



**IN THE HIGH COURT**

**AT MIGORI**

**CRIMINAL APPEAL NO. 23 OF 2014**

**BETWEEN**

**BOKE MARIBA MOSES.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 6 of 2010 at Senior Resident Magistrate's Court at Kehancha, Hon. J. R. Ndururi, SRM dated on 29<sup>th</sup> June 2010)***

**JUDGMENT**

1. Before the subordinate court, the appellant, **BOKE MARIBA MOSES**, was charged with the following five counts;

- i. Rape contrary to **section 8** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on 2<sup>nd</sup> January 2010 at [Particulars Withheld] in Kuria District, he unlawfully caused the penetration of SK with his genital organs.
- ii. Indecent Assault contrary to **section 7** of ***Sexual Offences Act, 2006***. The particulars of the offence were that on 2<sup>nd</sup> January 2010 at [Particulars Withheld] in Kuria District, he unlawfully and indecently assaulted SK by touching her private parts and breasts.
- iii. Assault causing actual bodily harm contrary to **section 251** of the ***Penal Code***. The particulars of the offence were that on 2<sup>nd</sup> January 2010 at [Particulars Withheld] he unlawfully assaulted SK thereby occasioning her actual bodily harm
- iv. Assault causing actual bodily harm contrary to **section 251** of the ***Penal Code***. The particulars of the offence were that on 2<sup>nd</sup> January 2010 at [Particulars Withheld] he unlawfully assaulted CS thereby occasioning him actual bodily harm.
- v. Being in possession of narcotic drugs contrary to **section 3(1)** of the ***Narcotic and Psychotropic Substances Control Act, 1994***. The particulars were that on 3<sup>rd</sup> January 2010 at [Particulars Withheld], he was found in possession of narcotic drugs to wit one roll of *cannabis sativa* valued at Kshs. 20/-.

2. He was convicted on all the charges and sentenced to 10 years imprisonment on the 1<sup>st</sup> count and three years each on the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> count. He now appeals against the judgment on the following grounds;

- i. The learned trial Magistrate erred in law and fact by failing to appreciate the inconclusive medical report.

- ii. The learned trial Magistrate erred in law and fact by convicting the appellant while relying on contradictory evidence.
- iii. The learned trial Magistrate erred in law and in fact by failing to appreciate fabrication on evidence.

3. The prosecution case was supported by five witnesses. PW 1 testified that 2<sup>nd</sup> January 2010 at 2.00am while she was asleep, the appellant came and banged the door demanding to enter the house. She opened the house for him. The appellant was given a hurricane lamp which he lit. He went into the room where PW 5, PW 1's cousin, was sleeping. He started assaulting him with a panga. He hit him with the lamp which broke. PW 5 escaped through the window.

4. PW 1 testified that the appellant came back to the sitting room and dragged her at the bedroom in the process cutting her small left finger with the panga. He removed her underpants and biker, threw her on the bed and forcefully had intercourse with her. He threatened her that he would kill her if she screamed. PW 1 later went to Bugumbe Health Centre and later to Isebania Sub District Hospital where she was treated. She reported the incident at Isebania Police Station.

5. PW 5, who was in the house with PW 1, also testified that on 2<sup>nd</sup> January 2010 at about 2.00am she heard commotion outside the door. He heard the appellant making noise and demanding that he open the door. He broke the door and entered the house. He came into PW5's room took the lamp and hit him with it until the glass broke. He threatened to kill him and he hit him with the panga on the left side of the neck. He cut him on the left arm and knee. He escaped through the window. PW 5 testified that he saw the appellant drag PW 1 into her bedroom. PW 5 ran to Mabera AP camp but he did not find anyone. In the morning he went to Bugumbe Health Centre and reported the matter to the police.

6. PW 2, a police officer, recalled that on 2<sup>nd</sup> January 2010 at about 7 p.m while on duty, he received a report from PW 1's husband that PW 1 had been raped by the appellant. The following day when he went to the appellant's house to arrest him. He found a roll of bhang after searching his pockets. He also recovered a panga in his house. PW 3, the investigating officer, was instructed to investigate the case. He interrogated PW 1 and PW 5, went to the scene and collected the broken pieces of the glass lamp. He also issued P3 form to the complainant. He prepared an exhibit memo and forwarded the substance to the Government Chemist in Kisumu for analysis. He produced the Government Analyst's report which confirmed that the substance was *cannabis sativa*.

7. PW 4, the Clinical Officer, testified that on 3<sup>rd</sup> January 2010 he examined PW 1. He noted a cut wound on the 5<sup>th</sup> finger on the left hand. He examined PW1's genitalia and noted that the vagina was wet and there were no bruises. The laboratory examination revealed pus cells and spermatozoa. He concluded that there was sexual intercourse. He also examined PW 5 and observed bruises on the left ear lobe and left side of the neck, left shoulder joint and a small cut wound on the left upper arm, a cut wound on the left knee joint. He assessed the injury as harm and recorded his findings in the P3 form.

8. The appellant elected to give an unsworn statement in which he denied that he committed the offence. He stated that at the material time he was involved in new year activities in church as it was the new year. He testified that on the night of 31<sup>st</sup> December he went for a funeral, on 1<sup>st</sup> January 2010 he was in church and until evening when he returned home. He went to Church on 2<sup>nd</sup> January 2010. He also stated that on 3<sup>rd</sup> January 2010 at about 4.00 am, the complainant's husband called him out to assist with some luggage. He opened the door whereupon he was arrested and later charged. He stated that he had sold a piece of land to PW 1's husband.

9. Apart from the grounds set out in his petition of appeal, the thrust of the appellant's oral submissions in this appeal was that the Court did not consider his alibi defence, that the policeman who found the cannabis in his pocket did not take an inventory of items found and that the panga he was found with was an ordinary implement. He noted that the case had several contradictions and inconsistencies which entitled him to an acquittal.

10. The State supports the conviction on the ground that the prosecution adduced sufficient evidence to prove the essential elements of the offence of rape. Ms Owenga, learned counsel of the State, submitted that PW 1 gave credible evidence, which need not have been corroborated, that the appellant was recognized as a person known to the complainants' and the intercourse was by use of force.

11. I have considered the entire evidence which I have outlined above. It is the duty of the first appellate court to consider the entire evidence, evaluate it and come to an independent conclusion taking into account that it never heard or saw the witness testify (see **Okeno v Republic [1972]EA 32**).

12. Under **section 3(1)** of the **Sexual Offences Act, 2006** , the offence of rape is defined as follows;

*A person commits the offence termed rape if*

- a. *He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.*
- b. *The other person does not consent to the penetration; or*
- c. *The consent is obtained by force or by means of threats or intimidation of any kind*

13. The evidence rape is supported by the testimony of PW 1. Under the proviso **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the evidence of the complainant need not be corroborated where there are grounds for believing that the complainant is telling the truth. Apart from the testimony of PW 1 that the appellant had sexual intercourse with her. The act of penetration was confirmed by the medical evidence of PW 4 who noted that there was spermatozoa in PW 1's vagina. There was no other evidence that PW 1 had sexual intercourse with anyone else. It is clear that the penetration was done under threat of force and violence which negated consent. The violence was confirmed by PW 5 who saw the appellant drag PW 1 to her bedroom. The offence of rape was therefore proved.

14. The testimony of PW 1 and PW 5 that there were assaulted was confirmed by the evidence of PW 4 who examined them ascertained their injuries. The charges of assault were accordingly proved.

15. As regards the charge of being in possession of narcotic drugs, the offence was proved by the production of the report of the Government Analyst by PW 3. The Government Analyst established that the substance recovered from the appellant was *cannabis sativa*. The production the report without calling the maker is permitted by **section 77** of the **Evidence Act**. In his oral submissions the appellant raised the issue that an inventory of the items recovered when he was searched was not prepared or produced. I hold that this issue was raised belatedly and was not the subject of cross-examination in the lower court.

16. I have also considered the contradictions in the prosecution case pointed out by the appellant. The general principle applicable in this instance is that not every contradiction in a case must of necessity raise doubt in the mind of the trial court as to the culpability or otherwise of the accused. If the contradiction is minor, trivial or can be explained, it will not affect the conviction (see **Joseph Maina Mwangi v Republic CA Criminal Appeal No. 73 of 1992(UR)**). The court has to bear in mind that witnesses have different ways of putting facts and as long as the evidence concerning the germane issues when taken as a whole is consistent, a conviction will result even in the face of minor discrepancies.

17. The appellant has pointed to the evidence of PW 1 and PW 5 regarding whether the appellant broke the door or whether PW 1 opened the door for him. PW 3 testified that testified that PW 5 opened the door for the accused. He did not confirm whether the door was broken when he went to the premises. In my assessment of the evidence, PW 5 was in a different room when he heard the commotion when the appellant entered the house. He could not see whether the door was broken. PW1, on the other hand, stated that she opened the door for him. I do not see this as a contradiction in the evidence and even if it was, it is minor as the main charge of rape was proved by all the other evidence.

18. The evidence about the injuries suffered by PW 1 and PW 5, which I have outlined above, are consistent with the testimony. PW 1 was first seen at Bugumbe Health Centre when she was treated for

the assault. She was seen by the clinical officer who confirmed the physical and sexual assault. There was therefore no contradiction in the evidence.

19. In light of the entire evidence, the appellant's defence of alibi cannot withstand the prosecution case. What is confirmed by his defence is that the appellant knew the PW 1's husband and his family as he had sold a plot of land to them. Like the learned magistrate, I find it wanting and it is dismissed.

20. The sentences imposed by the court below were within the law. The sentence of 10 year imprisonment for the offence of rape is the minimum sentence under the ***Sexual Offences Act, 2006***. As there is no error in principle that would cause the court to intervene, the sentences are affirmed.

21. I affirm the conviction and sentence. The appeal is dismissed.

**DATED and DELIVERED at MIGORI this 24<sup>th</sup> day of September 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.