REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 24 OF 2009

AKENO LOTINGOLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. H. M. Nyaga (Senior Resident Magistrate)

in Kabarnet SRM.CR. No. 69 of 2008 delivered on the 28th October 2008)

JUDGMENT

On the 25th February 2008, **AKENO LOTINGOLE** (herein, the Appellant), appeared before the Senior Resident Magistrate at Kabarnet charged with two counts viz robbery contrary to S. 296 (1) of the Penal Code and indecent assault on female contrary to S. 144 (1) of the Penal Code. He pleaded not guilty to both counts and the trial commenced on 5th August 2008 when two witnesses (i.e. PW 1 and PW 2) testified.

Thereafter, the case was adjourned to the 3rd September 2008 on which date it was further adjourned to 7th October 2008. On that 7th October 2008, the prosecutor informed the Court that the prosecution wished to substitute the charges by amending the second count to include the offence of rape instead of indecent assault.

The record shows that the charges as substituted were read and explained to the appellant who again pleaded not guilty.

The trial commenced with the evidence of one witness (PW 3). The complainant (PW 1) was also recalled for further cross-examination by the appellant. The case continued on the following day (8th October2008) when two more witnesses (PW 4 and PW 5) testified prior to the closure of the case for the prosecution. The appellant was placed on his defence on the same date and after his unsworn statement, the Judgment date was scheduled on the 28th October 2008.

The Judgment was indeed delivered on the 28th October 2008 whereupon the appellant was convicted on both counts and sentenced to serve seven (7) years imprisonment on count one and fifteen (15) years imprisonment on count two. The sentence was to run concurrently.

In Count one, the offence was robbery contrary to S. 296 (1) of the Penal Code, in that on the 12th February 2008 at Nakoko Sub-Location East Pokot District, jointly with another not before the Court, the appellant robbed Wiala Riwo of Ksh. 30,000/- and at or immediately before or after the time of such robbery used or threatened to use actual violence to the said Wiala Riwo.

In count two, the offence was rape contrary to S. 3 (1) (b) of the Sexual Offices Act. No. 3 of 2006, in that on the 12th February 2008 at N[...] Sub-location East Pokot District, the appellant unlawfully raped C.W.

Being dissatisfied with the conviction and sentence, the appellant lodged this appeal on the basis of the grounds contained in his petition of appeal. His general complaint is the insufficiency of the evidence relied upon by the trial Court to convict him. He relied on the same grounds at the hearing of the appeal. He also relied on his written submissions in support of the grounds.

The appeal was opposed by the respondent through the learned **Senior State Counsel, Mr. Chirchir**, who briefly went through the evidence adduced by the prosecution witnesses and contended that the charges were duly established and that the appellant was identified by recognition as the person responsible for the offences.

The learned State Counsel also contended that the alibi defence raised by the appellant was misplaced by the evidence adduced by PW 1, 2 and 3.
On sentence, the learned State Counsel observed that it was not harsh and that the appellant was lucky not to have been charged with a capital offence.

The learned State Counsel urged this Court to dismiss the appeal.

Being a first appellate Court, the duty of this Court is to reconsider the evidence availed before the trial Court and draw its own conclusions. In so doing, it must be appreciated that the trial Court had the advantage of seeing and hearing all the witnesses.

In that regard, the case for the prosecution was briefly that on the material date at about 8.00 p.m., the first complainant **WIALA RIWO (PW1)**and his wife, the second complainant **CHEPORO WIALA (PW 3)** were walking home from Chesokon Centre when they met and were stopped by the appellant and another. The appellant and his colleague had a knife and stick. They demanded money from the first complainant before getting hold of him and frisking his pockets for money. They found and took away a sum of Ksh. 30,000/= which had been obtained from a self help group for purposes of engaging in livestock trade. The second complainant was held by the hands and warned against screaming. She was led to a bush within an area called Cheptunoi where she was raped throughout the night by the appellant. At that time, the first complainant had already fled from the scene. On the following morning, the second complainant was led into another bush but the first complainant and others came to her rescue prompting the appellant and his colleague to escape from the scene.

The second complainant was referred to C[...] Health Centre after the incident was reported to the police.

LOKIRA ANGOLE (PW 2) was in his house on the material date at 9.30 p.m. when the first complainant went there and informed him that he had been attacked by robbers and Ksh. 30,000/- stolen from him. The first complainant told him (PW 2) that Akeno, the appellant herein, was one of the robbers. He (PW 2) accompanied the first complainant in search of the second complainant whom they found in a bush being sexually assaulted by the appellant who fled together with his colleague on seeing them.

CHRISTOPHER ROTICH (PW 4) of Chemalingot District Hospital examined the second complainant and filled the necessary P3 form confirming that she had been raped.

P.C ALBANUS MUTISYA (PW 5) of Nginyang Police Station received the necessary report from the two complainants and later charged the appellant after he was arrested on the 19th February 2008 by the complainants and members of the public.

P.C Mutisya concluded the prosecution case against the appellant who was thereafter placed on his defence. His defence case was a denial and a contention that the complainants and others confronted him while he was asleep at his home. He was then questioned about the offences and was apprehended after his failure to disclose the other suspect. He was searched but no money was recovered from him. Thereafter, he was taken to the police and charged. He further contended that he had been grazing his cattle on the material date and that the real culprit was at large.

The Learned trial Magistrate considered all the foregoing evidence ad concluded that the offences of robbery and that of rape were duly established.

The learned trial Magistrate also concluded that the appellant's denial of the offences was overwhelmed by the evidence of PW 1, PW 2 and PW 3 who all placed him at the scene of the second offence.

For those reasons, the appellant was accordingly convicted. Upon due consideration of the same evidence, this Court is satisfied that the evidence by the two complainants (PW 1 and PW 3) established and proved the occurrence of the offence of robbery. Indeed, what was proved was capital rather than simple robbery. However, the prosecution for reasons best known to itself opted to charge the appellant with robbery under S. 296 (1) of the Penal Code instead of S. 292 (2) of the Penal Code which carries a mandatory death sentence. This Court does not find it appropriate to interfere with that existing state of affairs.

As to the charge of rape, the evidence by the two complainants, PW 3 and PW 4 confirmed the occurrence of the same.

Indeed, in his defence, the appellant did not dispute the occurrence of the offences. His stand was that he was not responsible for the same. He implied and believed that the prosecution got the wrong person as the real culprit was still at large. He maintained his innocence by saying that he was grazing his cattle the whole of the material day.

However, the evidence by the two complainants and PW 2 strongly and corroboratively rebutted the appellant's defence. The evidence showed that the appellant was a person previously known to the two complainants and PW 2. The two complainants saw and recognized him as one of the two people who robbed the first complainant of his money. His name was mentioned to PW 2 to whom the first complainant ran after escaping from the scene of the robbery.

On the morning following the robbery, the first complainant and PW 2 while searching for the second complainant found him (appellant) continuing with his sexual abuse of the second complainant. As it were, the first complainant and PW 2 found the appellant with "*his pants down*" meaning that he was caught red handed while raping the second complainant who stated that the ordeal continued throughout the night when she was led into a bush after the robbery had occurred.

It was because the complainants had recognized the appellant as one of the two offenders that they led the members of the public into arresting and handing him over to the police on 19th February 2008 despite his escaping from the scene of the rape offence on the material date.

In the circumstances, this Court would readily associate itself with the findings made against the appellant by the learned trial Magistrate

The appellant's conviction on both counts was therefore sound and proper.

On sentence, the seven (7) years imprisonment handed down for the offence of robbery was neither excessive nor harsh. However, for the offence of rape, the sentence of fifteen (15) years imprisonment was rather on the higher side and is hereby reduced to ten (10) years imprisonment. Otherwise, the appeal generally lacks merit and is hereby dismissed.

J. R. KARANJA

JUDGE

[Delivered and signed this 7th day of July 2011]