



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 15 OF 2018

LLAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Sexual Offences Case No. 68 of 2017 by the Senior Resident Magistrate - Hon. C.M. Wekesa delivered on 22nd February, 2017 at Lodwar)

JUDGEMENT

1. The Appellant was charged with the offence of rape contrary to **Section 3 (1) (a), (b), (3)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 26th day of April 2017 at [Particulars withheld] Village in Loima sub-county within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **EE** without her consent.
2. He faced an alternative charge of committing an indecent act with an adult contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 26th day of April 2017 at [Particulars withheld] Village in Loima sub-county within Turkana County intentionally touched the vagina of **EE** with his penis against her will.
3. He 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) *He was tried and convicted as an adult while he was a juvenile aged (seventeen) 17 years.*
 - b) *The prosecution case was full of contradictions.*
 - c) *The case should be sent for re-trial.*

4. When the appeal came up for hearing the Appellant who was not represented filed written submissions which he relied upon while the Respondent through Mr. Mong'are opposed the appeal.

SUBMISSIONS

5. On behalf of the Appellant, it was submitted that by her action of sleeping outside naked the complainant should have been declared mentally disturbed and should have been subjected to **Section 163** of the **Criminal Procedure Code**. It was submitted that the prosecution case was made up by **PW1** and **PW2** and that he was not properly identified leading to a possibility of mistaken identity. It was finally submitted that the prosecution case was not proved beyond reasonable doubt.
6. On behalf of the Respondent it was submitted that the Appellant did not raise the issue of his age at the trial and that there was no evidence of an existence of a grudge between the Appellant and the family of the complainant. It was stated that the contradiction on time of the occurrence of the offence was very minor.
7. This being a first appeal the court is under a duty to re-evaluate the evidence tendered by the prosecution while giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses. See **OKENO v REPUBLIC [1972] EA 32** which I hereby do:-
8. It was **PW1's** evidence that while she was sleeping outside the house, the Appellant whom she knew as her uncle went and raped her and she called one E who came with a bright torch through which she was able to see the Appellant. In the morning she informed her uncle's wife before being taken to Lodwar County Hospital. In cross-examination she stated that she did not consent to having sex, with the

Appellant. **PW2, ETIIR ALONG'U** corroborated **PW1's** evidence and stated that when the complainant screamed she shone the torch and was able to see the Appellant who she knew as the son of AC. This evidence was further corroborated by **PW3** who stated that she heard **PW1** call the name of **PW2** while she was twenty meters (21) away. In the morning **PW1** informed her that the Appellant who was a brother of her husband had raped her.

9. **PW4 ANDREW EMURIA** produced P3 form on the complainant confirming that her hymen was broken, labia minora and majora had bruises with discharge form vagina. He formed an opinion that there was evidence of actual penetration. **PW5 CORP. KIRAGU MBATA** the investigating officer stated that on 27th April 2017 while at the police station the complainant **PW1** in the company of relatives reported the incidence, issued her with P3 form and through investigations established that the Appellant was sleeping some twenty five (25) meters from **PW1** and her relatives when he moved and raped her.

10. When put on his defence the Appellant stated that in March he was in Lorengekipi herding animals when he brought some goats to Lodwar which he sold. He went to Kaitethe where on arrival a crowd arrested him.

11. From the record and submissions herein I have identified the following issues for identification in this appeal:-

- a) *Whether the Appellant was positively identified?*
- b) *Whether the prosecution case against the Appellant was proved?*
- c) *Whether the Appellant's age was in issue?*

12. On the issue of identification of the Appellant whereas the incidence occurred at night from the evidence tendered before the trial court, it is clear that the Appellant was known to the complainant, he had served him dinner together with others and is uncle of the complainant and lived with her in the same compound. Through the aid of the torch of **PW2** the Appellant was properly identified and therefore find and hold that there was no mistaken identity of the Appellant.

13. On the issue of proof of the prosecution case, the complainant's account was corroborated in material particulars by that of **PW2** and **PW3** as to what had happened to her and **PW4** the clinical officer confirmed that there was penetration thereby proving the offence as charged. I am therefore satisfied that the Appellant's conviction was safe.

14. Whereas the Appellant has raised the issue of his age at this stage of appeal from the committal records I have noticed that the Appellant's age was placed at twenty (22) years and having not raised the issue before the trial court I find no fault with the prosecution of the Appellant herein as an adult and would therefore dismiss this ground of appeal.

15. In the final analysis, I am satisfied that the appeal herein lacks merit having noted that the Appellant's conviction was safe and therefore dismiss the same and affirm the trial court's finding on both conviction and sentence.

16. The Appellant has right of appeal.

Dated, delivered and signed at Lodwar this 6th day of December, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistant*