



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL APPEAL NO. 31 OF 2010.**

**JOHN LOKALA AKOLONG.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence by T. Nzioki – SRM in Criminal Case No. 176 of 2009*

*delivered on 23<sup>rd</sup> November, 2009 at Lodwar.)*

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

**1. John Lokala Akolong**, the appellant herein was charged with the offence of rape contrary to section 3 (1) as read with section 3 (3) of the Sexual Offences Act. The particulars of the charge stated that on the 20<sup>th</sup> day of February, 2009 at K village in Turkana Central District within Rift Valley Province intentionally and unlawfully committed an act which caused penetration to the genital organs of **C.M** without her consent. The appellant pleaded not guilty and after trial, he was found guilty and upon conviction he was sentenced to 15 years imprisonment.

**2.** Being dissatisfied with the conviction and sentence the appellant appealed. The appellant has challenged the decision of the trial magistrate on the grounds that there was no medical examination carried on him so as to connect him with the offence of rape. The appellant also contended that his Constitutional rights as to a fair trial were violated by the police. He also faulted the decision of the trial court for convicting him without sufficient evidence to prove his guilt. In addition to the petition of appeal, the appellant also filed written submissions to argumentum the grounds set out in the petition.

**3.** This appeal was opposed; **Mr. Onderi** the learned Senior Principal State Counsel submitted that the conviction and the sentence are within the law. The prosecution's evidence was watertight and it was based on the evidence of the complainant, **C.M** who was attacked by the appellant. She was assaulted, by the appellant who overpowered her, tore her skirt and underwear and raped her. It was in broad daylight. The complainant immediately reported the matter to the elders and was advised to seek medical treatment. She was examined at first at the Emukuse Health Centre and was referred to Lodwar District Hospital for further treatment and that is where PW1 examined her and filled a P3 form.

4. The complainant reported the matter at K police post. The appellant was arrested by **P.C. Peter Mukura**. According to **Mr. Onderi** the offence took place for about 4 hours. The complainant had ample opportunity to identify the appellant during the ordeal that took four hours. The documentary evidence being the P3 form was consistent with the complainant's evidence. The complainant was assaulted therefore there was no consent for a sexual intercourse. The ingredients of the offence of rape were proved. He urged the court to uphold the conviction and sentence.
5. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **NJOROGE VS. REPUBLIC [1987] KLR 19**. I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant. The evidence that led to the conviction and sentence of the appellant was specifically given by **C.M PW1** and complainant herein.
6. The complainant testified that on 20<sup>th</sup> February, 2009 at about 9.00 a.m. she was traveling EBU area along Lake Turkana. On the way she met the appellant who ordered her to stop. The appellant slapped her on the right cheek and when she tried to move he pushed her down, tore her skirt and underwear and raped her from 9.00 to 1.00 p.m. The complainant was 3 months pregnant at the time. After the appellant had raped her until he was satisfied, he walked towards the lake. The complainant reported the matter to some elders who advised her to seek medical attention. The following day the complainant went to Emukuse Health centre where upon examination she was referred to Lodwar District Hospital because she was advised there could be a problem with the pregnancy she was carrying.
7. The complainant also reported the matter to K police post and the report was received by **P.C. Peter Mukura PW3**. According to PW3, on 2<sup>nd</sup> March, 2009 while at Kalokor Patrol base he received 3 persons, the chief of Lomesh, PeterLorain, Samwel Embenyo and Domano Akwe who accompanied the complainant and also the appellant who had been apprehended by members of the public. The complainant reported that she was raped by the appellant. PW3 recorded the report and issued the complainant with the P3 form. The P3 form was completed by **Bernard Bundotich PW1**, a clinical officer working at Lodwar District Hospital. PW1 testified that he examined the complainant who was twelve weeks pregnant and was complaining of having been raped. There were no visible bruises on the labia majora. The laboratory tests showed that the complainant had an STD.
8. The appellant was put on his defence, he denied having committed the offence. He related to court the events of 28<sup>th</sup> February, 2009 when he had gone to Karimapus Centre to receive maize but at about 4.00 p.m. he was arrested by KPR officers. He was escorted to the police cells and later escorted to Lodwar where he was charged with this offence. The learned trial magistrate analyzed the above evidence and found the evidence of the complainant was consistent. The trial magistrate was satisfied that the complainant knew the appellant and the medical evidence corroborated the complainant's evidence especially because the clinical officer noted that the lower abdominal pain that the complainant was experiencing was attributed to forceful penetration. The trial court believed the evidence of complainant and convicted him as charged.
9. This appeal raises the issue of whether the prosecution proved its case to the required standard, in particular whether there was sufficient evidence in view of the fact that the appellant was not subjected to medical examination. The complainant was found to have an STD and according to the appellant, it was necessary for the police to subject him for medical examination to connect him with the offence of rape of the complainant. The learned trial magistrate who heard the evidence of the complainant and who had the advantage of observing her demeanor believed the complainant was truthful in her evidence.

**10.** I have also considered the evidence by the complainant.

**11.** The complainant said she was subjected to the orgy of rape for about 4 hours which gave the complainant ample opportunity to identify her assailant. The complainant was pregnant at the time and the clinical officer who examined her noted that the lower abdominal pain the complainant was experiencing could be attributed to the forceful penetration. It is not material that the complainant was found to have STD. What was material was the offence of rape. I find that the ingredients of the offence of rape were proved because the complainant was accosted, assaulted, was pushed down and then raped. The fact that there were no physical injuries on the complainants genitalia is also not material because the complainant was already three months pregnant.

**12.** Moreover the complainant who was the victim of rape confirmed in her evidence that she was subjected to rape and the appellant inserted his male organ into the complainant's organ. The proviso under section 124 of the Evidence Act provides clear guidance regarding the evidence of a victim of sexual assault in the following words:-

*“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*

**13.** Having carefully re-evaluated the evidence on record, I am satisfied that the learned trial magistrate's decision is safe from any possible error(s). The defence by the appellant lacked credibility and it was correctly disregarded by the trial court. Accordingly, I find no merit in this appeal which is dismissed. The conviction and sentence imposed by the trial court are hereby confirmed.

**Judgment read and signed this 25<sup>th</sup> day of February, 2011.**

**M.K. KOOME.**

**JUDGE.**