REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 112 OF 2011.

EKAL MATAYO
EBEI ::
APPELLANT.

VERSUS

REPUBLIC ::
:::::::::::::::: RESPONDENT.

((*Being an appeal from the original conviction and sentence of T. Nzioki – SRM in Criminal Case No. 557/2009 delivered on 4th August, 2011 at Lodwar)*

J U D G M E N T.

This appeal arises from the decision and judgment of the Senior Resident Magistrate at Lodwar in which the appellant, **Ekal Matayo Ebei,** was convicted and sentenced to serve ten (10) years imprisonment for the offence of rape, contrary to section 3 (1) read with section 3 (3) of the Sexual Offences Act.

It was alleged that on the 1st May, 2009 at [particulars withheld] Turkana North District, the appellant unlawfully had sexual intercourse with M A without her consent.

Being dissatisfied with the conviction and sentence, the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 11th August, 2011 and the grounds filed at the time of hearing the appeal, on the 25th September, 2013.

The state/respondent opposed the appeal through the learned prosecution counsel, **Mr. Chelashaw**, who submitted that it was confirmed by the complainant that she was raped by the appellant and that the fact was corroborated by PW2 and PW3.

Further, the complainant's evidence remained unchallenged and that the incident occurred in broad daylight.

The learned prosecution counsel also submitted that the alleged long stay in police custody was an afterthought and in any event, recourse lay in a civil suit. That, the failure to call the arresting officer was not fatal as there was no dispute of the appellant's arrest. That, the appellant was clearly identified by the complainant as the assailant and that his defence was considered by the trial court and found to have no merit. Therefore, the appeal should be dismissed.

Having considered the submissions by both sides, the duty of this court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the prosecution case was briefly, that the complainant , **M E**, was on the material date at about 11.00 a.m. heading home from a nearby trading centre when she met the appellant who asked her for sex and threatened her with death. He thereafter held her by the neck and put her on the ground whereupon he raped and left her alone. She saw two women approaching the scene while herding goats. She alerted them of what had happened and asked for their assistance.

The two women assisted her to report to villagers who included two police reservist. She reported the matter to the police at Lokitaung police station and was referred to the local District hospital for necessary medical examination. Later, the appellant whom she had not previously known but was able to identify was arrested by a Kenya police reservist.

M L (PW2) and **M K (PW3),** confirmed that they met the complainant who informed them that she had been raped by a person.

L (PW2) indicated that the suspect person was not named by the complainant but Kokwo (PW3) indicated that the complainant mentioned the name Ekale in reference to the appellant.

Stephen Ekitela (PW4), a criminal officer at Lokitaung District Hospital examined the complainant and indicated in the relevant P3 form that she had been raped.

P.C. Yusuf Shune (PW5), of Kakuma Police Station investigated the case and prepared the present offence against the appellant.

In his defence, the appellant denied the charge and indicated that he was arrested on 22nd August, 2009 by a police reservist while he was at Kachoda centre. He was then taken to Lokitaung police station where he was held for a week before being taken to Lodwar police station. He was surprised when he learnt about the charge facing him.

From the foregoing evidence, it was apparent that the allegation that the complainant was raped was not disputed. Indeed, the complainant confirmed as much by alerting L (PW2) and K (PW3) immediately after the act.

The medical evidence by the clinical officer (PW4) indicated that the complainant was actually raped. The issue for determination was whether the appellant was responsible for the offence. He denied the charge and indicated he was arrested and charged without good cause.

L (PW2) and K (PW3) did not see the appellant committing the offence and had to rely on what the complainant told them.

The complainant was therefore the only identifying witness against the appellant and although the offence occurred in broad daylight, her evidence had to be absolutely credible and reliable for it to be acted upon in the absence of independent corroboration.

In his judgment, the learned trial magistrate found that the complainant's evidence was credible and relied on it to convict the appellant. However, this court would differ just by looking at the contradictory nature of the complainant's evidence with regard to the person who offended her. First and foremost the offence occurred in a span of two (2) minutes in stressful circumstances. It is doubtful whether the complainant had adequate opportunity to see and identify the appellant whom she indicated was a stranger to her and implied as much when she narrated the ordeal to L (PW2).

However, and this is where the contradiction comes, the complainant also indicated that the appellant was not a stranger to her and she indicated as much when she told K (PW3) that she was offended by one

Ekale who she (complainant) later identified as the appellant. The foregoing contradiction went to the root of the prosecution evidence of identification against the appellant and if such evidence was unreliable as demonstrated herein by the complainant, then it was unsafe for the learned trial magistrate to rely on it to convict the appellant for such a serious offence which carries a minimum sentence of ten (10) years imprisonment.

Consequently, this court must hold that the appellant's conviction was not sound and proper and is hereby quashed with the result that the sentence imposed against the appellant is hereby set aside.

The appellant shall be released forthwith unless otherwise lawfully withheld.

Ordered accordingly.

[Delivered and signed this 2nd day of October, 2013.]

J.R. KARANJA.

JUDGE.