REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 22 OF 2016

NANOK LONYANGAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence in original Lodwar PMCR 987/2011

delivered on 31/8/2012 by H.O BARASA Senior Resident Magistrate)

JUDGMENT

The appellant **Nanok Loyanae** was charged in the magistrate's court with the charge of rape contrary to section **3(1) (a) C of the sexual offences Act Act No.3 of 2006.** The particulars of the offence are that on the 20th day of December, 2011 in Turkana Central District within Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of **R A** by use of force.

The appellant was also charged with an alternative count of committing an indecent act with an adult contrary to section11 (a) of the sexual offences Act. The particulars of the offence are that on the 20th day of December 2011 in Turkana Central District within the Turkana County unlawfully and intentionally touched the vagina of R A with his penis against her will. The appellant finally faced a charge of assault **C/S 251** of the penal code. The particulars of the offence are that on the 20th day of December, 2011 in Turkana Central within Turkana County unlawfully assaulted R A thereby occasioning her actual bodily harm. After the trial in which six prosecution witnesses testified and appellant gave sworn statement, he was convicted and sentenced to ten (10) years imprisonment on count 1 and two (2) years imprisonment on count 2. The imprisonment term to run concurrently. He was dissatisfied with the conviction and sentence and filed this appeal.

The main grounds in the appellant's petition of appeal are that the learned trial magistrate erred in not considering that his long stay in police custody was unconstitutional; that he failed to consider that no exhibits was produced; that he was not examined by a doctor; that he failed to consider that PW1, PW2 and PW3 were all family members, and finally that the learned trial magistrate did not consider his defence.

The appellant filed written submission in support of this appeal. He submitted that there were material considerations on the date of the offence by prosecution witnesses who indicated the date to be 27/12/2011 while this stated it was on 20/12/2012. He submitted that these contradictions affected the credibility of the witnesses. He referred me to the decision in **Richard Apela – V – Republic 1981 CA 945** in support of this contention. Appellant further submitted that the trial magistrate relied on the evidence of a single identifying witness which was not sufficient to …….a conviction. He relied on the decision in **Maina – V – Republic 1970 EA 370**; he further submitted that crucial witnesses particularly one Abraham was not called to testify which created a doubt in the prosecution evidence; that the clinical evidence adduced was shaddy and finally that the trial magistrate was not impartial in his judgment.

Mr. Gikunda for the Respondent opposed the appeal. He submitted that the offence was committed at 1pm, the complainant was known to the appellant; and that the sentence of ten (10) years imprisonment was legal and proper.

This is a first appeal. On first appeal the first appellate court is enjoined to review and re-evaluate the evidence before the trial court and arrive at. It's our finding but always bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify (**Ekeno V Republic 1972 EA 32.**

The evidence before the trial court was that **PW1 R A A** the complainant on 20/12/2012 went to her from where she worked upto 1.00pm when she went to the home of one Abraham. When there the appellant came and asked her to go with him. She agreed and while on the way the appellant wrested her down, polled her into the bush and had sexual intercourse by penetrating his penis in her vagina. He raped her severally and until she lost consciousness. She came to that 5am the next day when she went to the chief where she reported the matter she was taken to hospital where she was treated. The matter was reported to police. **PW2 James Anyik** a Kenya Police Reservist acting on instruction of the chief arrested the appellant PW3 L K the son of the complainant received information on 21/12/2011 at 3pm. That his

mother was lying at Mkeka grounds within Lodwar town. He went there and found her with injuries. He took her to Lodwar Hospital where she was treated. He noticed that she had injuries on the mouth, nose and neck.

PW4 Ben Kemboi a clinical officer attached to Lodwar District Hospital produced a P3 form filled by his colleague Mr. Lokopon who examined the complainant on examination the complainant was found to have pains on the chest, neck and head. The approximate age of injury was 3 days and degree of injury assessed as harm. On the genitalia, there were no bruises, no discharge noted, no deposits and urine examination had normal results. From the history the clinical officer found that there was rape; as the test did not show this.

The appellant gave sworn evidence. He testified that on 22/12/2011 he went to herd his goats and later was informed that his wife had taken a child to hospital. He went to the hospital at Nadoto and found she had been attended to. She then went to the home of one Nakamu from where he was arrested by police officers who alleged that he had stolen a camel. He was taken to the AP Camp where he was re-arrested and later charged with the present offence.

The appellant was charged with the offence of rape contrary to section 1 **(a) (b) (c)** as reads with section **3(3)** of the sexual offences Act. The section 3 provides a person commits the offence of rape if

a. He or she intentionally and unlawfully commits an act which causes penetration; with his or her genital organs

b. The other person does not consent to the penetration or

c. The consent is obtained by force or by means of threats or intimidation of any kind

2. In this section the term intentionally and unlawfully has the meaning assigned to it in section 43 of the Act.

3. a person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten (10) years but which may be enhanced to imprisonment for life.

The prosecution in a charge of rape must therefore establish the ingredients of the offence of rape which are

a. That there was an act which caused penetration with his or her genital organ,

b. The act was intentional and unlawful

c. That the other person did not consent to the penetration or the consent obtained by threat or intimidation

d. That the accused has been positively identified as the person who committed the rape

Was there an act of penetration? PW1 the complainant in her evidence stated

"He wrestled me to the ground. He tore my lesso. He also held me by the neck. He wrestled me to the ground and had sexual intercourse with me. This is the lesso I wrapped around my waist. I was injured following the incident. He raped me. He had sex with me. He forcefully inserted his penis into my vagina. He was violent. The incident occurred at 7pm.

The clinical officer who examined the complainant only noted the physical injuries sustained. On examination of the genital area there were no tears on the vagina and no bruisers on the labia minora and labia majora. The external genital was normal and no spermatozoa were seen.

The appellant submits that the medical report does not support evidence of any sexual contact, as no injuries in the genital area there were no tears on the vagina and no bruises on the labia minora and labia majora. The external genital was normal and no spermatozoa was seen.

The appellant submits that the medical report does not support evidence of any sexual contact, as no injuries in the genitalia were noted or that the hymen was torn of injured. In his submission the absence of these in the medical report shows that there was no evidence of sexual intercourse or penetration which is an ingredient for the offence of rape. An offence of rape is committed if a person intentionally and unlawfully commits an act which causes penetration with his or her genital organ. Penetration is defined in section 2 of the act as

"The partial or complete insertion of the genital organ of a person into the genital organ of another person"

What the prosecution has to prove therefore is penetration which heed not be complete or cause bruises or injuries to establish the offence, the court of appeal in **Mark Oiruri Mose – V – Republic 2013 EKLR** on this issue stated.

"Many times the attacker does not fully complete the sexual act during commission of the offence. That I s the main reason why the law does not require that the evidence of spermatozoa be availed. So long as there is penetration whether only on the surface. The ingredients of the offence is demonstrate and penetration need not be deep inside the girls organ"

It is therefore not necessary as the appellant submitted that the presence of bruises or injury to the hymen or presence of spermatozoa to be established for the offence of rape to be complete. I am satisfied that the oral evidence of the complainant that the appellant did commit an act of penetration to have established the fact.

The other ingredient the prosecution has to establish is that there was lack of consent in the part of the complainant to the act of penetration. This was emphasized in the **Oyiar – V – Republic 1985 KLR 353** where the court of appeal held.

> **1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not**
>
> **2. To prove the mental element required in rape the prosecution has to prove the complainant physically resisted or if she did not that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.**
>
> **3. Where a woman yields through fear of death or through duress it is rape and it is no excuse that the woman consented first if the offence was afterwards committed by force or against her will nor is it any excuse that she consented after the fact"**

Section 42 of the Act provides that a person consents if he or she agrees by choice and has the freedom and capacity to make that choice. Section 43 provides when an act is deemed intentional and unlawful to include any coercive circumstances, done by pretence of fraudulent means. The coercive circumstances include use of force on the complainant or his property, theft of harm or abuse of power or authority.

In this case the complainant testified that the appellant wrestled her down, he tore the lesso she was putting on, and then had sexual intercourse with her. She sustained injuries on the head, and chest for which she was treated and documented in the P3 form, those injuries sustained in my view support the assertion that the appellant used force to execute his act. That in my view demonstrated lack of consent on the part of the complainant to the act of penetration.

The other ingredient of the offence the prosecution must establish is the positive identification of the accused as the person who did the act of penetration. The appellant in his submission faulted the trial magistrate for relying on the evidence of a single witness in both the identification and the proof of penetration. Positive identification of an accused is an important element which the prosecution must establish. In this appeal the complainant stated that she knew the appellant well. Indeed she stated that they were neighbours. They had met at the home of Abraham and he requested that they go together which they did. This was therefore not an issue of identification of a ……bar recognition of a person known to her. In **Anjoroni & 2 others – V – Republic 1976 – 80 KLR** the coat of appeal stated.

"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in one form or other"

The learned trial magistrate on the issue of identification rendered himself thus

> **"There is nothing on record top show that the complainant had a grudge against the accused and/or that she had any reason to frame him p. The accused was her neighbor and it is unlikely that she was mistaken as to the person who raped her. I am satisfied that she told the court the truth"**

I concur with the trial magistrate that the appellant was positively recognized as the person who raped her. She knew him before, it was during the day and conditions for positive recognition were favourable.

The appellant submitted that the prosecution did not call crucial witnesses in particular one Abraham from whose home the complainant stated, to she and the appellant left. The prosecution is only obliged to call witnesses to prove a fact. No number of witnesses are required to prove a fact; the fact that the prosecution did not call Abraham did not create a gape in their case. His non-attendance in my view not a material omission which affected this prosecution case.

The charge against the appellant was drafted as follows

> **"Rape contrary to section 3(1) (a) (c) 3 of the sexual offences Act Act No.3 of 2006.**

The particulars of the offence are that on the 20th day of December, 2011 in Turkana Central District within Turkana County, intentionally and unlawfully caused his penis to penetrate the vagina of R A <u>by use of force</u>

The requirement of section 3 1(b) is that the other person does not consent to the penetration - luck of consent being an important ingredient of the offence must be reflected in the particulars of the charge sheet which the use of force may reflect the lack of consent, in my view the particulars must be specific that that act of penetration was done without the consent of the complainant. In this appeal however I do not find that the appellant was unduly prejudiced by that omission.

The appellant was sentenced to ten (10) years imprisonment which was the minimum sentence provided for. The sentence was therefore neither excessive or illegal.

In the result, I find that the conviction was proper and based on evidence and the sentence legal. I find no merit in this appeal. I uphold the conviction and affirm the sentence of ten (10) years imprisonment imposed. The appeal is hereby dismissed.

Dated at Lodwar this 18th day of December, 2016

<u>S N RIECHI</u>

JUDGE

Court – judgment read over and delivered in open court in presence of appellant, Mr. Kimanthi for state and Ariki interpreter English/Turkana this 11th day of January, 2017.

S N RIECHI

JUDGE