



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO. 75 OF 2017

JOSEPH MUIRU MUNGAI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with offensive of *Gang Rape contrary to Section 10 of Sexual Offences Act No. 3 of 2006*.
2. Particulars being that on the night of 1st December, 2014 at [Particulars Withheld] Estate Nyahururu Laikipia County, in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of TWN without her consent.
3. There was also an alternative charge of *Committing Indecent Act contrary to Section 11(A) of Sexual Offences Act*.
4. He pleaded not guilty and matter went into trial. He was convicted in the main count and was sentenced to serve 21 years' imprisonment. Thus he lodged instant appeal as he was aggrieved by the trial court verdict in his appeal be set out 4 grounds of appeal namely:
 - i. That trial magistrate erred both in law and fact while convicting him on reliance to the purported visual identification by recognition by the complainant without considering that the same was left in doubt since the offence was being committed during the night.*
 - ii. That trial Magistrate erred both in law and fact while convicting him with the evidence of the watch man who only witnesses the complainant loading a bodaboda but not at the locus-inquo.*
 - iii. That trial Magistrate erred in both law and fact while he lost direction in relying with the evidence with the mode of his arrest without considering that he was not pointed a finger by the complainant to the police while he got arrested due to information made by a neighbour of the complainant who didn't witness the offence.*
 - iv. That trial Magistrate erred both law and fact while rejecting his defense without putting in to consideration that the same was not challenged by the prosecution side as per the Section 212 of the Criminal Procedure Code requires.*

EVIDENCE TENDERED:

5. The Complainant recalled that on 30th November, 2014 about 11.30pm after having closed up at Gaza Club where she worked as a bartender, he asked George one of the bar bouncers, to get her a motor cycle rider to take her home.
6. George then got the accused person who confirmed he knew where the complainant lived being that she was new to the area and didn't quite know the neighborhood well. The accused then left with Complainant aboard his motor cycle but on the way at the place called quarry he stopped and alighted prompting the Complainant to ask him what was going on. He responded that he wanted to rape her.
7. A second man appeared and held the Complainant's hands. Accused removed her skirt, biker, inner pant and shoes forcefully. Complainant kicked the accused upon which the accused hit the Complainant and pushed her to the ground. The other man continued to hold her hand. Accused then punched the complainant's face. She fainted and he proceeded to rape.
8. When she woke up about 30 minutes later, she touched her vaginal area and found that it was watery. She then sat down. Accused came back at about 2.00am and asked her if she knew who had raped her. He then told complainant to sit on the motor cycle so he could take her to her husband. He took her home.

9. When he appellant returned to the place he left pw1, there were vehicles that flashed light onto accused's face prompting the Complainant to be able to recognize him. Further accused was someone Complainant knew well as he had taken complainant home after work for the past one week and 5 days.
10. The Complainant was taken home by the accused then she came to Nyahururu Police Station the following day at about 7.00am and reported. Her statement was recorded. She was sent to Nyahururu Hospital for treatment.
11. A P3 form was issued and filled at Nyahururu hospital and the accused person was arrested the same day at night after her boss MM called officer Munyoka when he sighted the accused. Complainant identified the accused before court.
12. During cross – examination, it emerged that it had rained and that George had brought the 1st motor cycle who took the Complainant home but could not locate her house prompting the rider to take her back to the bar.
13. Complainant was also unable to identify where she lives as she had gone home with her husband the previous nights and had only lived there for slightly less than 2 weeks. George then brought a second motor cycle, the accused who knew the Complainant well as he had taken her home with the husband the previous 1 week 5 days.
14. Complainant revealed she did not tell husband about incident the same night as accused is known and the husband would have killed the accused had he known what he did to her.
15. Complainant confirmed that there are people at the workplace who saw him carry her home and that if he had called the husband as a witness, accused would have claimed they are ganging up as a couple against him. She said she got home without biker, pant and shoes and that they did not have sex with the husband that night as the husband is not an animal.
16. During re – examination she clarified that she was not drunk. She also explained that the husband had told her that he is tired and that she should have asked Muiru to take her home. further when accused finally took her home, she waited until he had left before telling the husband what had happened.
17. **PW2 George Muriungi Njane** recalled 30th November, 2014 at 11.30pm he escorted **PW1** to the stage where she gets boda boda to take her home. A boda boda came but they didn't know him. He took Complainant home but returned because he couldn't find her home.
18. He took Complainant home but returned because he couldn't find her home. Complainant then said she will wait for the boda boda that often take them home. accused came and took her home. PW2 called Complainant's husband at 1.00am who said complainant had not arrived home.
19. The following day, he heard accused had not taken complainant home straight but detoured at a place called Kichinjio and raped her with others before proceeding to take her home. He identified the boda boda rider as the accused before court.
20. During cross – examination he revealed that he worked as a guard at the pub thus he went to look for a boda boda to take the complainant home upon her request. The said boda boda was being ridden by the accused person whom he identified well in court.
21. **PW3 Dr. Joseph Karimi** from Nyahururu Sub-County Hospital confirmed treating the Complainant at their facility on 3rd December, 2014 after she came with a history of having been raped on the morning of 1st December, 2014 by 2 people.
22. The Complainant had been hit on the cheeks below the right eye. She was calm, not intoxicated, under her right eye was darkened about 3 cm. The injuries were about 36 hours old, weapon used was a blunt object. Injury was classified as harm. Complainant was about 24 years old.
23. The hymen was broken as she had delivered before and she was on the last days of her menses at the time. No vaginal swab was obtained as it was useless due to the fact that she was on her menses. The doctor administered antibiotics, emergency contraception and post exposure proylaxis and pain medication. P3 form, lab request forms, PRC form and treatment notes were produced as evidence.
24. During cross – examination, the doctor stated he did not know who had raped the Complainant. That it was probable that she had got intimate with the husband.
25. On re – examination he did reveal that the reason for examining Tabitha was because she claimed she had been raped by 2 people and that she knew one of them. The vaginal swab was not useful to examine for any debris and sperms as the Complainant was on her menses.
26. **PW4 No. 91879 PC Woman Valentine Yegon** was the investigating officer whose investigations revealed what had been stated by PW1, PW2, PW3. She arrested accused and arraigned him to court but was unable to find the accused person's accomplices.
27. During cross – examination, the witness stated that Complainant husband did not record statement. The accused person had refused to reveal the identity of his accomplices prompting her to arraign him in court alone. Accused person, it emerged, was not taken to hospital. At re – examination, the witness stated that she had enough evidence to arraign the accused before court.
28. This he did not need to take even though he had not taken him to hospital. Besides he was arrested late at night and he had to be arraigned the following day. The accused was normally known as Gadafi but that his accomplices were never caught.

29. In his defence accused person Joseph Muiru Muigai recalled 1st December, 2014 and 2nd December, 2014 saying he operated his business on that day. On 2nd December, 2014 at 7.00pm, 3 police officers came and asked for Gadafi and he responded he was one upon which they arrested him and took him to the police station.

30. He was told he had raped one Tabitha who was now asking for Kshs.30,000/- but he did not have it. It was his testimony that he did not know the said Tabitha by name but only by looks. He didn't do it neither did he know who did it.

ANALYSIS

31. The core issues in the appeal are;

a) whether the ingredients of gang rape were established beyond reasonable doubt?

b) If above in negative was any other offence disclosed by evidence tendered?

32. **Section 10 of the Sexual Offences Act provides that: -**

“Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other 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 and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life”

33. **Under Section 10 of the Act**, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following four elements:

a) Commission of rape; Penetration as defined by section 2 of the Sexual offences act without consent thereof;

b) In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape

c) Positive identification of the perpetrator.

34. The question is; Were all these elements proved beyond reasonable doubt?

35. Penetration under **Section 2 of the Act** defines 'penetration' as:

“...the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

36. Case law has explained penetration sufficiently. See the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis mine).

Accordingly, it is not necessarily that medical evidence be availed to prove penetration. As long there is evidence that there was even partial penetration only on the surface, penetration has been demonstrated for purposes of Sexual Offences Act.”

37. Via article in **National library medicine** platform under **Pub Med.gov 2015**, it was opined that, ***Menstrual cycle phase at the time of rape does not affect recovery of semen or amplification of STR profiles of a suspect in vaginal swabs.***

38. The effect of women menstrual cycle on the forensic analysis of rapes was studied in a random group of 170 victims aged among 10 and 51 years. Participants were grouped according to the day of the menstrual cycle in which they were at the moment of the assault. From each participant, samples of vaginal fluid were taken and analyzed for sperm cells, p30 protein, total human DNA and human male DNA. Moreover, amplification of suspect's autosomal STR and Y-STR was attempted. Suspects' autosomal STR profiles were obtained from 92 of the 101 samples in which spermatozoa were found; and Y-STR haplotype was obtained in 1 of the 9 samples where autosomal STR profiles of a male were not obtained. On the other hand, Y-STR haplotypes were obtained in 2 of the 21 samples negative for sperm cells but positive for p30 protein. Y-STR haplotypes were also obtained in 11 of the 48 samples negative for sperm cells and p30 protein. It was found that groups of participants did not differ on the recovery of sperm cells from the vaginal swabs, quantification of suspect's DNA or amplification of their STR profiles. ***It is concluded that the menstrual cycle phase at the moment of the sexual assault does not affect the main outcomes of the forensic investigation of rapes.***

39. The doctor PW3 evidence was that;

“the hymen was absent which of course was not strange given that the Complainant had a child. As for debris and spermatozoa,

the lab request could not clearly reveal any of that as the Complainant was on her menses. However, when the Complainant was raped, she stated that the assailment hit her on the face. The description of her injuries matched the doctor's findings. That means that where the accused said she had been hit, the doctor found injuries on that particular place on her face according to the P3 form.

So while there were no visible injuries on her vagina which ideally would not be expected given that she is a married woman with a child who probably has sex on a regular basis, the other injuries as described by Complainant on her face were present. The vaginal swab also did not reveal anything as she was on her menses”

40. This aspect of menses hindering revelation of any evidence on vaginal swab such as presence of sperms is contradicted by piece of scientific opinion above stated in quoted article above.

41. There was absolutely no evidence of rape which could have corroborated victim's oral testimony on penetration into her vagina.

42. Thus this leaves us with assault occasioning the injuries noted by the doctor pw3. As to who occasioned them the victim knew the attacker who lifted her with a motor cycle as corroborated by pw2 and there was no evidence of grudge between the victim and the assailant. Thus the court finds that the appellat occasioned injuries in issue thus court substitutes charge of gang rape to that of simple assault.

43. The fundamental ingredients of the offence of assault causing actual bodily harm were spelt out in the case of *Ndaa v Republic [1984] KLR* which are:

i. Assaulting the complainant or victim,

ii. Occasioning actual bodily harm.

44. On occasioning actual bodily harm, in the case of *Alex Kinyua Murakaru v Republic [2015] eKLR* the court held that:

“Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. to make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus resus).”

45. From the evidence of pw1 and 3 the appellant inflicted on victim injuries which occasioned actual bodily harm which sentence is a maximum of 5 years' imprisonment. The appellant was said to be a first offender and repentant and remorseful.

46. Thus the court makes the orders that;

i. The appeal succeeds on conviction to the extent that a charge of gang rape is substituted with an offence of actual bodily harm.

ii. Thus the sentence is also substituted to imprisonment of 4 years from the date of conviction.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20TH DAY OF DECEMBER, 2021.

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CHARLES KARIUKI

JUDGE