



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 12 OF 2018

ARIONG LOCHUCH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 51 of 2016 by the Principal Magistrate – Hon. M.K. Mwangi delivered on 22nd July, 2016 at Lodwar)

JUDGEMENT

1. The Appellant was charged with the offence of rape contrary to **Section 3 (1) (a), (b) and (3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on 26th day for January 2016 at Lokwii in Turkana District within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **EA** without her consent.

2. He pleaded not guilty, was tried, convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied with the said conviction and sentence, he filed this appeal and raised the following summarized grounds of appeal:-

a. Vital prosecution witnesses were not called.

b. The prosecution case was full of contradictions and based upon hearsay evidence.

c. His defence was rejected without cogent reasons.

3. Together with the grounds of appeal the Appellant filed a Petition of Appeal supported by an affidavit in which he deponed that he was a first offender without any previous record and the sole bread winner to his family. He further stated that since his arrest and conviction his immune system had gone down.

4. When the appeal came up for hearing before me the Appellant who was not represented filed handwritten submissions which he relied upon while the State through Mr. Mongare opposed the appeal.

SUBMISSIONS

5. On behalf of the Appellant it was submitted that P3 form filed and produced in court was not in respect of the complainant **PW1** and was partially completed. It was submitted that the evidence tendered was full of contradictions. It was finally submitted that crucial prosecution witnesses were not called to testify.

6. On behalf of the prosecution it was submitted that the Appellant was properly identified by **PW3** the husband of the complainant as there was full moon light. It was submitted that the medical evidence linked the Appellant with the offence and having been caught in the act, the complainant's evidence was corroborated. It was submitted that the Appellant's defence did not dislodge the prosecution evidence.

7. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though giving an allowance that it did not have the advantage of seeing and hearing witnesses as was stated in the case of **OKENO v REPUBLIC [1972] EA 32** thus:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the

fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

PROCEEDINGS

8. The prosecution case was that on 6/1/2016 **PW2 EA** was at home sleeping with her children and husband when the Appellant who was heavier than her husband sneaked into the room and raped her. Her husband woke up as she held the Appellant who told her to let him go. It was her evidence that she did not consent to the act and was able to identify the Appellant. **PW3 RO** corroborated her evidence that she screamed and fell down on him struggling with a man whom he tied with rope and took to the chief’s office. It was his evidence that he did not know the Appellant before that date. **PW1 JECINTA ONYAGO** testified that on examination of the complainant the vagina libia major and labia minora were normal with blood stains as she was in her period but with a whitish discharge.

9. When put on his defence the Appellant gave unsworn evidence that in January 2016 he sold his livestock at Lokori for Kshs.6,800/= and on the way slept over at Morlem in a homestead where he was welcomed and at night while he was asleep he was attacked and beaten up and robbed of his money and mobile phone before the owner of the homestead intervened and took him to the police and was subsequently charged with the offence of rape.

ANALYSIS AND DETERMINATION

10. From the record of appeal and the submissions I have identified the following issues for determination:-

- 1. Whether the Appellant was properly identified.**
- 2. Whether the Appellant defence was considered.**
- 3. Whether the prosecution case was proved beyond reasonable doubt.**

11. The evidence on record is that the complainant was asleep while she felt the body of somebody heavier than her husband having sex with her. It was her evidence that she had not seen the Appellant before and that her husband woke up and told her to let the Appellant go. This evidence is contradicted in material particular by that of her husband **PW3** who stated that he bid the Appellant with ropes and took him to the chief’s office. In cross-examination he stated that the wife screamed and fell down to where he was. This being at night there was no evidence tendered before the trial court on how the Appellant was identified. I therefore find that the condition prevailing was not ideal for the identification of the Appellant.

12. The Appellant raised the defence of the complainant having accommodated him in their home and was later robbed off his money and phone which the trial court dismissed as an afterthought. At the close of the prosecution case which I have re-evaluated there remains a gap on how the Appellant entered into the complainant’s house, if he was unknown to them and how the same was arrested. It is clear to my mind that vital prosecution witnesses were not called including but not limited to the chief to whom the complainant’s husband (**PW3**) took the Appellant. It was not for the Appellant’s defence to poke holes in the prosecution case but for the prosecution to prove its case beyond any reasonable doubt.

13. What the Appellant was required to do is to present an account that raises doubt into the prosecution case and having found that there is a gap in the prosecution case as stated herein, that is to say, how was the Appellant arrested and how did he gain entry into the complainant’s house I am satisfied and hold that the Appellant’s conviction herein was not safe and would allow the appeal, quash the conviction and set aside the sentence.

14. The Appellant should be set free forthwith unless otherwise lawfully held. The state has a right of appeal and it is so ordered.

Dated, delivered and signed at Lodwar this 7th day of March, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

_____ for the Respondent

_____ for the Appellant

Accused - _____

_____ - Court assistant