



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 13 OF 2018

LOREE ILIKWEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 140 of 2016 by

the Senior Resident Magistrate – Hon. C.M. Wekesa delivered on 15<sup>th</sup> June, 2017 at Lodwar)

JUDGEMENT

1. The Appellant was tried of two counts as follows:-

**COUNT I:-**

Robbery with violence contrary to **Section 296(1)** of the **Penal Code** the particulars of which were that on the 5<sup>th</sup> day of March, 2016 at Lodwar Township in Turkana Central within Turkana County jointly with others not before the court robbed **AKOPE EKALI EWOI** of her cash Kshs.70,000/-, Nokia 168 Mobile phone valued at Kshs.2000/= and TECHNO phone worth Kshs.2,000/=.

**COUNT II:-**

Rape contrary to **Section 3 (1) (a) (c) (3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 5<sup>th</sup> day of March, 2006 at Kanamkemer Area in Turkana Central Sub-county within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **AKOPE EKALI EWOI** without her consent.

2. He was tried, convicted and sentenced to serve imprisonment for a period of five (5) years on Count I and seventeen (17) years on Count II. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

*(a) No evidence was tendered to link him with the pregnancy of the complainant.*

*(b) Vital prosecution witnesses were not called.*

*(c) Prosecution case was based on hearsay evidence.*

*(d) His defence was rejected without cogent reasons.*

**SUBMISSIONS**

3. When the Appeal came up for hearing before me the Appellant who was unrepresented filed two sets of written submissions which he relied upon while Mr. Mongare for the DPP opposed the appeal and supported his conviction. On behalf of the Appellant it was submitted that his identification was not safe as the complainant stated that she was accosted by someone she had not known before that date and it was stated that the prosecution case was full of contradictions and the offence of rape was not proved. The Appellant relied upon the case of **BEN MAINA MWANGI v REPUBLIC NAIROBI HCCRA NO. 471 Of 2007**. It was submitted that he was not arrested at the scene and the identification parade was not properly conducted.

4. On behalf of the prosecution it was submitted that the evidence of **PW1** was sufficient and therefore required no corroboration. It was stated that the prosecution evidence was neither hearsay nor contradictory and that the prosecution case was proved beyond reasonable doubt.

5. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

*“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**

6. It was **PW1 AKOPE EKALI**’s evidence that on 3/3/2016 the Appellant carried her to Kanamkemer and locked her inside a house. He later on took her to his house and raped her before robbing her of the two bags, tents and money, ATM card and two mobile phones. She was able to identify the Appellant because she slept with him the whole night. He had also carried her on a motor cycle to Kanamkemer and was able to see him. At night the Appellant was using flash light from his phone which aided her in seeing him. She later attended an identification parade and she was able to identify the Appellant.

7. **PW2 BENJAMIN ALILA** testified that he had rented out his houses to someone who later at night came with a woman. The following day he heard someone banging the door and when he opened a lady came out and ran away very fast. She later came with the police and was able to identify the Appellant who had paid him two months’ rent. **PW3 BEN KEMBOI** a clinical officer produced a P3 form in respect of the complainant who had tenderness at the neck, chest and marks from the upper and lower limbs he confirmed the degree of injury as harm and stated that the complainant was pregnant at the time.

8. **PW4 CONSTABLE GIBSON KURIA** recorded the report from **PW1**, issued her with P3 form, visited the scene and interviewed witnesses. He conducted an identification parade upon the arrest of the Appellant who was positively identified by the complainant.

9. When put on his defence the Appellant stated that he was engaged in the business of buying animals and on the material day he bought five goats and on 3<sup>rd</sup> he arrived in Nadapal when Kenya Police Reservists demanded to know whose goats they were. They then arrested him on allegation that he was a thief. At the police station they demanded for money which he did not have leading to his being charged in court.

## **ANALYSIS AND DETERMINATION**

10. From the proceedings and submissions herein the only issues for determination:-

*1) Whether the Appellant was properly identified.*

*2) Whether the prosecution case against the Appellant on both counts was proved to the required degrees.*

11. On the issue of identification the evidence on record is that **PW1** was with the Appellant while he carried her on a motor cycle. He spent the entire night with her having sex and **PW1** was able to pick him up at an identification parade which was properly conducted upon his arrest. **PW2** who had rented the house to him also testified and identified him as the person who had rented and paid him two months’ rent for the house where he locked the complainant. **PW2** placed the complainant in the same house having opened for her the door which had been locked by the Appellant from outside. I am therefore satisfied that the identification of the Appellant was safe from any error.

12. On proof of the prosecution case I have noted that the trial court convicted the Appellant on simple robbery contrary to **Section 296(1)** on the basis that there was no indication that the accused was armed with any dangerous weapon and that her evidence was not clear at what stage her bags were stolen. Having looked at the evidence tendered I find that the trial court misapplied the law and therefore fell into error. As stated in her Judgement the offence of robbery with violence is proved when any of the elements of the offences namely:-

*a) Armed with any dangerous or offensive weapon.*

*b) Is in company of one or more persons.*

*c) Immediately before or immediately after the time of robbery the offender wounds, beats, strikes or used other personal violence to the person.*

13. Having found as a fact that the Appellant sexually assaulted the complainant after robbery and threatened her with death, I have further weighed this against the complainant’s evidence that the Appellant and his accomplice took her by force and put her on the motor cycle and the medical evidence confirmed injuries. It is clear to my mind the elements of robbery with violence was proved against the Appellant. However, the Appellant having not been warned at the time of the hearing of the Appeal I will give him the benefit of the lesser sentence issued by the trial court and will dismiss his appeal without interfering with the trial court finding thereon.

14. On the charge of rape I am satisfied that the same was proved beyond any reasonable doubt through the evidence of **PW1** and **PW3** who confirmed that there was penetration. I therefore find and hold that his conviction on the second count was safe and the sentence issued was lawful and will therefore not interfere with the same.

15. Having re-evaluated the evidence tendered before the trial court and having taken into account the circumstances of this case where the Appellant not only stole the complainant's physical items but also stole her emotional items by having unlawful sex with her which act in itself qualify as a dangerous weapon, I find no merit on the appeal herein and dismiss the same. I hereby affirm the trial court's find on both conviction and sentence. The Appellant has right of appeal.

**Dated, delivered and signed at Lodwar this 3<sup>rd</sup> day of April, 2019.**

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ *for the Respondent*

\_\_\_\_\_ *for the Appellant*

*Accused* \_\_\_\_\_

\_\_\_\_\_ *- Court assistant*