



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A.)

CRIMINAL APPEAL NO. 3 OF 2015

BETWEEN

LUCAS BARASA ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Busia, (Muchemi, J.) dated 6th March, 2012

in

HCCRA NO. 10 OF 2009)

JUDGMENT OF THE COURT

The appellant, Lucas Barasa Onyango, was arraigned before the Senior Principal Magistrate’s Court at Busia on one count of rape contrary to section 3(1) of the Sexual Offences Act. The particulars were that on 1st January, 2007, at [particulars withheld] market, Bukhalalire sub-location, Busia District within Western Province with others not before court he intentionally had unlawful carnal knowledge of E.A.K. without her consent. The appellant also faced an alternative charge of indecent assault on a woman contrary to section 11(1) of the Sexual Offences Act; with particulars being that on the same day and place, the appellant unlawfully and indecently assaulted EAK. by touching her private parts.

The appellant denied the charges but following a full trial, he was found guilty of the main count and sentenced to ten (10) years imprisonment. His appeal to the High Court, which was limited to sentence, was dismissed by Muchemi, J., who in turn enhanced the sentence to life imprisonment. It is this action of the High Court that has led to this 2nd and perhaps last appeal.

The facts of the case briefly stated were that on 1st January, 2007 at about 8.00pm, EAK was window shopping in Murumba market when she bumped into six (6) men, among them, the appellant. The men grabbed her and took her to a nearby slaughter house where they all raped her in turns, and even attempted to insert a bottle in her vagina after the rape ordeal. The gang threatened to kill EAK. but a Good Samaritan by the name Joanes Okumu, (PW2) happened by and attempted to rescue EAK but all was in vain. Instead the gang ordered him to remain with them as they went on with their heinous crime. The gang then led EAK as well as PW2 to a nearby farm and gang raped her some more, until 4.00am. The following day when three members of the gang left the scene, the appellant and two others remained with EAK. They dragged her to the road and threatened to kill her and throw her body away.

Fortunately, she was rescued by people passing on the road. PW2 testified that he had found the appellant and the rest of the gang smoking bhang before they attacked EAK and himself. The evidence of the clinical officer, Caroline Soi, (PW5) confirmed that indeed the EAK had been gang raped.

After the hearing of the appeal which as already stated was limited to sentence, the learned Judge (Muchemi, J.) whilst dismissing the appeal on sentence found the sentence of ten (10) years imprisonment imposed on the appellant lenient given the circumstances of the case. To the learned Judge, the manner in which the offence was committed called for a more deterrent sentence to stop other would be offenders from their bad ways. Accordingly, she enhanced the sentence for public good and for protection of innocent victims like EAK to life imprisonment.

The appellant has now filed this appeal on grounds that the first appellate court erred in not finding that the case before the trial court was not

properly investigated, the offence being gang rape, the appellant should have been charged under section 10 of the Sexual Offences Act; that the first appellate court failed to revisit, analyse and evaluate the evidence afresh so as to arrive at independent conclusion; the first appellate court erred in upholding the conviction of the appellant based on contradictory and uncorroborated evidence; that the burden of proof was not discharged and finally, that the first appellate court erred in enhancing the sentence from 10 years imprisonment to life imprisonment.

As we have already stated, the appeal before the first appellate court was on sentence only. It had nothing to do with conviction. This being a second appeal, from the judgment of the first appellate court, we can only deal with the question of enhancement of sentence. We have no jurisdiction to enter into the fray regarding the conviction of the appellant since that issue was not canvassed before the first appellate court.

The record does not show that the first appellate court ever gave notice to the appellant of its intention to enhance the sentence in the event that the appeal was unsuccessful. It is a practice which has since evolved into a requirement that the appellant be made aware before the hearing of his appeal of the court's intention to enhance the sentence in the event that the appeal was unsuccessful.

In the case of **Hosea Otieno Wetete v Republic**, Criminal Appeal No. 326 of 2010 at Busia, (Ur), this Court stated as follows on the issue:-

“Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency of sentence, the learned Judge recorded that he had warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning...”

Similarly, in the case of **JJW v Republic [2013] eKLR**, this Court stated:-

“In this appeal the prosecution did not urge enhancement of sentence and did not file cross-appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any not stated, yet all of a sudden, in the judgment, the learned Judge enhances the sentence to ten (10) years.”

Finally, this Court in the case of **Josia Kibet Koech v Republic [2019] eKLR** observed:

“The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omulele’s submissions that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction...”

The need for prior warning to be given to the appellant in such situations is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, there was no formal warning by the court to the appellant that it was considering enhancing the sentence to life imprisonment in the event that his appeal was dismissed. Indeed, it was in the course of his submissions in response to the appellant's submissions that counsel casually alluded to the possibility of the court enhancing the sentence of imprisonment to one of life imprisonment. Nor was the appellant afforded an opportunity of persuading the court against such a move. As it is, the appellant was ambushed with the State's request that came at the tail end of its submissions in opposition to the appeal. This was wholly unsatisfactory and we are compelled on this score to interfere with the enhanced sentence.

The upshot of the above is that the appeal partially succeeds. The enhanced sentence is set aside and replaced with the ten (10) years imprisonment that had initially been imposed on the appellant on the 12th May, 2008. Should the appellant have served that sentence, he should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.