**IN THE COURT OF APPEAL**

**ELDORET**

**(CORAM: MARAGA, MUSINGA & GATEMBU , JJ.A)**

**CRIMINAL APPEAL NO. 156 OF 2012**

**BETWEEN**

**ABRAHAM KIMUTAI MASANI.........................................APPELLANT**

**VERSUS**

**REPUBLIC.......................................................................RESPONDENT**

***(An Appeal from the Judgment of the High Court of Kenya***

***in Kitale, (J. R. Karanja, J.) dated 24th May, 2012***

**in**

**HCCRA. NO. 162 OF 2011)**

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**JUDGMENT OF THE COURT**

1. The appellant, Abraham Kimutai Masani, was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence were that on 30th May 2010 at [particulars withheld] village in Trans-Nzoia within the then Rift Valley Province, in association with another not before the court the appellant intentionally and unlawfully caused his penis to penetrate the vagina of one CN without her consent. The appellant was tried before the Magistrate's Court at Kitale, convicted and sentenced to 10 years' imprisonment. On appeal to the High Court, the conviction was upheld and the sentence enhanced from 10 to 15 years' imprisonment.

2. The appellant is aggrieved and has lodged this second appeal, which, under section 361(1) of the Criminal Procedure Code must be restricted to questions of law. [See **M'Riungu vs. R [1983] KLR455**]. The question that arises is whether the prosecution proved the offence to the required standard.

**The facts**

3. On 30th May 2010, CN, (PW1) a resident in Endebess, had travelled to a place known as Kapsokwony. At about 3.00pm she got onto a motorcycle at Kapsokwony to return to her home in Endebess. The motorcycle on which she was travelling broke down at about 7.30 pm at a place known as Saboti. She telephoned her husband and informed him what had happened.

4. CN's husband referred her to a person by the name Caro (PW2). CN located Caro at her place of work known as Raha Club in Saboti where she was to wait for Carol to finish her work. Leaving her handbag on a bench at Raha Club, Caro escorted CN to a hotel to buy tea.

5. On returning to Raha Club, CN could not find her handbag where she had left it. Caro told a man who had the bag that it belonged to CN. That man went away with the bag. Within CN's hearing, Caro called Abraham, the appellant, to assist CN to look for the bag. Abraham and CN left the Club in search of the bag. On the way they met another man. They then met and talked to the person who had taken the bag but he refused to surrender the handbag.

6. CN then asked the appellant, and the other man who had joined them on the way, to escort her back to the club. On the way back, they reached a bush near Saboti Police Post. The appellant removed his belt and put it on CN's neck to strangle her. The other man held CN's hands behind her. Together, they removed CN's clothes and had sex with her in turns. The other man thereafter ran away leaving CN with the appellant.

7. After the appellant's accomplice ran away, CN told the appellant that she would not leave him as it was about 2.00 am. The appellant then entered a hotel. CN slept under a tree and at about 5.00 am reported the incident at the police post. She reported that she had been raped by Abraham and another person and showed the police the hotel where Abraham had entered. The police said they knew him and went looking for him but did not find him. The police then asked CN to go and call Caro. On her way, CN met the appellant about 50 meters from the police post. She signaled the police officers and the appellant was arrested.

8. CN was examined at Kitale District Hospital with a history of gang rape. Francis Barchebo (PW3) the clinical officer at that hospital produced the P3 form relating to that examination and said CN's vaginal wall was inflamed and the hymen was torn.

9. Police constable Paul Kamau Mwangi (PW4) who was attached to Kitale Police Station assigned to 'children and gender duties' at the station investigated the matter and having been satisfied that the appellant was identified as one of the people who gang raped CN charged him with the offence.

10. In his defence, the appellant denied the charge. He however confirmed having escorted CN, at the request of Caro, in pursuit of "*the boys who had run away with her bag*". According to him however, he advised CN to wait until the following morning to report the loss of the bag to the police as they found the boys who had taken the bag drunk. He thereafter went home and was surprised the following day to be accused, and arrested for allegedly having raped CN.

11. The trial court was satisfied that the prosecution had proved the offence to the required standard and convicted the appellant. The appellant's appeal to the High Court was not successful.

**The second appeal and submissions**

12. The appellant, who appeared before us in person, relied on his written submissions. He argued that the charge was framed; that no evidence was produced to show that CN was strangled as she claimed as there was no evidence of bruises or physical injuries presented to support that claim; that the lower courts relied on false evidence; that the arresting officer was not called as a witness; that prosecution evidence was inconsistent; that the witnesses contradicted each other raising doubts as to when and where the alleged incident took place; that the medical evidence by PW3 is questionable and was inconsistent with that of CN as to where and when treatment was carried out; that there was no medical evidence of penetration and that the evidence of CN was not corroborated.

13. Opposing the appeal, the Assistant Deputy Public Prosecutor, Mr. Zachary Omwega, submitted that there can be no doubt the appellant accompanied CN in her bid to recover her handbag; that the testimony of CN in that regard was corroborated by that of PW2 who knew the appellant before the incident; that the offence was proved to the required standard; that CN and PW3 in particular confirmed the element of

penetration; and that the appellant admitted that he was at the scene of crime. According to counsel, the offence was proved beyond reasonable doubt.

**Determination**

14. We have considered the appeal. As already indicated this being a second appeal, our mandate is restricted to matters of law. We can only interfere with the findings of the lower courts if such findings are not based on evidence, or are based on a perversion of the evidence or unless no reasonable tribunal can reach such findings.

15. After reviewing and analyzing the evidence before it the trial court said:

> "*PW1 is a single identifying witness and I have warned myself of the dangers of relying on her evidence but in this case it has emerged that she was with accused before the incident which is not denied and she had an opportunity to see him well as there was electricity light in the bar and also moonlight at the scene. Though accused denies being at the scene, PW1 had no reason to lie against him as they did not know each other before the incident. This cannot also be a case of mistaken identity as there is overwhelming evidence that he was at the scene. I dismiss accused's defence as a mere denial. I find that accused was properly placed at the scene.*"

16. On appeal, the High Court on its part was also satisfied there was sufficient evidence on the basis of which the appellant was convicted saying, "*this court must hold that there was sufficient evidence to prove that the complainant was on the material date raped by the appellant and another*."

17. There are therefore concurrent findings by the two courts. As this Court said in **Adan Muraguri Mungara vs. R [2010] eKLR**, we must:

> "***Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere***."

18. We think the decisions of the lower courts are well founded and supported by the evidence. There is no doubt that PW2 who introduced the appellant to CN to assist her in retrieving her handbag was well known to her. CN spent a considerable amount of time with the appellant in circumstances, as noted by the trial court, that were conducive to positive identification. The trial court observed in the course of cross-examination of CN by the appellant that CN was firm in her evidence and was no doubt impressed by her demeanor and found her to be a credible witness. The medical evidence by PW3 fortified that of CN on the issue of penetration that the appellant says was not proved. We do not, therefore, have any basis for holding that the decisions by the lower courts are bad in law.

19. The sentence imposed by the trial court having been illegal, it was incumbent on the High Court to correct it.

20. The final result is that we have no basis for interfering with the decisions reached by the trial court and the High Court. The appeal fails and is hereby dismissed.

Orders accordingly.

**Dated and delivered at Eldoret this 14th day of June, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU,**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

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**DEPUTY REGISTRAAR**