



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 45 OF 2013.

VINCENT WEKESA MUKHEBI ::: APPELLANT.

VERSUS

REPUBLIC:::RESPONDENT.

(Being an appeal from the original conviction and sentence of S.K. Ngetich – AG. SRM in Criminal Case No. 2068 OF 2012 delivered on 5th April, 2013 at Kitale.)

J U D G M E N T.

The appellant, **Vincent Wekesa Mukhebi**, appeared before the Senior Resident Magistrate at Kitale charged with rape, contrary to Section 3 (1) read with Section 3 (3) of the Sexual offences Act, in that on the 23rd July, 2012 at [particulars withheld] Trans Nzoia county, he engaged in sexual intercourse with B N O, without her consent.

After trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment. He was however, dissatisfied with the conviction and sentence and preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 16th April, 2013. He appeared in person at the hearing of the appeal and presented written submissions in support of his appeal which was conceded by the learned prosecution counsel, **Mr. Chelashaw**, on behalf of the state respondent.

In his concession, the learned prosecution counsel submitted that although the medical evidence showed that the complainant (PW3) was raped, the evidence regarding to the identification of the appellant was not proper as the circumstances at the time did not allow a positive identification.

Further, the charge ought to have been that of gang rape as the complainant was attacked and raped by three people.

Having considered the submissions by the appellant and those by the respondent in conceding the appeal, the duty of this court is still to re-visit the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In brief, the prosecution case was that on the material date, the complainant **B N (PW3)**, was walking home from [particulars withheld] trading centre where she had alighted when she spotted the appellant and other young men approaching from behind. It was about 8.00 p.m. She had previously known the appellant as a local workman. His group caught up with the complainant and she made an attempt to greet them. The appellant however tripped her causing her to fall down. He then proceeded to rape her.

IL (PW1), was on his bicycle when he reached the scene and saw a group of people and heard a woman shout while lying down. The group of people took off but he recognised one of them as the appellant.

He stopped at the scene and was told by the woman that she had been raped. He noted that the woman was bleeding from the nose and had scratches on her neck. He assisted and took her to her home where they found her husband, **S O W (PW2)**, who also noted the injuries on his wife who was the complainant herein. She also told him that she had been raped.

Linus Ligare (PW4), a clinical officer at Kitale District Hospital examined the complainant and complied a P3 form indicating that she was indeed raped.

P.C. Martin Munene (PW5), investigated the case after receiving the necessary report. He later charged the appellant with the present offence.

In his defence, the appellant denied the offence and stated that he was preparing to go to church on the 2nd July, 2012 when he saw the complainant coming to his house. She arrived there and alleged that he had raped her. She was very hostile at the time. He reported the matter to the village elder and later learnt that the complainant had been drunk and had slept in the house of one T N. He (appellant) was accosted and threatened by the complainant's son. He made a report to the village elder and was referred to the Ass. Chief who ordered for the arrest of the complainant but when she learnt of the impending arrest she rushed to Kitale Police Station and reported him. He was then arrested and charged with the present offence.

All the foregoing evidence was duly considered by the learned trial magistrate who thereafter arrived at the conclusion that the complainant was raped and that the person responsible for the offence was the appellant. This court would accept the finding that the offence of rape was indeed established. Indeed, there was no dispute that the complainant was raped. This was confirmed by her own evidence coupled with that of the clinical officer (PW4).

However, this court does not think that the alleged identification of the appellant as the offender was reliable and free from the possibility of error or mistaken identity. This is because, the offence occurred in difficult circumstances for purposes of identification. It was during the hours of darkness and yet the complainant and Isaac (PW1) made no attempt to explain how they were able to see and recognise the appellant. None of them alluded to the presence of light at the scene of the offence. The investigating officer (PW5), did not even explain how the appellant was picked out and arrested for the offence although he preferred the charge against him.

With respect, the learned trial magistrate failed to consider the circumstances under which the appellant was allegedly identified and went straight to find him culpable on the basis of what the complainant and I (PW1) stated.

Apparently, there was insufficient or no evidence at all to establish positive identification of the appellant as having been the offender or one of the offenders.

As indicated by the appellant in his defence, it may well be true that he was framed by the complainant to cover up for her wayward manner of getting intoxicated and sleeping at the house of another man instead of her husband's.

This court agreed with the learned prosecution counsel that the alleged identification of the appellant was not proper. It could not therefore be said that the appellant was responsible for raping the complainant. The prosecution needed to look elsewhere for the culprit or culprits.

Consequently, the appellant's conviction by the learned trial magistrate was not sound and safe and is hereby quashed.

The sentence imposed upon the appellant is hereby set aside.

It is to that extent that this appeal is allowed.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

[Delivered and signed this 4th day of March, 2014.]

J.R. KARANJA.

JUDGE.