



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**  
**CRIMINAL APPEAL 109 OF 2011**

**JOSEPH MODO ::: APPELLANT.**

**VERSUS**

**REPUBLIC ::: RESPONDENT.**

*(Being an original conviction and sentence of T. Nzioki – SRM in Criminal Case No. 585 of 2010 delivered on 12<sup>th</sup> July, 2011 at Lodwar.)*

**J U D G M E N T.**

This appeal is against the decision and judgment of the Senior Resident Magistrate at Lodwar in SRM Criminal case No. 585 of 2010 in which the appellant, **Joseph MODO**, was charged with rape contrary to section 3 (1) read with section 3 (3) of the Sexual Offences Act.

It was alleged that on the night of 11<sup>th</sup>/12<sup>th</sup> August, 2010 at Turkana West District, the appellant intentionally and unlawfully penetrated the genital organs of **M.K** without her consent.

There was an alternative count of indecent act contrary to section 11 (1) of the Sexual Offences Act in that the appellant committed an indecent act with **M.K** by touching her genital organ.

After pleading not guilty, the appellant was tried and convicted on the main count. A sentence of ten (10) years imprisonment was imposed upon him.

Being aggrieved by the conviction and sentence, the appellant preferred the present appeal.

The grounds of appeal are contained in the petition of appeal dated 18<sup>th</sup> July, 2011. At the hearing of the appeal, the appellant represented himself and relied on his written submissions.

The learned prosecution counsel, **M/s. Bartoo**, opposed the appeal on behalf of the respondent.

In her submissions, the learned prosecution counsel contended that the appellant was identified after a

torch was flashed on him and that he was seen by PW3 and PW4 outside the home of PW2.

The learned prosecution counsel further contended that the case for the prosecution was fully proved as the appellant used force against PW2 who did not consent to a sexual act. Further, the appellant was armed with a knife at the time and penetration was proved by medical evidence.

On sentence, the learned prosecution counsel contended that it was lawful. This court was therefore urged to dismiss the appeal. In response, the appellant stated that the alleged knife was not produced in court and that PW3 did not speak the truth.

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 the witness.

The complainant **M.K (PW2)**, indicated that the appellant entered her house on the material night at about 1.00 a.m. while she was sleeping with her two children. On waking up, she found the appellant on top of her. He was too strong for her. Her neck was strangled and left hand twisted by the appellant who then removed her inner wears and raped her.

Thereafter, the appellant rose up. It was at that juncture that the complainant picked her bright torch and was able to see and identify the appellant. She pointed the torch on the appellant's face when he returned to her house and hit her with a stone.

The complainant referred the matter to the police at Kakuma.

**Dr. Clare Nyambati (PW1)** of IRC Main Hospital Kakuma produced the P3 form completed by her colleague **Dr. Musawa** who examined the complainant and signed the report.

A neighbor of the complainant, **Yakub Arum Abdulmal (PW3)**, heard the complainant screaming and went out of his house. He then saw the appellant standing outside the complainant's compound. He saw him with the help of torch light being flashed by the complainant.

Another neighbor of the complainant **Adams Salleh Hassan (PW4)**, also heard the complainant screaming and thereafter saw the appellant coming out of the complainant's house. He saw him with the help of a torch flashed at him by the complainant. **P.C. Sammy Nyasutu (PW5)** of Kakuma Police station investigated the case and preferred the present charge against the appellant.

In his defence, the appellant gave a lengthy statement and contended that he was framed. He narrated a previous incident involving him, the complainant and her husband and another incident involving him and PW3 for purposes of shedding light as to why he was framed of having raped the complainant.

In convicting the appellant, the learned trial magistrate relied on the complainant's evidence to find that she was raped by the appellant and on the evidence of PW3 and PW4 to show that they heard the complainant screaming and then saw the appellant at the scene.

Having considered the evidence availed before the trial court, it was apparent that it was the word of the complainant (PW1) against that of the appellant. Other than the complainant and her two children there was no other person at the actual scene of the offence. PW3 and PW4 did not witness the alleged rape. They only testified that they saw the appellant outside the complainant's house or when he was 'bolting' out of the house.

The incident occurred in the night when conditions for favourable for identification were not favourable although the complainant said that she had a bright torch which she flashed at the appellant and saw him. It was not clear at what juncture this happened because the complainant suggested that the assailant rose up and she saw him with the help of the torch. The complainant also said that she saw the assailant when he returned to the house and threw a stone at her.

PW3 and PW4 were not clear as to how they were able to see and identify the appellant as the assailant. They also suggested that light from the complainant's torch helped them see the appellant but they were rather silent on how far they were from the appellant when they saw him.

In view of the aforementioned gaps and discrepancies in the evidence by the complainant, PW3 and PW4 it would not have been safe to hold that if the complainant was indeed raped then the appellant was the person responsible. The alleged identification of the appellant by the complainant PW3 and PW4 could not be said to have been free from the possibility of error or mistaken identity.

With regard to the medical evidence availed through PW1, a P3 form was produced but it is not specific whether or not there was penetration as alleged on the material date.

Other than the general examination of the complainant's sexual organ, the doctor never formed any opinion as to whether or not there was penetration as alleged.

The learned trial magistrate did not rely on the P3 form to find that there was penetration but relied more on the testimony of the complainant which evidence, in this court's view, may not have been that reliable and more so, considering the defence raised by the appellant which showed that there was indeed a possibility of a frame up due to the strained relationship between him and her and between him and PW3.

On the whole, this court would arrive at the conclusion that the prosecution did not prove its case beyond reasonable doubt. The appellant's conviction by the learned trial magistrate was unsound and unsafe.

Consequently, this appeal is allowed to the extent that the conviction is hereby quashed and the sentence set aside.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**[Delivered and signed this 24<sup>th</sup> day of May, 2012.]**

**J.R. KARANJA.**  
**JUDGE.**