REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL 162 OF 2011

ABRAHAM KIMUTAI MASANI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an original conviction and sentence of T. A. Odera – PM in Criminal Case No. 1524 of 2010 delivered on 5th December, 2011 at Kitale.)*

J U D G M E N T.

The appellant, **Abraham Kimutai Masani**, was charged before the Principal Magistrate at Kitale with gang rape contrary to section 10 of the Sexual Offences Act. It was alleged that on the 30th May, 2010 in Trans-Nzoia West in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of C.N without her consent.

After pleading, not guilty to the charge, the appellant was tried and convicted. A sentence of ten (10) years imprisonment was imposed against him but being aggrieved by the conviction and sentence, he preferred this appeal on the basis of the grounds contained in his petition of appeal filed herein on the 15th December, 2011.

The appellant represented himself at the hearing of the appeal and relied on his written submissions.

The learned prosecution counsel, **M/s. Bartoo**, appeared for the respondent and conceded the appeal.

In her submissions, the learned prosecution counsel stated that the prosecution evidence was not consistent and that the evidence by PW1 and PW2 did not add up although they alleged that they were together at the material time.

The learned prosecution counsel submitted that PW1 did not show any evidence of having been strangled nor did she say in which police station the report against the appellant was made. Further, the officer who allegedly received the report was not called to testify.

The learned prosecution counsel further submitted that PW1 did not say where the P3 form was filled or

whether she sought any medical assistance. Also, the P3 form produced by the clinical officer (PW3) indicated that it had been filled nine days prior to the date of the offence.

The learned prosecution counsel pointed out discrepancies in the evidence of PW3 and PW4 and contended that the appellant's conviction was unsafe.

For all those reasons, the learned prosecution counsel conceded the appeal.

At this point, the duty of this court is to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In brief, the prosecution case was that on the material date at 3.00 p.m., the complainant **C.N (PW1),** was at Kapsokwony when she boarded a motor cycle taxi for her home in E. The motor cycle broke down at S at 7.30 p.m. She called her husband who directed her to call a lady called Caro whom she later met and took tea with her in a hotel.

While in the hotel, the complainant's handbag went missing and she was informed by Caro that a man had taken away the handbag. The appellant was at the place. He offered to assist the complainant retrieve her handbag. The man with the handbag was traced but he refused to release it. As the complainant accompanied by the appellant and another were going back to Caro, the appellant turned against the complainant and strangled her on the neck with his belt. Together with his accomplice, the appellant forcefully removed the complainant's clothes and raped her. Both men raped her. Thereafter, the second man went away. The complainant was left with the appellant.

She (complainant) refused to leave the appellant as it was 2.00 a.m. they went to the home of one Serah and thereafter the appellant entered a nearby hotel. The complainant slept under a tree upto 5.00 a.m. when she reported the incident to the police at a nearby police post. The appellant was later arrested.

Caroline Chebet (PW2), indicated that the appellant offered to escort the complainant to fetch her lost bag but on the following day the complainant alleged that she had been raped by the appellant.

Francis Barchebo (PW3), a clinical officer at Kitale District Hospital examined the complainant and compiled the necessary P3 form while **P.C. Paul Kamau Mwangi (PW4)** of Kitale Police station investigated the case and preferred the present charge against the appellant.

In his defence, the appellant denied the offence and said that Caro (PW2) took the complainant to him so that he may help her look for the boys who had run away with her bag. They found the boys drunk and he told the complainant to wait until the following morning to report the matter to the police. He went home but on the following day, it was alleged that he raped the complainant. He met the complainant at Caro's house and they all went to the police.

In convicting the appellant, the learned trial magistrate believed the evidence adduced against him by the complainant (PW1) and disbelieved the defence raised by the appellant. The opinion of this court is that there was sufficient evidence from the complainant (PW1) and the clinical officer (PW3) showing that most likely than not, the complainant was indeed raped at a time when she had been left with the appellant.

The incident occurred on the night of 30th/31st May, 2010. The complainant was examined by the clinical officer (PW3) for the purposes of the P3 form on 3rd June, 2010, a few days after the fact. The complainant was alone at the time of the offence save the offender or offenders. She was found credible by the learned trial magistrate who saw and heard her testify and was therefore advantaged than this court to make findings on the credibility of witnesses.

The learned trial magistrate cautioned herself prior to relying on the evidence of the complainant and was satisfied that the offence of rape was committed against the complainant by two men including the appellant herein. This court finds no good reason to interfere with the finding. The appellant denied the

offence but not the fact that he was left alone with the complainant to look for persons who had taken away her bag. He had not previously known the complainant who was a stranger and a stranded person. It would not be far-fetched to opine that the appellant and another took advantage of the complainant's vulnerability and raped her.

There was no reason why the complainant would have reported to the police that she was raped by the appellant if at all she was not raped.

The appellant had no obligation to prove his innocence but his defence was quite wanting and was unable to dislodge the complainant's credible evidence against him.

Consequently, this court must hold that there was sufficient evidence to prove that the complainant was on the material date raped by the appellant and another. His conviction by the learned trial magistrate was sound.

The sentence meted out by the learned trial magistrate was unlawful and incompatible with S. 10 of the Sexual Offences Act which provides for a minimum sentence of fifteen (15) years which may be enhanced to life.

Therefore, the sentence of ten (10) years imprisonment imposed by the trial magistrate is hereby set aside and substituted for a sentence of fifteen (15) years imprisonment.

In the end result this appeal is dismissed despite the concession by the respondent.

[Delivered and signed this 24th day of May, 2012.]

J.R. KARANJA.
JUDGE.