



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO.41 OF 2019

THOMAS LUSENGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 87 of 2018 – L Mutai, CM)

J U D G M E N T

1. The Appellant, **THOMAS LUSENGEI**, was convicted after trial of **gang rape** contrary to **section 10** of the **Sexual Offences Act, 2006**. It was alleged in the particulars of the offence that on 01/12/2018 in Laikipia County, in association with another person not before court, he intentionally and unlawfully caused his penis to penetrate the vagina of one JRN without her consent. On 10/09/2019 the Appellant was sentenced to ten (10) years imprisonment. He has appealed against both conviction and sentence.

2. In his petition of appeal filed on 17/09/2019 the Appellant mainly challenged his identification by the complainant. It is also his case in this appeal that the charge against him was not proved beyond reasonable doubt. In his amended grounds of appeal filed on 10/03/2020 and submissions the Appellant elaborated the issue of identification.

3. Learned counsel for the Respondent supported the conviction; his submission was that all the ingredients of the offence were proved beyond reasonable doubt.

4. I have read through the record of the trial court in order to evaluate the evidence presented and arrive at my own conclusions regarding the same. This is indeed my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

5. The fact that the complainant (PW1) was chased by two men on the afternoon of 01/12/2018, knocked down, forcibly held down by one while the other raped her, was proved beyond reasonable doubt by her own testimony. Penetration was corroborated by the medical evidence given and produced by PW4 (a clinical officer) who examined her about 3 hours after her ordeal. PW1 reported the rape to her husband (PW2) immediately she got home and gave a description of her two assailants.

6. Upon my own evaluation of the evidence on record, I am satisfied beyond reasonable doubt that indeed the complainant was gang-raped by two men as she testified, and as corroborated by medical evidence.

7. The main issue in this appeal is whether the Appellant was positively identified by the complainant as one of her two assailants. The incident occurred in broad daylight at about 2 p.m. However, the two assailants were total strangers to the complainant.

8. The complainant could have had a good opportunity to observe her assailants during the ordeal. She gave a description of the two men to her husband. Of the Appellant she stated in her testimony-in-chief –

“...I saw the accused very well. His eyes were reddish. I saw his face very well...”.

In cross-examination she stated –

“...I saw you well on the material date. Your eyes were very red then...I identified you to my husband and later to police.”

9. The complainant’s husband (PW2) stated as follows –

“...I had asked my wife to describe the suspects. One was said to be tall and dark. The second one was dark and short with reddish eyes.”

These are general descriptions that would fit many men, except for the reddish eyes, of which more later.

10. The complainant is said to have given the same descriptions to the police when she and her husband reported the gang-rape. However, the Appellant was not arrested by the police from the description given by the complainant. He was arrested by the complainant's husband (PW2) and other people who did not testify. PW2 said that on 03/12/2018 he was approached by a young man who was looking for his lost goats/sheep, and that he fitted the description given by his wife of one of her assailants two days before. He therefore lured him to his home where the complainant identified him as one of her assailants. They arrested him and handed him over to the police.

11. In his sworn defence the Appellant pointed out that there was no way he could have gone around the locality where he was supposed to have participated in gang-raping a woman only two days before, and visit home after home looking for his animals lost the previous day. He repeated the same assertion in his written submissions.

12. Visual identification can be problematic as people can and do make mistakes regarding the identity of even people they well-know, even in circumstances that are otherwise conducive to a good and positive identification. It is also to be remembered that even a candid, forthright and convincing witness may nevertheless be mistaken. That is why identification parades were invented to help clear any lingering doubts regarding the identity of total strangers in criminal trials.

13. In the present case, no identification parade was held, and none could have been usefully held as the complainant (PW1) was in reality one of the persons who arrested the Appellant and handed him over to the police.

14. Upon my own evaluation of the available evidence on identification, there is a lingering doubt that the Appellant could have been one of the complainant's assailants. She never mentioned his obvious youthfulness to her husband and the police as one of his features. It was also not categorically stated that he had reddish eyes when arrested. I also find it highly unlikely that one of the assailants could as it were return to the scene of crime only one or two days after committing the offence and move from home to home looking for animals lost only one day before (on the day after the complainant was assaulted). I am not satisfied beyond reasonable doubt that the Appellant was positively identified by the complainant.

15. I will in the even allow the Appellant's appeal in its entirety. His conviction is hereby quashed and his sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 21ST DAY OF JULY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 22ND DAY OF JULY 2021