



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 55 and 56 OF 2007**

1. DAN EKENO .....1<sup>ST</sup> APPELLANT

2. SIMON MAINA..... 2<sup>ND</sup> APPELLANT

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

*(From the original Judgment of Hon. G. M. A ONG'ONDO Senior Resident Magistrate Lodwar in Criminal Case No. 770 of 2006 delivered on 29<sup>th</sup> September 2007 and Sentence passed.)*

**JUDGMENT**

The appellants herein, **Simon Maina** and **Dan Ekeno** were charged in count 1 with the offence of gang rape contrary to section 10 of the Sexual Offences Act, 2006.

The particulars in count 1 are that on the 14<sup>th</sup> day of October, 2006 in Turkana District within the Rift Valley Province in association, gang raped M.L.  
In the alternative they were charged with the offence of indecent act with an adult contrary to section 11(6) of the Sexual Offences Act, 2006.

The particulars of the alternative charge are that on the 14<sup>th</sup> day of October, 2006 in Turkana District jointly committed an indecent act to M. L by touching her private parts.

In count 11 they were charged with robbery contrary to section 196(1) of the Penal Code.

The particulars of the offence are that on the 14<sup>th</sup> day of October, 2006 at Lodwar Township in Turkana District jointly stole from M.L cash of Shs.30/- the property of M.L and at the time of theft used actual violence against the said M.L.

For purposes of clarity they were charged jointly with the offence of indecent assault. However, on 28<sup>th</sup> March 2006 the charge was amended under section 214 of the Criminal Procedure Code to include count II so as to be in line with the Sexual Offences Act No. 3 of 2006.

PW1, M.L was on her way home from G[...] where she was working. About C[...] area, she was accosted by two people, both of whom are the appellants herein, who were walking from the opposite directions.

The first appellant held her as the 2<sup>nd</sup> appellant searched her person and stole Shs.30/= from her jeans skirt pocket. In the process she was rendered unconscious. The appellant and his companion carried her to a thicket at Lodwar showground. Luckily some children saw them and informed two Administration Police who were in the nearby AP camp, near Lodwar Show Ground. The two AP's rushed to the scene, and found the appellants engaging her in gang rape. The two appellants were then arrested.

It was the complainant's evidence the first appellant forcibly removed her jeans skirt while the second appellant held her. As she resisted, her white pant (Exhibit 1) got torn. In the process, they also removed her bra (Exhibit 2). The Second appellant pushed her to the ground by force. The first appellant then forced himself into her - had carnal knowledge of her. Thereafter the second accused did the same. In sum they had carnal knowledge of her for about one hour in turns.

**APC Julius Kimutai Kirui** (PW2) and **APC Tanguis Kiplangat** (PW3) rushed to the scene and found the 2<sup>nd</sup> appellant lying on top of complainant, PW1 who was facing upwards while the first appellant was holding her leg in a grasshopper position and legs stretched apart. Both accused were then arrested. Exhibits 1 and 2 were retained by PW2 and PW3 and later on tendered in evidence as such. A search

conducted on the appellants resulted in recovery of Shs.30/= from the pocket of appellant No.1. (Dan Ekeno) PW2 and PW3 handed over the appellants to Lodwar Police Station. Medical examination was conducted on the person of the complainant at Lodwar District Hospital by PW4 (Dr. Joseph Karimi Kinyua). It disclosed presence of spermatozoa in the vagina of the complainant. The P3 was admitted as exhibit 3.

In his defence the second appellant, (Simon Maina) generally denied all the charges levelled against him. His testimony was that on the material day and time he was walking from his residence at Public Works Compound towards his father's home. He neither met PW1 nor was he in the company of appellant No.2. On his way to his father's home, he met PW2 and PW3 who arrested him at 10.00 a.m. on allegations of rape. They took him to showground AP Camp. He found appellant No.1 at Lodwar showground. He was not found having carnal knowledge of the complainant. That exhibit 1 does not relate to him. Moreover no DNA test was done to confirm that the blood sample or spermatozoa found in PW1 came from him. That exhibit 4 does not belong to him.

In his defence the 2<sup>nd</sup> appellant, Dan Ekeno, generally denied all the charges levelled against him. His testimony was that on the material day and time, he was at his home. About 7.00 a.m. he went to a barber shop at Lodwar Town next to Lorgum Motor Vehicle Stage. On his way home he met PW2 and PW3 who asked him to identify himself. He told them he was a student and had no identity card. They then arrested him for undisclosed offence. That he never met the complainant (PW1) on the material day. He had not known PW2 and PW3 before.

Against that backdrop of evidence, it is clear to me that both appellants were within Lodwar Town on the material date and time. The two were found in *flagrante delicto* having carnal knowledge of PW 1 by PW2 and PW3. The offence was committed at day time in a thicket near Lodwar Show Ground. Hence the issue of identification is not in dispute. The complainant met both appellants while she was from work. The second appellant (Simon Maina) held her neck using his arm while the first appellant (Dan Ekeno) took away Shs.100/= (Exhibit 4) from her bra by force. Thereafter the second appellant (Simon Maim) held her shoulders while the first appellant (Dan Ekeno) removed her jeans skirt and tried to remove her pant in a thicket at the Lodwar showground. In the process she resisted and her pants (exhibit 1) got torn. Both appellants engaged her in gang rape in turns starting with second appellant. Luckily for her two young boys saw the appellants carrying away the complainant and alerted the AP's (PW2 and PW3), at a nearby camp. The APs rushed to the scene and found 2<sup>nd</sup> appellant in the act of having carnal knowledge of PW1 as the first appellant held her leg. In essence the two appellants had carnal knowledge of the complainant in turns. In support of this fact is a torn white pant (exhibit 1), black bra (exhibit 2), P3 form (exhibit 3) and Kshs.130/= (exhibit 4).

Against that backdrop of evidence, I am persuaded that the defence *alibi* by both accused was displaced by the evidence of PW 1, PW 2, and PW 3. There was enough evidence to found a conviction of gang rape, contrary to section 10 of the Sexual Offences Act, 2006 and robbery contrary to section 296(1) of the Penal Code i.e. count 1 and 11. The conviction was thus proper.

Accordingly, there is no merit in the appeal, which I dismiss in its entirety.

It is so ordered.

Dated and Delivered at Kitale this 4<sup>th</sup> day of April, 2011.

**N.R.O.OMBIJA**  
**JUDGE**

Dated, delivered and countersigned by Hon. Lady Justice

Martha Koome this..... day of..... 2011.

**MARTHA KOOME**  
**JUDGE**