



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**LODWAR HIGH COURT CRIMINAL APPEAL NO. 30 OF 2016**

**LAKADEL LORENGEI PETKO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(An appeal from conviction and sentence in original PMCR 496/2012 delivered on 28/1/2014 by W Washira Senior Resident Magistrate)**

**JUDGMENT**

The appellant **Lokodel Lorengei Perko** 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 the offence are that on the 11<sup>th</sup> day of July, 2012 at Katitu location in Turkana County, he intentionally and unlawfully caused his penis to penetrate the vagina of **R E** without her consent. The appellant faced an alternative charge of indecent assault contrary to section 6(b) of the sexual offences Act.

The particulars of the offence are that on the 11<sup>th</sup> day of July, 2012 at Katilu location in Turkana County he unlawfully and willfully touched the vagina of **R E** with his penis against her will.

After full trial where 4 witnesses testified for the prosecution and the appellant gave sworn evidence, the appellant gave sworn evidence; the appellant was convicted in the main charge and sentenced to serve 10 years imprisonment. Dissatisfied with the conviction and sentence, he filed this appeal.

His main grounds of appeal advanced in his petition of appeal are that he was not examined by the doctor; that the complainant's first report to police was for an offence of assault and not rape; rather was an afterthought and that no exhibits were produced during the trial.

Briefly the evidence before the trial court was that on 27/7/2012 at about 8pm **PW1 R A** the complainant was in her house with 2 children, whom she was feeding. The appellant went there while armed with a stick. He hit her on the neck and head and she became unconscious. When she came to she found she had no clothes on and had been raped. While there a village elder **Peter Lawan** and **Anna Napeyo** came and took her to Katilu dispensary and later to Lokichar Health Centre. She was treated and reported the matter to police.

**PW2 E N D** was at his home having supper when he heard the complainant running outside his house while screaming. He came out and it was the accused who was chasing her. He saw the appellant catch up with her and kicked and punched her. He tried to stop him but appellant threatened him and the witness went away. **PW3 Hasan Weli Mohammed** who produced the P3 form prepared by his colleague **Dorothy** testified that upon examination it was found that the complainant had bruises on the scalp and

face, laceration marks on the chest, bite marks on the finger and degree of injury assessed as harm. On part c there was nothing abnormal noted on the labia minora and majora or cervix except that there were epithelial cells which means there was an infection. PW4 corporal Godfrey Cheborer who re-arrested the appellant testified that appellant was brought to the police station as allegations of assault and rape.

The appellant in his sworn evidence stated that on 11/7/2012 he fought and he was beaten. He denied raping the complainant. This is the evidence upon which the trial court found the appellant guilty.

Mr. Kimanthi learned prosecuting Counsel for the Respondent did not oppose the appeal. He submitted that the original report made to police was of assault. The evidence of the clinical officer supported a charge of assault and that the P3 form was not clear on rape. He submitted that from the evidence of the doctor we can conclude that there was no rape.

This being a first appeal, this court is enjoined to consider and evaluate the evidence and come to its own conclusions. The appellant raises two main issues in this appeal, firstly whether the offence of rape was proved, and secondly the charge against him ought to have been that of assault and not rape.

In respect to the first issue whether the charge of rape was proved; the learned trial magistrate in her judgment stated.

**“PW1 was able to identify the accused. I find this identification proper. From P3 form, PW1’s evidence, I find rape occurred”.**

With due respect to the trial magistrate the complainant’s evidence was that as a result of an assault she became unconscious and when she came to, she found she was naked her clothes having been torn and removed. She concluded that she had been raped as she stated in her evidence.

**“the accused raped me. I know this because when I regained my consciousness I found a wet substance in my vagina. There was also sand inside. I felt pain on the lower abdomen. I could not sit or walk properly; I fainted when the accused hit me. I passed out”**

According to the complainant, the only evidence that she was raped was the torn clothes and presence of wetness and sand in her vagina. The clinical officer who examined her did not find anything abnormal in her vagina and was unable to confirm whether there was any penetration to confirm rape. In the premises I agree with Mr. Kimanthi that the conviction on rape was premised on unsafe prosecution evidence.

The next issue is whether the appellant assaulted the complainant on that material day of 11<sup>th</sup> day of July, 2012. PW1 testified that on the material day the appellant while armed with a stick went to where she was and started beating her using the stick which was shaped like a hammer. He hit her on the neck and head. **PW2 E N D** a neighbor testified that he heard screams and coming out found the appellant chasing the complainant and then started kicking and punching her. He tried to rescue her but the appellant turned to him and kicked him. Pw3 the clinical officer confirmed that on examination the complainant was found to have sustained injuries on the chest, scalp and face. She also had bite marks on the finger. Eh assessed the degree of injury as harm. PW4 corporal **Godfrey Cheborer** the police officer confirmed that the complainant made a report of assault and rape. The appellant in his evidence admits the existence of a fight on the material day but blames other people. This is the offence the appellant should have been charged with as there was sufficient evidence. The prosecution in its wisdom did not include the charge of assault occasioning actual bodily harm in the charge sheet. This court therefore sitting on appeal has no power to an appeal to convict a person in which the appellant was never charged (see **Kalu – V – Republic 2010 KLR** where the court of appeal observed.

**“with the greatest respect to the trial judge, there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was not charged. All the provisions of the criminal procedure code which are under the heading convictions for offence other than those charged” and beginning with section 179 upto 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a**

**person is charged with a more serious offence.**

This court while it has powers under section 354 of the criminal procedure code to alter a finding, the same can only be in respect of a cognate and minor offence. In the result, I allow the appeal,quash the conviction for rape and set aside the sentence of ten (10) years imprisonment imposed. I direct that the appellant **LOKAPEI PETKO** be released forthwith unless otherwise lawfully detained.

Dated at Lodwar this 2<sup>nd</sup> day of March, 2017

**S N RIECHI**

**JUDGE**