



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 54 OF 2010.

MARKO IMANA LOKOLONYOI:..... APPELLANT.

VERSUS

REPUBLIC:..... RESPONDENT.

(Being an appeal from the original conviction and sentence by T. Nzioki – SRM in Criminal Case No. 312 of 2009 delivered on 10th May, 2010 at Lodwar)

J U D G M E N T.

The appellant, **MARKO IMANA LOKOLONYOI** was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The information of the charge stated that on the 18th day of May, 2009 in Turkana Central district within Rift Valley province, intentionally and unlawfully caused penetration of genital organs of **P.E**, a girl aged 9 years.

The appellant pleaded not guilty to the charge and was convicted and sentenced to ten (10) years in prison.

Being aggrieved by the conviction and sentence, the appellant has appealed, he relied on the following grounds of the appeal.

- (1) That he did not plead guilty to the charge.
- (2) That PWII was not able to clearly recognize the footprints of the alleged defiler since it was at night and the road is usually used by many pedestrians.
- (3) That the evidence adduced before the trial magistrate by prosecution witnesses was contradictory since none of the witnesses gave a true account of my arrest and the manner in which it was dressed at the time of my arrest.
- (4) That I was convicted wrongly by the trial magistrate since PW1 clearly informed the court that she did not know her defiler but the trial magistrate went ahead and convicted me.
- (5) That evidence that a kikoi was recovered from the defiler and that the same was not provided as exhibit in this case leaves no doubt that this was a planned fabrication that denied me a fair trial.
- (6) That I was not medically examined as I requested to the police officer who declined to allow me to be examined. This would have confirmed if indeed I had sexual contact with the complainant.
- (7) That PWIV who was a medical officer also informed the court that he had not examined me at any given time since I was not taken before him for examination.
- (8) That PWII testimony that the defiler entered the house and stayed for four hours without being noticed even by PWII who claimed to have been awake at the same time clearly leaves a lot to be desired since she had enough time to mobilize her relatives and neighbors to arrest the defiler.

(9) That I was not accorded fair trial since my true account of events leading to my arrest in that fateful day was not considered by the trial court which led to my wrongful conviction.

The appellant also put in written submissions and relied particularly on 4 aspects that boil down to issues of identification and contradictions in the evidence adduced. That the evidence was inconsistent and contradictory.

The state counsel conceded to the appeal on the ground that there were inconsistencies. That P.W 2 stated that she was at the scene at all the material times but that she took no action. That she testified to the effect that the person who entered into the house was one Fred. That they followed foot steps that led them to the appellant's house. She conceded that the victim was assaulted but that it is inconclusive that it was by the accused person.

This is an appeal and as mandated by the law the court is to examine as at this level matters of law and fact.

The evidence as adduced by the prosecution witnesses indicate that the complainant was sleeping inside the house when her older sister P.W. 2 saw a person entering the said house where the minor was sleeping. That her initial assumption was that it was her brother. That later P.W2 heard her sister scream. That as the assailant was running out she realized that it was the accused herein. That the accused person's kikoi was trapped by a thicket. That he later took it and ran away with it. That he was subsequently arrested and charged.

The accused person denied any involvement in committing this offence and stated that he was at his late brother's abandoned house.

The issues that call for determination in this case is whether the accused person was positively identified as the assailant and whether the conditions existing at the time were conducive for a positive identification, if there were contradictions as alleged or whether the judgment by the trial court was made on sound evidence. The burden of proof and where it lies

The duty of this court as a first appellate court as been re-stated in numerous cases by the Court of Appeal. Today i refer to the decision of Platt and Apaloo JJA and Masime Ag. J. in the case of **GABRIEL KAMAU NJOROGE vs REPUBLIC (1982 -1988) KAR 134** where that court held:-

“It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision both on the question of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions bearing in mind always that it has neither seen nor heard the witnesses and make allowance for this neither seen nor heard the witnesses and make allowance for this”.

The issues that need to be determined in this case are whether the accused person from the evidence on record was positively identified and whether there is sufficient evidence to sustain the conviction. Is P.W 2's evidence of identification reasonable? Were the conditions existing favoring a positive identification. Pg 2 of the judgment, par. 3 that the witness PW2 failed to recognized the accused as he was going in and mistook him for her brother. That she recognized him as he went out.

Was the accused person positively identified? The key witness PW2 stating that she initially did not recognize the accused person and mistook him for her brother raises serious doubts in her evidence.

She was a single identifying witness and her evidence ought to have been subjected to the stringent examination as laid in the case In **Roria vs the Republic [1967] E.A. 583** The court held:

“that while it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was

not safe to do so”.

In **Abdallah Bin Wendo Sheh bin Mwambere [1953] E.A.CA 166** The Court of Appeal for Eastern Africa held-

Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such a witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other circumstantial or direct, pointing to guilt is needed, and,

In **Jackson Kimathi Marete vs Republic (Court of Appeal at Nyeri Criminal Case No. 3 of 2001)** the court held that where the conviction of an accused person is predicated an eye witness identification evidence in that regard must conclusively show that the conditions favouring his correct identification were satisfactory

The identification was never subjected to the test as laid in the above cases. In any event the key witness in this case P.W2 did not recognise the assailant who went in. The lighting that existed at the scene has not been outlined

It was also stated that the accused person's clothing were found but this was never recovered and produced in court.

There is a lot of suspicion in this case, but suspicious *per se*, can not be a basis of a conviction.

It is on the basis of the foregoing that the court finds that the evidence as adduced is inconclusive and therefore the conviction is unsafe. The court sets aside the conviction and sentence and orders that the accused be forthwith released unless lawfully held.

READ, DATED & SIGNED IN THE OPEN COURT THIS 11TH DAY OF NOVEMBER 2011.

S.M. MUKETI
JUDGE