REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 158 OF 2018

SALMON ODHIAMBO ONYOSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the Judgment, conviction and

sentence of the Senior Principal Magistrate, (Hon. E. Boke, SPM)

on 18.7.2018, in Kibera Chief Magistrate court, Sexual Offences Case Number 29 of 2017)

JUDGMENT

The appellant ***SALMON ODHIAMBO ONYOSI***, was charged in the above case with the offence of gang rape contrary to section 10 of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that on 14.11.2017 at Ngong forest in Langata sub-county within Nairobi County, in association with others not before the court intentionally and unlawfully, caused his male genital organ (penis) to penetrate the female genital organ (vagina) of CAO without her consent.

The appellant faced an alternative charge of committing and Indecent an Indecent Act with a child contrary to section 11(i) of the Sexual Offences Act, No. 3 of 2006. That on 14.4.2017, jointly with others not before court Ngong forest in Langata Sub-county within Nairobi county, he intentionally touched the vagina of CAO with his penis against her will.

The case against the appellant proceed to full hearing. He was convicted as charged on the main charge and sentenced to serve 25 years imprisonment on 18.7.2018.

Being aggrieved of the conviction and sentence, the appellant filed his appeal against the same herein on 20/9/2018. He has raised up to 4 grounds as follows

> ***1. THAT the learned trial magistrate erred in law and fact in his failure to observe that the elements that constitute defilement were not conclusively proved as required by the law.***
>
> ***2. THAT the learned trial magistrate erred in law and facts in his failure to comply with section 124 of the Evidence Act.***
>
> ***3. THAT the learned trial magistrate erred in law and facts when he solely relied on the prosecution evidence that did not meet the required threshold i/e proof beyond reasonable doubt.***
>
> 4. ***THAT the learned trial magistrate erred in law and facts when he refuted the appellants defence without giving clear points of determination***.

The appellant has pleaded that this appeal be allowed, the conviction be quashed and the sentence be set aside. The Respondent, on the other hand, has urged that this appeal be dismissed. This appeal was canvassed by way of written submissions. Both sides duly filed their submissions.

In his submissions, the appellant submitted that his rights to fair trial were grossly violated by the trial court. That he was not given an opportunity to properly challenge the adverse evidence levelled against him since he was never supplied with proceedings to enable him prepare written submissions. On this, he relied on the following authorities.

> *i)* ***Joseph Ndungu Kagiri versus Republic (2016)eKLR****, that in case of breach of provisions of the constitution, by the trial court is competent to reverse the decision of the trial court depending on the material in question.*

ii) ***Morris Kiberia versus Republic (2018)eKLR****, on the right of an accused person to be accorded adequate time and facilities to prepare his defence.*

iii) ***Simon Ndichu Kahoro Versus Republic (2016)eKLR,*** *on the rights to fair trial under Article 50.*

The appellant further submitted that it was incumbent upon the prosecution to lead evidence to show he acted in common intention with the others not before the court. Also that the complaint would not have positively identified him in view of the fact that it was in the evening hours and inside a forest. And also in view of the violence used against them. He also alleged an inconsistency in the evidence of PW1 and PW4 respecting the way the whole incident occurred. That PW4 stated that the people who raped her were never arrested implying that the appellant was not one of them. He relied on the cases of ***Mwaura Versus (1987)KLR 645***, that for visual identification, the Judge must deal with matter as length of time the witnesses had for seeing, the position from the accused and the quality of right.

The appellant also challenged the evidence of the complainant that the complainant gave him a date to meet later only for him to appear and be arrested by police lying in wait. That first, the complainant had not given his description to the police ***(Maitanyi Versus Republic (1986)KLR (98).*** Also on the impossibility of the complainant giving appellant such a date after the ordeal ***(Peter Mwaura Waweru Versus Republic (2018)eKLR***. He claimed that he may have only been arrested because of his perceived bad name (evidence of PW2)

On the issue of penetration, the appellant submitted that having the vagina inflamed, reddish or swollen do not amount to proof of penetration, and that it was highly inconceivable for infections to have manifested itself only a few hours after the ordeal since incubation of bacterial takes several days. On this, he relied on ***Gabriel Gatonye Gakunga Versus Republic (2019)eKLR.***

The appellant also submitted on the contradictions in the prosecution case. These included the evidence of PW1 and PW2 on whether PW1 bathed or only washed her legs, whether PW1 gave his descriptions to the police, and that of PW1 and PW4 on whether they could see the other during the ordeal. That the said contradictions were material.

And lastly, it was submitted that 2 crucial witnesses were never called, the village elder mentioned by PW2, and one Inspector Wambui on the arrest of the appellant. He relied on the case of ***Bukenya and others Versus Uganda (1972)EA 549),*** that an adverse inference could be drawn like in failing to avail critical witnesses.

The state/Respondent, on the other hand, has submitted that the prosecution successfully proved the facts of rape, that the assault was with other persons and also positive identification of the appellant. She relied on the evidence of the 7 prosecution witnesses and the exhibits produced during trial.

I have considered the position of appeal filed herein and also the submissions filed by the 2 opposing sides. This court sitting on this matter as a 1st appeal, its mandate herein is to independently analyse, consider and re-evaluate the evidence as tendered before the lower court, and to arrive at it's considered conclusion. And in so holding, I am guided by the many Court of Appeal decisions on same, including ***David Njuguna Kariuki Versus Republic (2010)eKLR,*** in which the superior court held

> ***"The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion"***

It is therefore imperative that this court must fully consider the whole evidence as submitted before the trial court. The case of the prosecution before the trial court commenced on 24.5.2017 with the evidence of the complainant, PW1, CAO, whose testimony was that on 14.4.2017 at about 6:20pm, her aunt JA asked her to take her to Ngong forest to answer a call of nature as they live next to the forest. That immediately they entered the forest, they were surrounded by 3 men with knives and pangas. They were ordered not to make noise. One of the men held her in the forest as the other 2 held her aunt. That 2 of the men did not want them to look at their faces and kept slapping them whenever they tried to look at them. She was however, able to see one of them even though it was her first time to see him. Once in the forest, the man slapped her and knocked her down. He tore her inner wears as he ordered her to keep quiet which she did since he had a knife and pang. The man then had sex with her by force, by inserting his penis into her vagina. This took about 20 minutes. The man then went on to rape her aunt nearby as the man who had been raping her aunt came and raped her. The 3rd man stood watching. The 3rd man then also came and raped her. All this time, she could only hear her aunt struggling with the men. She could not see her.

The men then came to her and took her to a nearby river and forced her to bathe. She however only cleaned her legs. Then the man who had first raped her, and whom she now called Salmon, started talking to her asking her personal questions. She eventually found her way home at around 7:00pm, while crying. She told her parents what had happened. She was taken to hospital where tests were done on her. They later reported to the police.

This witness went on that Salmon had told her to meet him the following day at NYS toilet next to the forest, which she accepted. She told the police this. That on the set day, salmon appeared to her. He talked to her and gave her 60 to buy inner wear. He told her he would give her more money in the evening after selling some stolen phones and camera. He was however immediately arrested by the police who had been monitoring all this together with her father. She handed over the money to the police. She identified the man who had first raped her as Salmon, the accused before court, now the appellant.

She identified her birth certificate showing she was 19 years old. Accused was arrested as she was admitted for 5 days.

On being cross examined, this witness went on that she knows the appellant (accused), but that she did not record in her statement that the attacker was a dark, tall and huge man. That he had agreed to meet her again and buy her the clothes having been convinced that she had no parents.

The 2nd witness was CAK, father of PW2. He recalled that on 14.4.2014 (says 2017 typo), at about 6:20pm, he had been in his house when PW1 and his sister in law JA, went out. PW1 came back at about 7:00pm while crying and dirty, with scratch marks that she had been defiled by 3 men at the nearby Ngong forest. Also that her aunt had remained behind with 2 other men. He took her to hospital and to Langata police station the following day. His sister In law only later came home at around 10:00pm. That following the revelation by PW1, a trap was laid and the appellant was arrested the following day at about 3:30pm.

The cross examination of this witness was short and his response were that both PW1 and her aunt were raped and that appellant was arrested by the police and the village elder. He also witnessed the appellant showing phones to PW1.

Dr. Joseph Maundu was PW3. He examined PW1 on 24.4.2017 and filled in her P3 form which he produced in court. He noted that her external genitalia was normal, broken hymen, no discharge and the tear was not a recent one. Her vagina was externally bruised with change of colour.

And PW4, JA recalled that she had visited her sister when on 14.4.2017, at around 6:20pm, she had gone for a call of nature with PW1, to the nearby forest, that immediately 3 people appeared one of whom is the one in court. 2 men held her while 1 man held PW1. The men were armed with panga and knives. The men warned them not to scream. Both were led inside the forest. From where she was, she could see PW1 being raped. In her evidence, she resisted and was raped while seated, before the men left her to go and also rape PW1. She then found herself alone in the forest and only found her way out about 1 hour later. She bathed and slept only to go to hospital 2 days later. She later also reported to the police and took out a P3 form. She was emphatic that she saw the men well and that the appellant is the one who had held PW1.

She confirmed on cross examination that the remained conscious all through.

PW5, Peter Ngatia, produced the post Rape care form filled on 14.4.2017 for PW1 at Nairobi Women's hospital. His testimony was that on examination, her vagina was highly inflamed, reddish and swollen. Her hymen was broken and her urine was full of blood and pus cells. Because of bleeding she was admitted for 2 days. And PW6, PC Susan Ouko, testified that she took witness statements, had the P3 form filled and later had the appellant charged in court.

Witness No. 7 was PC Dennis Mwangi who recalled that on 15.4.2017, he got a report of rape in the OB, Langata police station. He later accompanied Inspector Wambui and other police officers to arrest the suspect. They laid an ambush and arrested the suspect, the appellant, whom he only saw that day. He denied that he arrested an innocent person.

The appellant, on being put to his own defence, gave a sworn defence in which he stated that on 15.4.2017, he was on his way to work when someone suddenly pounced on him and handcuffed him. He was taken to the police station and accused of raping 2 women which he denied. He called no witness.

Having considered the evidence herein in detail, I am convinced that the following issues are up for determination in this appeal:

i) Proof of gang rape

ii) Proof of common intention

iii) Identification

iv) Contradictions or inconsistence in prosecution case

v) Any breaches to constitutional rights to fair trial.

vi) Whether prosecution proved the case against appellant beyond any reasonable doubt.

vii) Sentence.

On the 1st issue, it is important to consider what the offence of gang rape specifically entail. Under section 10 of the Sexual Offences Act, No. 3 of 2006 states;

"Any person who commits the offences of rape or defilement under this act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape…."

The offences of rape is itself espoused under section 3 of the Act as;-

i) Intention and unlawful commission of an act which causes penetration with his or her genital organs.

ii) Where the other person does not consent to the penetration.

iii) Where the consent is obtained by force or by means of threats or intimidation of any kind.

At least 2 witnesses, PW1 and PW2 gave evidence on how they had gone for a call of nature in the forest only to be confronted by 3 armed men. That the 2 were then pulled forcefully into the forest and raped. According to PW1, it is the appellant who first raped her, as the other 2 men raped PW4. That the appellant then left her to go and rape PW4 in exchange for the other 2 men who then came and rape PW1 in turns. This evidence was corroborated by that of PW4. These 2 witnesses gave evidence that they had gone to the forest for a call of nature when they were forcefully pulled by the 3 men into the forest. The 3 men were armed with pangas and knives. The 3 men beat them up as they ordered them against making any noises. Both PW1 and PW4 sustained various body injuries in the process.

Further material evidence came from both PW3 Dr. Joseph Maundu and PW5, Peter Ngatia, the 2 medical officers who produced the P3 form (exh. 3) and the post rape care form (exh. 2b) and the other medical records of PW1, all of which confirmed that there was positive evidence that PW1 had indeed been raped.

All these factors point to only one conclusion. That PW1, the complainant was raped by the 3 men in turns and against her wish. And the manner in which the 3 men (including the appellant) attacked PW1 and PW4, while armed, leading them into the forest, beating them into submission and raping them in turns clearly confirm the common intention on the part of the 3 men to commit the offence of rape on the victims, for our case, PW1. I therefore find in the affirmative the 2nd issue of whether common intention was proved in this matter.

The other issue for determination is one of whether the appellant was positively identified as one of the 3 men who raped the complainant in turns on the material date. On this score, I am guided by the decision of ***Mwaura Versus Republic (1987)KLR 645*** (Quoted by the appellant) in which the Court of Appeal adopted the finding in ***Wangombe versus Republic (1980)KLR*** at 150, that;

> ***'…. In this case guilt turned upon visual identification by one or more witnesses ,,,, a reference to the circumstances usually requires the Judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of the light.'***

In essence, in answering to this issue, the court must consider the circumstances of this particular case. From the evidence on record, I find various circumstances that go into the very root of identification. First, it is on record that PW1 and PW4 went to the forest for a call of nature at about 6:20pm. This implies that it was not yet dark. The forest is just next to their house. They had barely entered the forest that the 3 men had to force them into the forest confirms that when they were attacked, they must have just been at the edge of the forest. Being during daylight, both PW1 and PW4 confirmed seeing well the 3 men as they pounced on them. And in the evidence of PW1, the appellant was with her from the time of the attack at about 6:20pm to just before he left her. She reached home at about 7:00pm. All this time, the appellant talked to her as he inquired from her about her personal family details. The appellant even led her to the river for her to bathe. The conversation went as far as and as long as PW1 and the appellant "agreeing" to meet again the following day. For PW4, her evidence was that all through this ordeal, she saw the appellant well as she never lost consciousness.

Other factors relevant to the identification of the appellant came out on how his arrest was executed. In the evidence of PW1, she "agreed" to meet the appellant the following day at the NYS toilet next to the forest. And that belief that PW1 was genuine in giving him the date, the appellant appeared and approached PW1 as agreed. The 2 talked and the appellant gave PW1 money to buy a replacement underwear. He even promised to give her more money in the evening after selling some stolen phone and camera. All this time, PW2 and police lying in wait watched. He was then caught by the police.

These factors, without a doubt, proved that the appellant was one of those 3 men who had raped PW1 in turns on the material date, I so find therefore that the circumstances herein were such that there was sufficient light and time for both PW1 and PW4 to properly identify the appellant. The appearance of the appellant the following day to meet PW1, leading to his arrest puts to a rest any doubts as to the accuracy of the identification of the appellant by both PW1 and PW4.

The next issue to determination herein is on the contradictions, if any in the evidence of the prosecution. It was submitted by the appellant that there were material contradictions between the evidence of PW1 and PW4. That whereas PW1 stated that from where she was being raped, she could not see PW4 being raped (only hear her struggles), PW4 on her part said in her testimony that she could see PW1 being raped. Indeed this was the evidence of these 2 witnesses. The appellant relied on ***John Mutua Musyoki Versus Republic, (2017)Criminal Appeal No. 11/2016***, that the court must consider such contradictions to determine it they go to the root of the case.

In the case of ***Joseph Maina Mwangi Versus Republic (2000)eKLR***, the court considered this issue and held,

> ***"in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"***

In effect, the court is under duty to consider if indeed such inconsistency, if at all, is material enough as to affect the conviction and or sentence. The contradiction claimed by the appellant is only on what PW1 and PW4 each saw as they were separately being raped. They were not being raped at the same spot or in the same positions. They therefore, in my view, would not have had the same views at that specific moment. It is for this reason that I am not persuaded by the appellant's submissions that this difference in the evidence of PW1 and PW4 was material enough as to alter the course of the case.

The appellant has submitted extensively that his rights to fair trial under Article 50 of the constitution were infringed on by the lower court and that his conviction and sentence ought to be reversed on this ground. He has relied on the various authorities which I have noted above. I must say that the decisions that the appellant has cited are on spot on this regard. The issue is however, whether the right of the appellant under Article 50 were indeed infringed. He has only cited the fact that he was never given the opportunity to file submissions before the Judgment was passed. He claims no other breach.

With regard to these submissions, I have perused the proceedings of the lower court. The appellant closed his defence on 25.5.2018. On same

date, his request for opportunity to file written submissions was granted. On the date fixed to confirm same on 8.6.2018, he had not complied. He stated that he was waiting for proceedings. The court allowed for the proceedings to be photocopied and given to him. He raised the same issue again on 18.6.2018 and again on 22.6.2018. the court then proceeded to read out the judgment.

Article 50(1)(c), guarantees an accused person the right to have adequate time and facilities to prepare a defence. This right, in my view, goes hand in hand with the other related rights that constitute fair hearing. At sub-article (e), there is the related right to have trial begin and conclude without unreasonable delay.

It is clear that the appellant was accorded the opportunity to file his submissions from 25.5.2018 to 22.6.2018, leading to the Judgment on 6.7.2018. The opportunity to file submissions was therefore given to the appellant. In fact, the trial court even ordered that copies of the proceedings be supplied to the appellant. There is no evidence on record at all to show that the appellant even pursued the issue of being supplied with the copies. And in the Judgment, the learned trial magistrate, clearly noted that it had taken note (Judicial notice) of the fact that appellant had not filed submissions. The court went further as to give an explanation that the decision to proceed with the Judgment was to avoid further delay of the case. This was clearly in fulfilment of the right to have the trial heard and concluded without undue delay (Article 50 (1)(e)).

The submissions of the appellant on this score therefore has no merit and must fail. I so find.

In answer to the 5th issue for determination, I am convinced that the prosecution managed to discharge its burden of proof and indeed proved its case against the appellant beyond any reasonable doubt as requires by the law.

Lastly, on the issue of sentence, I note that the appellant was charged under section 10 of the Sexual Offences Act, No. 3/2006. The sentence therein is a term of not less than 15 years' imprisonment, but which may be enhanced to imprisonment for life. The appellant herein was sentenced to serve 25 years' imprisonment. I find this sentence meted out by the lower court to be proper and in accordance with the law.

In all therefore, I am not convinced that this appeal of the applicant has any merit. I accordingly dismiss the same wholly.

D. O. OGEMBO

JUDGE

25.5.2021.

Court:

Judgment read out in court (on-line) in the presence of the appellant (from Kamiti prison), and Mr. Kiragu for the state.

D. O. OGEMBO

JUDGE

25.5.2021.