



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 169 OF 2011**

DENNIS LESKAR LOISHIYE .....APPELLANT

VESUS

REPUBLIC.....RESPONDENT

**(From the original conviction and sentence in Criminal case No. 2772, of 2007 of the Chief Magistrate's court at Makadara before T. Ngugi, Senior Principal Magistrate on 22<sup>nd</sup> June, 2011)**

**JUDGMENT**

The appellant was charged in count one with the offence of rape contrary to Section 3(1) (a) as read with Section 3 (3) of the Sexual Offence Act No. 3 of 2006. In count two he was charged with the offence of unnatural offence contrary to Section 162 (a) of the Penal Code. In the alternative to count II he was charged with the offence of indecent Act with an adult contrary to Section 11 (6) as read with Section 3 (3) of the Sexual Offences Act aforesaid.

He denied the offences but after the trial he was convicted of the offence of rape as set out in count I and acquitted of count II and the alternative offence thereto. Upon conviction he was sentenced to 20 years imprisonment. This appeal arises from the said conviction.

The evidence adduced before the learned trial magistrate was that the complainant was on her way home after alighting from a vehicle when she approached four Maasai men who used to escort her home. On that night however, they declined to escort her saying they had checked and there was nothing to worry about. She used to live at place she considered risky so she decided to use a different street. As she walked along, the appellant is said to have appeared and turned towards her. She saw his face as it was not very dark and there were houses from which there was electricity light.

She at first thought he was an ordinary thief and so she gave him her phone. This man grabbed her hand and removed something that the complainant thought was a gun with which he threatened her. She did not shout neither did this man say anything. She was led into an incomplete building and ordered to remove her clothes. She tried to run away but as it was raining she slipped and fell. Her assailant got hold of her and took her back to the incomplete building in the process hitting her head against the wall on the forehead. All this while he was threatening her saying he would kill her.

She was ordered to remove her clothes after which she was pushed down and raped. The same person also tried to sodomise her. After some time, the assailant told her he will take her to the Maasai man who used

to escort her. She dressed up putting on her muddy clothes and taken through another street. She was handed over her keys and the Sim card for her phone and the man ran towards where the other Maasai men were.

She reached home at about 3 a.m. and because she was very dirty she took a shower. On the following day she went to Mwiki Police station and then she was referred to Nairobi Women's hospital where she was treated. Later she was issued with a P3 form. After some days she led the police to another Maasai man whom she knew and who used to escort her and asked to be shown where her assailant lived. They went there and she was able to identify the appellant.

Dr. Adan of Nairobi Women's hospital was called as P.W. 2 who gave evidence on behalf of Dr. Muhombe who was indisposed. He was conversant with the handwriting and signature of Dr. Muhombe. He produced the medical report prepared by Dr. Muhome in evidence.

P.W. 3 was Dr. Zephania Kamau who also examined the complainant. He produced the P3 form issued to the complainant in respect of the alleged offence. Dr. Kamau also examined the appellant and produced a report relating to him. P.W. 4 was the arresting officer who was led by the complainant to apprehend the appellant. Finally the prosecution called P.W. 5, the Investigating Officer in this case.

After the court found the appellant had a case to answer he gave

an unsworn statement in his defence narrating how he was arrested and held in custody for one month and two days, and informed that there was a complainant who had alleged that she had been raped by him. He was arrested along another person who was released after three days and later turned to be a prosecution witness but who never testified. He alleged that there was a grudge between him and the arresting officer who had threatened him before the arrest. It was his case that the investigating officer never availed records of the O.B.

In his appeal before me he has complained that the OB should have been produced to show the first report and that the intensity of light at the scene did not provide positive identification. He also complained that his constitutional rights were violated which was also acknowledged by the trial court. He has also said that Section 200 of the Criminal Procedure Code was not complied with and the case was not proved beyond any reasonable doubt. Finally, his defence was rejected yet he raised fundamental doubts on the prosecution case.

As the first appellate court it is my duty to go through the entire evidence, evaluate the same and make independent conclusions. The offence of rape entails intentional and unlawful act of penetration by an accused person upon the complainant without her consent. The complainant was alone at the time and date of the alleged offence. The reports by the two doctors P.W. 2 and P.W. 3 did not afford any medical evidence to confirm whether or not there was any penetration. The only evidence therefore that remained was the oral evidence of the complainant.

The complainant left work at about 11 p.m. and took a PSV alighting at Maji Mazuri stage in Mwiki. It was soon thereafter that she was accosted by her attacker. It is her evidence that there were electricity lights at the point where the attacker met her. The incident took place in an incomplete house but it was not until 3 a.m. that she was released by her attacker.

The offence of rape entails close contact and it is her evidence that she was able to identify her attacker. The circumstances surrounding this offence were conducive for positive identification. When she led the police to where the appellant lived she was able to identify him easily. It was her evidence that she had seen him well at the time of the incident.

It is true that the appellant was convicted on the basis on the complainant's evidence alone but the learned trial magistrate in so doing was persuaded that it was the appellant who raped the complainant.

In arriving at the said conclusion the learned trial magistrate had the following to say,

**“Even though it was at night the time the complainant spent with her attacker and the nature of the offence and the intimate nature of the offence rules out any doubt in my mind as to whether she was able to identify the assailant. I had an opportunity to see and hear the complainant testify in court and found her a truthful and honest witness and I believe her.”**

The observation by the learned trial magistrate as to the truthfulness and honesty of the complainant is a benefit that I do not have. I have no reason to doubt that assessment.

Earlier on, the learned trial magistrate said in her judgment that she had considered the evidence before her by both the prosecution and the defence. It is clear therefore that his defence was considered and rejected. It is true that the O.B was not produced although the appellant had asked for it. The reason he asked for it is not to dispute that he was arrested, but so that the dates of the arrest could be clear. No prejudice was occasioned by non compliance thereof. The hearing of his case was never conducted by more than one magistrate and therefore compliance with Section 200 of the Criminal Procedure Code does not arise.

It is true that it took quite some time for the appellant to be arraigned before the court because the charge sheet shows that he was arrested on 9<sup>th</sup> June, 2007 and produced in court on 22<sup>nd</sup> June, 2007. At no time however did he raise the issue of late arraignment before the court. Indeed the learned trial magistrate observed as much in her judgment.

On my part I find that the charge of rape against the appellant was proved beyond any reasonable doubt and the conviction was well founded. The sentence was legal and I have no reason to interfere with the same. This appeal is therefore dismissed.

**Dated and delivered at Nairobi this 14th day of May, 2014**

**A.MBOGHOLI MSAGHA**

**JUDGE**