



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO.6 OF 2014

LEONARD WANJALA MASIBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Arising from the judgment of Hon. J.A. Nyagol R.M in Sirisia PMCC NO. 518 of 2012]

JUDGEMENT

1. This is an appeal arising from the judgment of Hon. J.A. Nyagol R.M in PMCC NO. 518 of 2012. In the case the appellant Leonard Wanjala Masibo was faced with the offence of rape contrary to section 3(1) (a) (b) & (c) of the Sexual Offences Act with an alternative count of indecent assault. He also faced a second count of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code.
2. Upon hearing the case the trial court convicted the accused of the main count 1 & count 2 and sentence the 10 years for count 1 and 7 for count 2. The sentence was to run concurrently.
3. The appellant was dissatisfied with both the conviction and sentence and appealed to this court and his grounds are that; the trial court erred in law and fact in failing to consider that there was no sufficient evidence medically as required by section 36(1) of the Sexual Offences Act to connect the accused to the offence, there was no independent evidence to prove the case beyond all reasonable doubt; the trial court failed to evaluate the evidence before it as the same was a fabrication, speculative, Conjective, distorted, unreliable and lacked probative value to justify the decision arrived at by the court, the court over looked material factors, and the trial court rejected the alibi raised by the defence.
4. The appellant had both written and oral submissions and the same may be summarized as follows, that the complainant stated there was a tin lamp lit when the assailant entered her house however the light was not sufficient to have identified the appellant, secondly the complainant did not say that she personally identified the appellant's voice, further the evidence of the complainant in chief varied with her evidence in cross examination. The P3 form was not clear on how the complainant bled, no weapon used was mentioned in the P3 form, the evidence of the clinical officer was not forthright, the blood on the petticoat was never analyzed; **PW6's** evidence contradicted the evidence of **PW1, PW2 & 3**, the court ought to have listened to the defence.
5. The State opposed the appeal and urged that all the ingredients of the offence of rape were proved in that the victim had a lamp on as she was being raped; she knew the appellant as they were neighbours and he was known to her, the ordeal lasted 1 hour, and that the evidence of **PW4** the doctor corroborated the incidence of rape. Further that the appellant forced entry by breaking a wooded window. It was argued that all in all the prosecution was able to prove its case.

6. This is the first appellate court and it has the duty to consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion bearing in mind that the trial court had the benefit of seeing and observing the witnesses first hand. ***See Okeno Vs. R. [1973] E.A.***

7. The evidence by the prosecution is that the appellant failing to gain entry through the door to **PW1's** house, he broke a wooden window, got and raped PW1 for a period of one hour. As the appellant entered the house and raped the applicant the tin lamp was on allowing the complainant to identify the appellant who is her neighbor. After the incident, the complainant informed her sons **PW1** and **2** and they went to the appellant's house and found him, with the same clothes the complainant had seen him with while raping her and the same had soot and marks that went on to the T-shirt as he gained entry into the complainant's house.

8. The appellant denied the offence and stated that on 25.9.2012 while asleep some people went for him in his house tied him up and took him to the A.P camp in Sirisia and later to Malakisi police station. He called his mother and sister as witnesses. They testified that they had supper with him on the material day between 7 and 8 pm and did not hear him leave his house.

9. The issue of determination is whether or not the complainant was raped as alleged and if so whether there is proof to the required standard to link the appellant to the offence.

10. The offence of rape is defined in the Sexual Offences Act as follows;

3.(i) A person commits the offence of rape if;

(a) He or she intentionally and unlawfully commits an act which causes penetration with him or her genital organs.

(b) The other person does not consent to the penetration.

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

11. The complainant testified that the appellant forcefully entered her house and forced himself to have sex with her for over one hour. She did not consent to the sexual intercourse. The appellant threatened her in the process when she attempted to scream.

12. It is my view against the evidence of **PW1** which evidence I believe as she appears truthful and consistent and the evidence of rape is corroborated medically involving the proviso to section 124 of the Evidence Act. I will take her evidence as the truth in arriving at a conviction.

The proviso to Section 124 provides

"124

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victims of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

13. I therefore agree with the decision of the trial court and do not fault the same on both counts.

14. As for the sentence the appellant was given the minimum sentence for rape on the first count. The sentence on the 2nd count appears reasonable. I do not fault the trial court either.

15. Consequently, the appeal is hereby dismissed.

DATED and DELIVERED at BUNGOMA this 16TH day of FEBRUARY, 2017

ALI-ARONI

JUDGE.