



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 11 OF 2013

EKAI EKALE APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant, Ekai Ekale, was convicted and sentenced to fifteen (15) years imprisonment by the Senior Resident Magistrate at Lodwar for rape contrary to section 3 (1) and 3 (3) of the Sexual Offences Act in that on the 23rd January, 2012 at Turkana West District, he unlawfully had sexual intercourse with A A without her consent.

There was an alternative count of committing an indecent Act with the said woman but the appellant was convicted on the main count of rape. Being dissatisfied with the conviction and sentence, the appellant filed this appeal on the basis of the grounds in his petition of appeal filed herein on 13th February, 2013. He appeared in person at the hearing of the appeal and relied on his written submissions.

The learned prosecution counsel, Mr Chelashaw appeared for the state respondent and opposed the appeal by submitting that the offence occurred in broad day light and that the appellant was a stranger to the complainant (PW2) but she (complainant) was able to identify him.

That, PW3 went to the rescue of the complainant and arrested the appellant who was on a bicycle. That, the doctor (PW1) confirmed that the offence of rape was committed. Therefore, the appeal has no merit and that the sentence which was passed was lawful.

The submissions by both sides having been considered, the duty of this court is to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Accordingly, the prosecution case was briefly that the complainant, A A (PW2), had on the material date at 3.00 p.m. gone to fetch firewood when she was confronted by the appellant whom she had not previously known. He wrestled her to the ground and had sexual intercourse with her without her consent. Nobody came to her rescue during the act and when he was finished he attempted to lure her to accompany him. He was at the time in possession of a traditional knife known as "Abarait". She escaped from him and alerted **J E (PW3)** and **E E (PW4)**. The two went after and apprehended the appellant who attempted to escape using a bicycle.

The appellant was handed over to the police while the complainant proceeded to hospital where she was examined by **Dr. Violet Awori (PW1)**, who compiled the necessary P3 form (P.Ex.1) which indicated that the complainant had been sexually penetrated. P.C Saidi Kassim, investigated the case and thereafter

preferred the present charge against the appellant.

The appellant denied the offence and defended himself by stating that on the material date he left his home and proceeded to Katilango to sell his goats. He sold his two goats, took lunch and proceeded to Arimat Ayoja at 4.00 p.m.

At Arimit Amoja, he met three men who questioned and arrested him. They went ahead to take his money, shoes and cloth piece (kikoi) before tying his hands with a rope.

The three men ran away on seeing a motor cycle taxi (boda-boda) approaching the scene. The taxi operator and his passenger saved him (complainant) and identified one of the assailants as one Lopoyok who remained at the scene but informed the taxi – operator and his passenger not to be involved in the matter prompting them to depart from the scene. Lopoyok called his colleagues who had ran away and together with them they took him (complainant) to the police at Kakuma police station.

From the foregoing evidence, the opinion taken by this court is that there was sufficient and credible evidence by the complainant. (PW2) establishing that she was raped by a person who she clearly identified as the appellant.

The offence occurred in broad daylight so that the possibility that the appellant's identification was erroneous was remote. Further, the complainant had enough opportunity to see and mark the appellant who was apprehended within a short period after the offence and after being pointed out to E (PW3) and E (PW4) as the complainant's assailant.

The defence by the appellant could not stand in the light of the evidence adduced against him by the complainant. It was thus adequately rebutted and reduced to an untruthful account of events which were privy to him and which may not have occurred as alleged.

Consequently, it is the finding of this court that the appellant, conviction by the learned trial magistrate was sound and proper and is hereby upheld.

The sentence imposed by the learned trial magistrate was lawful but since the appellant was a first offender the same is hereby reduced to ten (10) years imprisonment. Otherwise, the appeal is dismissed.

J. R. KARANJA,

JUDGE

(Delivered and signed this 21st day of January, 2014).