointed out the appellant's house to the complainant and later heard that the two had sexual intercourse. She denied having threatened him with a knife.

P.C. Shelmath Wanjiku (PW5), investigated the case and thereafter preferred the present charge against the appellant.

In her defence, the appellant denied the offence and indicated that she saw the complainant and other two boys on the material date. They were seated at a place called Lokinama. The complainant greeted her. He knew her. He told her that they had finished their exams and asked her where she stayed. She told him where she stayed and went away. Later, at about 7.00 p.m., she was confronted and questioned by police officers. They alleged that she had raped the complainant. She was taken to the police station and later charged with the present offence. She indicated that the charge was framed on her by the complainant's mother who was not happy with the assistance she received from her husband.

After considering all the foregoing evidence, the learned trial magistrate concluded that the prosecution had proved the charge against the appellant beyond reasonable doubt.

In so concluding, the learned trial magistrate placed heavy reliance on the evidence of the complainant which he found to have been consistent and credible.

The opinion of this court is that the evidence adduced against the appellant by the prosecution witness including the complainant (PW1) did not establish beyond reasonable doubt that the complainant was sexually offended by the appellant to the exclusion of any other person. This is because, in the first place, the complainant alluded to two women having threatened him with a knife and then gone ahead to sexually offend him. He alleged that the appellant was one of the two women and that she inserted his penis into her vagina. He also alleged that the other woman wanted to rape him but he ran away. He did not come out clearly as to how he was sexually offended and exactly whom. His evidence was therefore not consistent and credible and more so, looked at from the view of the evidence by Esther Ewoi (PW4) which indicated that she was the second woman referred to by the complainant. She (PW4) which indicated that she was the second woman referred to by the complainant. She (PW4) vehemently denied that she held a knife against the complainant. She strongly indicated that she did not in any way participate in the alleged offence.

The evidence by the clinical officer (PW2) did not show any link between the vaginal fluid found on the complainant's penis and the vaginal discharge found on the appellant's vagina. Apart from saying that the vaginal discharge was indicative of sexual penetration and intercourse, the clinical officer could not attribute such act with the complainant.

Paul (PW3), did not witness the alleged offence. He was only told by the complainant that he (the complainant) was raped by the appellant while another woman threatened him with a knife.

The investigating officer (PW5) did not thoroughly investigate the matter. She merely recorded statements from the prosecution witnesses and charged the appellant. No attempt was made to follow up

and determine the truthfulness or otherwise of the appellant's version of the story.

The appellant did not deny having met the complainant on that material date. She however denied that she sexually offended him. She contended that the charge was a frame up by the complainant's mother. She indicated that the complainant's family had assisted her while she was an internally displaced person (IDP) following the killing of her husband.

All the foregoing factors indicated that there was something else which may have led to the arraignment of the appellant and that the complainant was used as a cover up in "fixing" the appellant. It is sad to note that the appellant's defence was disregarded by the learned trial magistrate and dismissed as being untruthful yet it went along way to show that the complainant (PW1) was not a reliable and credible witness as to warrant the appellant's conviction.

For all the foregoing reasons, this court makes a finding that the appellant's conviction by the learned trial magistrate was neither safe nor sound.

Consequently, this appeal is allowed to the extent that the conviction is quashed and sentence imposed upon the appellant is set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

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

J.R. KARANJA.

JUDGE.