



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUSIA**

**Criminal Appeal 15 of 1998**

**TOBIAS WESONGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the conviction and sentence of S.O. Omwega, Resident Magistrate in  
Busia cr.case no.229 of 1996).*

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

The appellant Tobias Wesonga Sakwa, was charged with one count of Rape contrary to section 140 of the Penal Code and another count of stealing contrary to section 271 of the Penal Code. He was convicted of both offences and sentenced to three years for rape and three months if he failed to pay a fine of ksh.3000/- in respect of the count of theft. He appealed against the convictions and sentences.

It is observed that the appellant must have by now already served the sentences. However for whatever it is worth it is noted that the Republic did not support the convictions when the appeal came for a hearing on 2.10.2003. Judgement was reserved for 4.12.03 but Mitey, J had by then left the bench without writing the judgement.

The facts of the case as I understand them, are as follows:-

The complainant M.N, a school girl of 17 years – PW1 – was in company of her father – pw2 – returning home after visiting M.G.N High school. They arrived at Mungachi where they alighted from a matatu at 7p.m. They walked to Lwanya market where they visited a home to drink water. That is where the two met the appellant whom the complainant and her father knew well from before. From there the appellant is said to have led the two to his own home nearby to buy fish which his wives were known for selling.

The complainant who was carrying some ksh.2550/- in her bag, spent 35/- to buy fish she kept and the balance of 2515/- remained. The appellant is said to have escorted them out of his home and gone back as the complainant and her father proceeded ahead to their home. On their way the father stopped to talk to a lady at her home along the way. He allowed the complainant to proceed on towards their home which was not far off.

It was as she walked on that the complainant saw the appellant running from behind. She became uncomfortable but the appellant allegedly asked her why she appeared surprised. He walked ahead and when the complainant reached a spot with sugarcane which was near her home, she saw the appellant without a shirt, running towards her. She screamed as the appellant got hold of her, took away her bag with the cash of ksh.2535/-, knocked her down and forcefully had sexual intercourse with her, without her consent. She during the ordeal warned her not to raise alarm as he threatened to kill her.

Her earlier screams had however been heard by her grandfather, D. S. O, PW3. They had also been heard by her father who had earlier remained behind to talk to another lady. The grandfather proceeded to the scene of crime armed with a torch. There he saw the appellant on top of the complainant. At that moment he asked the appellant what he was doing. The appellant is testified to have taken off. Complainant's father also soon arrived but before the appellant had taken off. The grandfather and father of the complainant noticed the dirtying of the complainant's skirt and other clothes she wore that evening. They also noticed how the clothes had been torn by the appellant to gain access into the complainant for sexual intercourse. It is in her testimony that the appellant had escaped with her bag containing the money. There was moonlight which the complainant, her grandfather and father used to recognize the appellant.

The same evening a report was made to the clan elder, PW4 who arrested the appellant the next morning and handed him over to Omungachi AP camp where PW5, No.90087830, APC Michael Cheptoo, received him before he delivered him to Nambale police patrol base. The complainants clothes and other exhibits were also handed over to the police there.

On the same day of 8.2.1996, the complainant was taken to Busia district hospital by her father. On examination she was found to be 17 years old. A vaginal smear swab taken confirmed the presence of spermatozoa. The Clinical officer, Wafula Edward, PW6 filled the relevant P3 marked as exhibit 8. He said that the presence of spermatozoa confirmed that complainant had had sexual intercourse recently as spermatozoa do not last for longer than 48 hours.

PW2, the father of the complainant – G.N – and PW3, D.S.O, the grandfather, testified. They confirmed the main story of the complainant as stated herein above. PW3 in particular confirmed that when he responded to the screams by walking to the spot where the noise came from, he saw the appellant on top of the complainant as he used his torchlight to observe.

In his sworn defence statement, the appellant had stated that on 7.2.1996, the material night, the complainant and her father indeed went to his home where they bought fish at 8p.m. They however, only paid ksh.20/- leaving a balance of 10/-. That they had then left but at 9p.m. or so, he and his wives heard screams from a distance. However, thereafter he got his meal and went to sleep in the house of Florence, one of his two wives. The next morning he went to work in his shamba as usual until 10a.m. when two clan elders approached him and told him that the complainant had been raped the evening before after buying fish from his home. He joined them to the scene of the rape where the complainant who was present did not claim that he had raped her before the people who were present. He also testified that the name of one Wandera, was the suspect for the rape, not him the appellant. That it was the complainant's father and the clan elder M.B.O who coerced the complainant to stay that it was him who had raped her. The appellant further stated that the scene of the alleged rape was disturbed with clear indication that there had been struggles there.

The appellant called four witnesses. DW2, John Namunyu Ohidi said that he was present at the appellants home that night of 7.2.1996 when the complainant and her father bought fish. He stressed that they paid ksh.20/- left a balance of kshs.10/- to pay later. He also said he had supper at appellant's and was present when the screams or alarm came through at about 9p.m. He said he did not know the names of appellants wives as that was his first visit there. He said he left that house at 10.30p.m.

The second witness was appellant's wife Florence. She testified that she, in the material night, sold fish to the complainant and her father at sksh.30/- with a balance of ksh.10/- remaining unpaid. She said DW2 J. N was present and ate dinner with them. She confirmed that she saw the complainant with a bag when they were buying fish. She confirmed also that the complainant's home is not far from theirs.

The third witness was appellant's second wife Tentrix Kandal Wesonga. She confirmed that the complainant and her father bought fish from them on the material night at 8.30p.m. before they left. At 8.30p.m. they heard screams. By then they served dinner and they went to sleep at 10p.m. They testified that accused never left their home after the complainant left and he did not escort them.

DW5 was Pamela Anyango. She testified that she went to the home of the appellant after the screams were heard but found the appellant, his wives and a visitor there. She said that although it was a custom that neighbors rush to the home where there appears distress, she and the appellant's family did not answer to the scream which they heard that night.

It was on the above evidence that the trial court convicted the appellant.

I have carefully considered the evidence from the prosecution. I find it straight forward and credible. There is no doubt that the complainant was raped soon after she and her father left the appellant's home after purchasing fish. The complainant had met the appellant in a different house where they had gone to drink water with her father. The appellant went with them to his home to buy fish which they did from one of his wives. The complainant had all that opportunity to see appellant whom she knew well. The appellant escorted them briefly – 100 metres from his home before returning to his home.

If the complainant, a few minutes later saw appellant following her and he talked to her, asking her why she appeared surprised on seeing him following, I have no good reason to disbelief her. When after passing her, he returned towards her without a shirt and attacked her, she appeared sure that she recognized him. Furthermore it took over 10 minutes to force her to yield into forced sexual intercourse. All this time she was able to recognize him. Apparently from the evidence, she did not easily yield to him. Hence the clear signs of struggle at the scene of attack.

Through the evidence, the complainant did not betray any signs that she was in doubt as to who actually attacked her that evening. She was sure that it was the appellant. This view is held by this court despite the fact that the appellant attempted to build an alibi during the material time. However, the evidence of the alibi do not in any way alter the conclusions reached after taking into account the strong cogent evidence of the complainant, her grandfather and, father. The Clinical officer's evidence confirmed that she spoke the truth that she was violated that material evening. There was no time to plan a story to implicate the appellant. She shouted out the name of the attacker. Her

grandfather who had a torch and who answered to her screams found the appellant on top of the complainant. He recognized him and asked him what he was doing before the appellant took off, leaving his name in their lips as they confronted the situation.

In my view the trial court came to the correct conclusion in convicting the appellant. This court's duty is to confirm and uphold the conviction and the sentence in the above circumstances. It does so and makes the orders accordingly.

Dated and delivered at Busia this 19<sup>th</sup> day of May 2010.

**D.A. ONYANCHA**  
**JUDGE**