



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 1 OF 2018

ROBERT LOKWAWI EMURON *alias* ERUU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 654 of 2016

by the Senior Resident Magistrate - Hon. C.M. Wekesa

delivered on 19th December, 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 night of 17th October 2016 at around 3.00 a.m. in Turkana sub-county in Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **RAL** by use of force and threat.

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

a) He was convicted on insufficient evidence.

b) Vital prosecution exhibits including the complainant's top dress and shorts alleged to had been torn or had blood stains were not produced in evidence.

c) He was convicted on the evidence of the complainant and her husband without corroboration.

d) His defence was not considered

SUBMISSIONS

3. At the hearing of the appeal the Appellant who was not represented submitted written submissions and what he termed substituted grounds of appeal which he relied upon while Mr. Mong'are appeared for the Respondent and opposed the appeal.

4. On behalf of the Appellant, it was submitted that he was falsely accused of the charge by the police under **PW4** having been arrested at a drinking den with the aim of obtaining money from him. It was submitted to confirm that he was framed up, the P3 form produced in court was not fully completed and the evidence of **PW3** was not conclusive since based on the age of the complainant who was over 18 years and of child bearing, her hymen could not be perforated.

5. It was stated that there was contradiction in the testimony of **PW1** and **PW4** on the dates of the incidence and the conditions prevailing at the time were not suitable for identification calling for the need for identification parade. It was submitted that the prosecution case was not proved beyond reasonable doubt.

6. On behalf of the Respondent it was submitted that the Appellant was clearly identified by the complainant in circumstances which were favourable for identification. It was submitted that the sexual act was not consensual but forcibly obtained and that the evidence of **PW1** and **PW2** though being his wife and husband respectively was credible without any contradictions.

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**.

8. It was the prosecution's case that on 17/7/2016 at 3.00 a.m. when the complainant **PW1** and her husband **PW2** were sleeping outside their house the Appellant and three others known by *alias* "head master" and "PC" passed by their home in a truck started to beat her up and causing injuries to her head before pulling her towards the roadside, the Appellant then forced her inside a culvert and told her to lie down on her back before having sex with her while the other people stood by the road waiting for him. It was her evidence that she never consented to have sex with the Appellant whom she was able to see well by the use of street lights and lights from the vehicles and motor cycles on the road. She further stated that the moon light was also bright and that she knew the Appellant and his group since they were young and knew the Appellant as "ERUU".

9. **PW2 MOSES ERIEKA** corroborated **PW1's** evidence and stated that as they were preparing food at the complainant's sisters hotel, the Appellant came with a torch which he shone on them before leaving only to return with three other people after 15 (fifteen) minutes. He was hit and ran away leaving **PW1** behind whom they pulled away while beating her up. It was his evidence that there were street light through which he was able to see the Appellant whom he had known for four (4) years. He went to seek help but no one was willing to come to them and since people feared the Appellant.

10. **PW3 NGASIKE JOHN KIONGA** a clinical officer produced P3 form on the complainant confirming that she had been physically and sexually assaulted and that there was penetration since her hymen was perforated and she was bleeding slightly. **PW4 CORP. BENARD MOROKO** the investigating officer in this matter received the report and investigated the matter and recorded statements from the witnesses before receiving a tip off from the members of the public of the Appellant's whereabouts whom they arrested and charged with the offence. He visited the scene where he confirmed that there was indication of a struggle and when he interviewed the neighbours they confirmed the incident but declined to record statements for fear of victimization by the Appellant. It was his evidence that the Appellant was well known for being involved in a series of cases within Lodwar town.

11. When put on his defence the Appellant stated that he was a mason from Gold Area and that on 26/10/2016 he went to Lodwar town to see his ailing sister and on 27/10/2016 on his way back he met police officers patrol at Kanamkemer Junction–Roberts who arrested him and charged him with an offence he did not know anything about.

12. From the record of proceedings and the submissions herein I have identified the following issues for determination:-

a) Whether the Appellant was positively identified?

b) *Whether the prosecution case against the same was proved beyond reasonable doubt?*

c) *Whether the Appellant's defence was considered?*

13. The law on identification has been stated by the Court of Appeal in the case of **CLEOPHAS OTIENO WAMUNGA v REPUBLIC, CRIMINAL APPEAL NO. 20 OF 1989** at Kisumu as follows:-

*“We now turn to the more troublesome part of this appeal namely the Appellant's conviction on count 1 and 2 charging him with the robbery of Indakwa (PW1) and Lillian Adhiambo Waguda (PW3). Both these witnesses testified that they recognized the Appellant among the robbers who attacked and robbed them. . . What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the Appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a Defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the Defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ in the well known case of **REPUBLIC v TURNBULL [1976] 3ALL ER 549** at page 552 where he said:-*

“Recognition may be more reliable than identification of a stranger but even the witness is purporting to recognize someone whom he knew, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. . .

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lesser but the poorer the quality the greater the danger.”

14. With this in mind I now turn to the trial court's treatment and analysis of the issue of identification as follows:-

“I also find that identification of the accused person is that of recognition, according to PW1 both accused persons were known to her as they had grown up within the neighborhood. In addition to the above the two of them had passed by the place where PW1 and her husband were, they had a torch i.e. the 1st accused had a torch, they were in the company of two other people. PW1 recognized them. They returned again and forcefully led her to the scene. PW1 was categorical that there were street lights on the road and that as she was forced to lie in the culvert, she could see the lights from the vehicles which were passing by the road. . . From the above I am of the humble view that conditions for identifying the accused person were proper.”

15. The evidence on record as per **PW1** was that there was street lights, the moonlight was bright and there was light from the passing motor vehicles and motor cycles. She was able to recognize the Appellant with his *alias* name of “**ERUU**”. She identified the two other people he was with as “head master and “**PC**”. She had seen the Appellant for the first when he came to where they were before going away. She was with them when they pulled her to the road and was with the Appellant when he forced her inside the culvert before telling her to lie on her back before forcing himself into her. This evidence was corroborated in material particulars by that of **PW2** her husband. I therefore find and hold that the conditions prevailing were ideal for the identification of the Appellant who was identified by recognition by both **PW1** and **PW2**.

16. When put on his defence the Appellant was silent on what happened on 18th day of October 2016. He only testified on what happened on 27/10/2010. I have contrasted this evidence against the prosecution evidence and the Appellant's submissions and find that the same had no merit and was rightly rejected by the trial court.

17. On the issue of whether the prosecution case was proved beyond reasonable doubt, **PW1**'s evidence was corroborated in material practice by that of **PW2** and **PW3** who produced the P3 form confirming that there was penetration of her vagina by the Appellant's penis. She did not consent to the said act and therefore find and hold that the conviction of the Appellant was safe.

18. 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.

19. 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*