



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 40 OF 2014

NASHON AKILENG AMOS..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal Against conviction and sentence of D.O. Ogola Chief Magistrate Busia In Cr. Case No. 1662 of 2013 delivered on 5th November 2014)

JUDGMENT

1. Nashon Akileng Amos (**The Appellant**) was on 5th November 2014 convicted of the Offences of Defilement of a Girl contrary to Section 8 (1)(4) of the Sexual Offences Act (Act No. 3 of 2006) and Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code. Upon conviction, the Court passed a sentence of 15 years imprisonment. In this Appeal the Appellant challenges both conviction and sentence.
2. It had been alleged that on Count 1, that on the 18th day of September 2013, at 04.00 hrs at [Particulars Withheld] within Busia County, The Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of C A a child aged 17 years. In Count 2, the allegation was that on 18th day of September 2013 at 04.00 hrs at [Particulars Withheld] within Busia County, he unlawfully assaulted C A thereby occasioning her actual bodily harm. At trial, seven witnesses gave evidence on behalf of the State while the Appellant and one Denis Asiba Osigerere (DW2) testified for the Defence.
3. C A (PW2 and The Complainant herein) told Court that she was born on 10th October 1996 and produced a Certificate of Birth in proof thereof (P Exhibit 4). On the evening of 17th of September 2013, she visited the home of her grandfather for a funeral. That at about 2.00 a.m., the Appellant came to the funeral and spoke to the Complainant. He told her that he loved her but PW2 rejected his overture. The Appellant who was with one Shadrack then went away. After a short while Shadrack returned alone and told her that the Appellant was waiting for her. She refused to oblige. Later, the Appellant returned back to her and told her that they would meet some other time and then he went away. That, however, the Appellant never went away and would return and continue disturbing her.
4. That at about 4 p.m. (perhaps 4 a.m.!) the witness left the venue in the company of Kevin Ingura (PW3). The evidence of PW2 was that as they walked home, they saw someone calling them from a distance. They were able to recognize the person because of moonlight. The person reached them and at that point PW2 realized that it was the Appellant. The Appellant who was armed with a stick, hit PW3. PW2 ran but the Appellant gave a chase and caught up with her. She started to scream but the Appellant strangled her and dragged her into a bush. The evidence of the witness was that she lost consciousness because of the intensity of the strangle. When she came round, she found the Appellant standing next to her. After a short conversation the Appellant hit her on the

back with a stick. She then noticed that her skirt was bloodstained, her pant was torn, she had pain on her back and her vagina was painful and bleeding. She struggled and reached a home where she got help. Later, her mother escorted her to Alupe Hospital. She produced the treatment book as an exhibit (P Exhibit 1) and P3 Form

(P Exhibit 2).

5. PW3's evidence in court differed from what he had recorded in a statement to Police Officers at Adungosi Police Station. In Court, the witness stated that at about 4.00 a.m. on the fateful day, he was asked by PW2 to walk her home. And as they did so, they were accosted by a man wearing black who hit him (PW3) and ran away. It was his testimony that it was totally dark on that night and he could not identify the assailant. That testimony dramatically differed from the witness statement which was produced as P Exhibit 3.
6. In that Statement the witness stated as follows:-
“On our way home, we could see someone follow us and through the help of moonlight I saw It was Nashon. He hit me with a wooden bar he was carrying and ran away. I went back to the disco where I had come from and found no one there. From far I could hear someone screaming and I went home and because it was at dawn already I started studying for almost one and a half hours and later prepared and went to school.
7. Michael Etyang Ekode (PW4) was on the morning of 18th September 2013 at his house. At about 5.00 a.m. he went out in answer to call of nature and he saw someone bending behind the kitchen. That person called out for help and introduced herself as a grand-daughter to a lady who was known to him (PW4.) The witness found PW2 lying down and in pain. She was holding her stomach. She told the witness that she had been defiled by the son of George Akileng.
8. Alfred Obwire (PW5) is a neighbour to PW4. He was woken on that morning by PW4. He found PW2 lying on the ground with her legs astride. This witness reported the matter to the village elder called Meshack. Later he and another, recovered the pant of the complainant from the scene. This witness also took the Complainant to Alupe Hospital and later escorted her to Adungosi Police Station where she was issued with a P3 Form.
9. On 22nd September 2013, the witness met the Appellant and his brother by the name Akore. That Akore requested him for a meeting at the office of Assistant Chief on 23rd September 2013. On that day the Appellant attended the meeting together with his father while the witness accompanied the Complainant. At the close of the meeting the Assistant Chief advised the complainant to lodge a formal report. Later at 5.00 p.m. he learnt from the Complainant that Nashon (the Appellant) had been arrested. At 9.00 p.m. the Appellant's father visited the home of PW5 and asked him to help the Appellant and complainant to reconcile. The witness refused to intervene. On the following day at 6.00 a.m. the Appellant's brother asked him to help in the release of the Appellant. Again he declined.
10. Wellington Omusol (PW6), was at the material time the Assistant Chief of Aterait Location. On 18th September 2013 he received information that a girl from her village had been defiled and injured. He advised the victim be taken to Hospital. Later, the Assistant Chief visited the complainant while she was undergoing treatment at Alupe Hospital. He observed that the complainant had sustained injuries on her neck and was walking with difficulty. It was his evidence that the complainant informed him that she had been defiled by one Nashon Akileng (the Appellant). On 23rd of September 2013 the witness escorted the Accused person to Adungosi Police Station where he was arrested and charged.
11. The Medical Officer who examined the complainant is Moses Makokha (PW1). He is a Clinical Officer at Alupe District Hospital and at the time of testifying, he had been a Clinical Officer for 13 years. The witness produced the treatment book and P3 Form in respect of the complainant. The witness examined the patient about 10 hours after the incident. In the P3 form he observed that the hymen of the complainant was torn with active bleeding. He also observed scratch marks over the anterior part of the neck with tenderness. There was also tenderness to the complainant's back. The Doctor also remarked in his report that **“besides the act of rape patient sustained bodily harm.”**

12. The Police Officer who investigated the complaint herein is PC Selista Mwikali (PW7). She was at the Crime Office at Adungosi Police Station on 18.9.2013 when at about 1.00 p.m. the Complainant reported that she had been defiled by one Nashon Akileng. She escorted the complainant to Alupe Hospital where she was examined. On 19th September 2013 she recorded the statements of the witnesses herein. On 23rd September 2013 she arrested the suspect who had been brought by the Assistant Chief. The witness visited the scene a day after the offence had been committed. The witness was unable to recover anything from the scene. But she noted that the scene was at Aterait off a public road and there were grass bushes at the scene.
13. At the close of the Prosecution case, the Trial Court found that the Accused person had a case to answer. In a statement made under oath, the Appellant stated that he attended a funeral of a neighbour on 17th September 2013. He later went home at about 11 p.m. using a boda boda and slept. Later he was summoned through letter by a Village Elder to the office of the Assistant Chief. That on visiting the Assistant Chief, the Assistant Chief told him nothing and simply took him to Adungosi Police Station where he was locked in the cells. He denied the charges.
14. The Appellant told Court that he does not know the Complainant and that she was a stranger to him. He however stated that he knew PW3 who also knew him. The witness thought that the Assistant Chief had a grudge with his family because his elder brother Justus had an affair with his daughter. That the Complainant who is related to the Assistant Chief trumped up the charges.
15. DW2 testified that he attended the funeral on 17th of September 2013. That the Appellant left the funeral at 10.00p.m. The following morning he learnt that there had been allegation that the Appellant had raped a girl. He also learnt that the Complainant was his neighbour. The witness had seen the complainant at the funeral and that she left the funeral at about 4 a.m.
16. In the Petition of Appeal filed on 18th November 2014 through the Firm of Situma & Co. Advocates the Appellant raises the following 7 grounds:-
 1. **That the trial magistrate erred in law and fact when it convicted the Appellant and sentenced him to 15 years imprisonment when there was no identification parade for the Appellant.**
 2. **That the trial magistrate failed to make a determination on the age of the complainant as there is more than one ages submitted before court.**
 3. **That the trial magistrate failed to make a finding on the said Kevin who is alleged to have invited the complainant to his house as alleged by PW2.**
 4. **That the trial magistrate failed in law and fact by relying on the evidence of PW5 who is essence was an interested party as the complainant was his nephew.**
 5. **That the trial court heavily relied of MF1-3 and MF1-5 which were never produced before court and PW2 evidence is contrary to PW7 evidence.**
 6. **That the evidence adduced is insufficient to sustain a conviction of the Appellant.**
 7. **That the trial magistrate failed to consider the defence of the appellant leading to miscarriage of justice.**
17. As a first Appellate Court, this Court has a duty to re-evaluate and reconsider the evidence adduced before the Trial Court so as to reach its own independent conclusion. The Court is also alive to the fact that it did not have an opportunity to test the demeanor of the witnesses (see **Okeno v Republic** [1972] EA 32).
18. Mr. Situma for the Accused asked this Court to find that the Complainant did not recognize the assailant because it was dark and as she was defiled after she lost consciousness. Mr. Owiti on the other hand was of the view that there was sufficient evidence of recognition. He urged this Court to consider that prior to the attack, the Appellant had attempted to woo the Complainant and the two were in view of each for over one hour.
19. Prior to the incident, the Complainant knew the Appellant by appearance. This is what she testified,

“I knew him before 18.9.2012. I knew him physically”

 As for PW3, the Appellant was a far distant neighbour and was known to him and in the words of the witness **“I have known Accused for a long time.”** If the Complainant and PW3 saw the Appellant at the time of the attack, then their evidence would be of recognition.

20. Admittedly, however, the circumstances then obtaining were not conducive for easy identification. The attack was in the night and sudden. Although in the evidence of the Complainant it was recorded that she and PW3 left the funeral at 4.00 p.m., that time would more likely be 4.00 a.m. This is because she had told Court that she saw the appellant come to the funeral at about 2.00 a.m. when after he made several approaches at her. Not too long after she left for home with PW3. And when she left there was moonlight. It is more likely to have moonlight at 4.00 a.m. than at 4.00 p.m. That the attack took place at about 4.00 a.m. was supported by the evidence of PW3. Denis Asiba Osigerere (DW2), a Defence witness also confirmed that the Complainant left venue of the funeral at about 4.00a.m. I find that the attack took place at 4.00 a.m. and the time of 4.00p.m. on the record of the evidence of the Complainant may have been an error.
21. How did the Trial Court treat this crucial aspect of recognition? The Court held, **On the 2nd issue of who had raped the Complainant, this Court has considered the evidence of the Complainant (PW1) that she knows Accused well and that in the night Accused had himself approached her and told her that he is son of Akileng. He had then continuously sent other men to call for him the Complainant, a fact that PW3 (Kevin) also confirmed. It is also admitted by the Accused that him and Kevin are well known to one another. Both these witnesses also confirmed that as they walked home, it is in fact Accused who had followed them before hitting Kevin to scare him away.**
22. The evidence of the Complainant was that there was moonlight and she saw the Appellant. This was her testimony, **“As we walked we saw someone following us from a distance. There was moonlight. Accused then came where we were and I realized he is the one that was following us. Accused had a stick with which he hit Kevin. I ran and Nashon chased and managed to get hold of me. I screamed and Nashon Strangled me.”** After the Assault the Complainant lost consciousness but when she came round she found the Appellant standing next to her. Under cross-examination the witness was steadfast. She stated, in part, **“You hit Kevin with a rungu and he ran away. It was then that you chased me and defiled me. You also assaulted me.”**
23. Mr. Situma for the Appellant, sought to discredit the evidence of the Complainant by pointing out that PW3 stated that it was totally dark on that night. It is true that in his evidence to Court, PW3 stated, **“It was wholly dark on that night. I did not identify the person who hit me with a stick on the night.”** That evidence was, however, diametrically at variance with the Statement of the witness to the police. This Court, again, reproduces the relevant portion of that statement; **“On our way home, we could see someone follow us and through the help of moonlight I saw it was Nashon. He hit me with a wooden bar he was carrying and ran away. I went back to the disco where I had come from and found no one there. From far I could hear someone screaming and I went home and because it was at dawn already I started studying for almost one and a half hours and later prepared and went to school.** One quickly notices that the contents of the Statement are consistent with the evidence of the Complainant. This Court agrees with the observation of the Trial Court that PW3 was **“rather reluctant to give evidence in Court.”**
24. So the evidence of the Complainant which is supported by the Statement of PW5 is that using moonlight they were able to see the Appellant. What is however troubling about that evidence is that there was no inquiry whatsoever carried out about the intensity of that moonlight. Was it a half-moon or a full moon. How intense was the light? This inquiry were necessary because the attack on the two was sudden and violent. Infact the attack caused the complainant to lose her consciousness. This inquiry was necessary because there was no evidence that the recognition was also by another means, say voice recognition. The inquiry was necessary so as to rule out the possibility that the Complainant and PW3 may have mistakenly, albeit honestly, held the belief

that the person who attacked them was the man who had earlier on that night made relentless approaches on the Complainant.

25. I must therefore conclude that, in the absence of inquiry as to the intensity of the moonlight, the evidence of recognition was weak and required corroboration. Was there corroboration? The Learned Trial Magistrate appears to have found corroboration on two aspects. First, the Learned Trial Magistrate held:-
Further this court notes the conduct of the complainant herein immediately after the incident. It is on record that immediately PW4 Michael Etyang found her in his compound, she mentioned to him the accused is the one who had raped her. Had she been in doubt, she would not have mentioned him so readily. She repeated the same claim to PW5 Alfred Obwire on being taken home.
The view of the Trial Court was that the victim mentioned the name of the Assailant immediately after the attack because she was certain of the identity of her assailant. I am unable to agree with that view. I would rather think that she mentioned the name of the Appellant because she honestly believed that the person who attacked her was indeed him. But in the absence of foolproof evidence on recognition, it cannot be ruled out that the belief, as honest as it may be, could in fact be mistaken.

26. The Learned Magistrate also found corroboration as follows:-
The conduct of Accused and his family members also betrays accused's innocent(sic). Both PW5 Alfred Obwire and PW6 Wellington Ambogo gave account of how accused and his family members made various attempts at settling this matter out of court. I do not see how accused would have sought to have this matter settled in this matter if he was really not the one responsible.

The Learned Magistrate, I am afraid, was relying on inadmissible evidence! If it is true that the Appellant incriminated himself before PW5 and PW6, then his words and/or conduct would amount to a confession. That confession would, sadly, not be admissible because provisions of Section 25A (1) of the Evidence Act which reads:-
A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

Any incriminating Statement or Conduct of the Appellant made to or in the presence of PW5 and PW6 is not admissible and cannot prop up the weak evidence on recognition.

27. The inevitable result I must reach is that there was insufficient evidence to prove that it is the Appellant who sexually and physically assaulted the Complainant in the early hours of 18th September 2013. Otherwise sufficient evidence may have been lost by the poor Prosecution of the case. The Appellant's conviction was unsafe and is hereby quashed. Consequently the Sentence imposed on him is set aside. The Appellant is free to go unless detained for some other lawful reason.

Dated, signed and delivered at Busia this 8th day of March 2016

F. TUIYOTT

JUDGE

In the presence of:-

Orwasa – Court Assistant

Appellant in person

Owiti - for the State