



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 171 OF 2012

FRED MASIKA OKEMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Principal Magistrate Honourable G.

A Mmasi in Iten Senior Principal Magistrate's court Criminal Case No. 5913 of 2010 dated 28th April, 2011)

JUDGMENT

FRED MASIKA OKEMO, the appellant herein, was charged with two main counts, the first one being of Gang rape, contrary to *Section 10* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 30th day of October, 2010 in Lugari District, within Western province, the appellant in association with another not before court, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of SC without her consent.

To this court there is a preferred alternative count of committing an Indecent Act with a woman, contrary to *Section 11(1) (6)* of the *Sexual Offences Act no. 3 of 2006*, of which particulars are that on the 30th day of October, 2010 in Lugari district, of the Western province, the accused intentionally touched the vagina of SC with his penis against her will.

The second main count is of stealing from the person, contrary to *Section 279 (a)* of the *Penal Code*; particulars of which are that on the 30th day of October 2010 in Lugari district, within Western province, the appellant stole a Mobile phone make Samsung S/No. 351615041584111 valued at Ksh. 1,900/- the property of SC from the person of the said SC.

There is an alternative count to it of handling stolen goods, contrary to *Section 322 (1) (2)* of the *Penal Code*, of which particulars are that on the 30th day of October, 2010 in Lugari District, within Western province, the appellant otherwise than in the course of stealing, dishonestly received or retained a mobile phone make Samsung, knowing or having reason to believe it to be a stolen good.

The prosecution case is that the complainant herein, one SC, was on 30th October 2010 at 10.00p.m heading to her house from a neighbour's homestead where there was a funeral. This was within Bondeni village, in Matunda. On the way she was accosted from behind by a neighbour's son, who is the appellant herein. He held her by the neck and was in company of another. There was moonlight which enabled her see the assailants. She told them to pick whatever they wanted and spare her life. The other person was a stranger to her. She was wrestled to the ground where she fell facing upward. The accused removed her biker and pant. He then got her mobile phone from the skirt's pocket, before he raped her. His companion as well raped her. When the two left her she went and reported to the appellant's younger brother, who escorted her home. She reported the case at AP's office at Mabusi centre. She was treated on 31st October, 2010 at Mabusi Health clinic. She then reported the case at Matunda police station where she was issued with a P3 form. The P3 form was filled on 1st November 2010 at Kitale District hospital. The medical officer found that she had tenderness on the neck, the voice was hoarse and the hymen was torn. The injuries were approximately 5 days old. He was of the opinion that she was harmed and penetrated.

The complainant had presented to Pw-4 her yellow flowered skirt, pant, black biker and creamish jacket of which she was in during the ordeal. They were kept as exhibits.

On 8th December, 2010, the known suspect who had gone underground resurfaced in his home. PW-3 went there to arrest him early in the morning. He emerged out of the house armed with a panga, ready to attack on the police officers. The police grappled with him and took the panga. He however escaped in underpant. The stolen cell phone of the complainant was got in the house. The complainant later presented at the police station its purchase receipt. The appellant was later arrested at Matunda by members of the public who were shown him by the complainant. The police got to the place and rearrested him. He was then charged with the offences in the charge sheet.

In his brief defence, the appellant alleged that on 5th December 2010 he had gone to Soy to collect timber. He was arrested by police officers who were on a motor bike. They alleged that he was a thug. He was taken to Matunda police station. The following day PW-3 availed a cell phone and a panga. The items were strange to him. He was charged with offences he knows nothing about.

The trial court evaluated the evidence and found the two main counts proved by the prosecution beyond reasonable doubt. He was convicted on both, and sentenced on the first count to serve 15 years imprisonment, while on the 2nd he was given unconditional discharge under *Section 35 (1) of the Penal Code*.

The appellant, dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

1. The first report was not made at the police station.
2. The matter was not investigated.
3. The moon light which enabled the complainant see and identify the appellant was not described.
4. The evidence of PW-3 and PW-4 was contradictory.
5. Essential witnesses did not give evidence.
6. The appellant's defence was not properly weighed.

I have evaluated the entire evidence on record, considered the judgment passed, sentence, grounds of appeal and submissions by both sides.

On the evidence of recognition of the appellant at the scene, the only eye witness who is the complainant in this case gave evidence to the effect that she knew the appellant as a neighbor. She saw and recognized him using moonlight. Though I agree with the appellant that the moon size was not given and the intensity of its light, the recognition which would have been doubtful is made good by the fact that when PW-3 went looking for the suspect in his house, he was able to recover the phone stolen from the complainant on the day of the incident. This connects the appellant to the offences and buttresses the evidence of recognition.

The evidence of PW-2 shows the complainant was aged then 44 years. She was a mature woman by all standards. When she alleged in her evidence that she was raped after her biker and pant were removed while she was on the ground, simply indicates that she was forcefully penetrated in her genital organ by the appellant, using his genital organ. The evidence of PW-2 corroborates her evidence as he noted of injuries in her genitalia. All the ingredients of the offences of which the accused was convicted of were established beyond reasonable doubt. The appellant's defence was of mere denial and could not measure meaningfully against the weighty prosecution case. It was rightly dismissed.

The offence of gang rape carries a minimum sentence of 15 years. The trial court was lenient to the maximum to have preferred the bear minimum sentence for it and discharging him unconditionally on the second count.

I find no ground warranting interfering with the conviction and the sentence. If any would be worthy, it would be to enhance the sentence of which I am not inclined to do. The appeal lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th Day of April, 2019

In the presence of:-

The appellant

Ms Mumu for state

Mr. Mwelem - Court Assistant