REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.185 OF 2018

(*As consolidated with Appeals Nos.23 & 8 of 2018*)

NICHOLAS MWANGI NYAWIRA......................1ST APPELLANT

PETER CHEGE KIMANI.....................................2NDAPPELLANT

AGGREY TUBULA SHERA.................................3RDAPPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Kimaiyo Suter SRM delivered on 14th September 2018 in Makadara CM Cr. Case No.87of 2016)

JUDGMENT

The 1st Appellant, Nicholas Mwangi Nyawira, the 2nd Appellant Peter Chege Kimani and 3rd Appellant Agrey Tubula Shera were jointly charged with the offence of **gang rap**e contrary to **Section** 10 of the **Sexual Offences Act**. The particulars of the offence were that on 12th December 2015 at Korogocho Slums in Kariobangi within Nairobi County, the Appellants in association with another not before court, intentionally and unlawfully caused their penises in turn, to penetrate the vagina of SA without her consent. In the alternative charge, the Appellants were charged with the offence of **committing an indecent act with an adult** contrary to **Section 11(A**) of the **Sexual Offences Act.** The particulars of the offence were that on 12th December 2015 at Korogocho Slums in Kariobangi within Nairobi County, the Appellants in association with another not before court, intentionally and unlawfully caused their penises respectively to touch the vagina of SA against her will, and act which was indecent.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged on the main charge of **gang rape**. They were each sentenced to serve twenty (20) years imprisonment. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court challenging their respective convictions and sentences.

In their petitions of appeal the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that the trial magistrate convicted them on the basis of the evidence of a single identifying witness which was incredible. They were of the view that the prosecution failed to establish the case against them to the required standard of proof beyond any reasonable doubt. They took issue with the fact that the trial court failed to properly analyze their defence before arriving at the impugned decision. The 2nd Appellant was aggrieved that the trial court failed to take into account the fact that he was a minor when the offence was committed. In the premises, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the sentences that were imposed on them by the trial court.

The three separate appeals were consolidated and heard together as one. This is because the appeal arose from the same proceedings of the trial court. During the hearing of the Appeal, the Appellants presented to court written submission in support of their respective appeals. They urged the court to allow their appeals. Ms. Kimaru for the State opposed the appeals. She made oral submission to the effect that the prosecution had established its case on the charge brought against the Appellants to the required standard of proof beyond any reasonable doubt. She submitted that the complainant was on her way home when she was accosted by the Appellants who physically and sexually assaulted her. The 3rd Appellant had a knife which he used to subdue the complainant to co-operate with them. She was rescued and spent the night at a good samaritan's house. She was taken to hospital the following day.

Learned Stated Counsel averred that the Appellants had common intention to rape the complainant. They jointly waylaid the complainant

before taking turns in sexually assaulting her. The complainant was able to identify the Appellants since they were well known to her prior to the occurrence of the incident. They all grew up in the same neighborhood. The complainant also indicated their local nicknames in the first report that she made to the police. Ms. Kimaru averred that medical evidence adduced established the element of penetration. It also corroborated the complainant's testimony with regard to the injuries that she sustained during the ordeal as she struggled to escape from her assailants. She further submitted that the lady who rescued the complainant failed to testify due to witness interference which was confirmed by the investigating officer. She therefore urged the court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows. PW1 SAA s , is the complainant. On 12th December 2015 at about 7.30 p.m., she was on her way home to Korogocho. As she approached a corridor, she saw four men. Two of the men, whom she identified as Nicholas a.k.a **"Wayne"** (1st Appellant) and Chege (2nd Appellant) were infront of her. Aggrey a.k.a **"Bumbee"** (3rd Appellant) and Robby (not before court) were on the opposite side. She stated that she was not afraid to approach them since she knew them, and she did not think that they would occasion her any harm. Suddenly, the 1st and 2nd Appellant pushed her to a dark corner. The 3rd Appellant took out a knife and ordered her to be quiet. He aimed the knife at her neck but she turned her head. He cut her on her right cheek near the mouth. The men pushed her to the ground and started beating her up. The 1st and 2nd Appellant undressed her. She tried to resist but they overpowered her. The 3rd Appellant brandished the knife in a bid to force her to co-operate. Robby raped her while the other men held her down. After he was done, the 3rd Appellant penetrated her as the others watched guard. The 2nd Appellant took his turn in sexually assaulting her after the 3rd Appellant was done. After he was done, the 1st Appellant undressed and just as he was about to penetrate her, members of the public came to her rescue. The four men ran away. Members of the public were shouting the Appellants' names as they fled.

The Appellants hit her knees using stones to coerce her into co-operating with them. Her face and legs were swollen. A lady by the name N rescued her and took her to one L's house where she spent the night. She was taken to Nairobi Women's Hospital the following day. She was admitted for one week. The said N however declined to record a statement with the police since she was stabbed by friends of the Appellants and was threatened if she dared come forward to testify. When she was discharged from hospital, the complainant went to Korogocho Police Post and recorded her statement. She led the police officers to the 2nd and 3rd Appellants. They were arrested. The 1st Appellant was arrested by the police on a different offence. She informed the police that he was also part of the gang that had sexually assaulted her. The complainant stated that she knew the Appellants since they grew up together in the same neighborhood. She produced before court the clothes she wore on the material day. The clothes were ripped and contained mud stains.

PW2, Cpl. Michael Kalama was based at Korogocho Police Post. He was on duty on 10th January 2016. The complainant came to the police station at about 7.00 p.m. She stated that she had been raped by four men and that she had reported the incident on 19th December 2015. She informed him that the men who raped her had been seen at a house located in Grogan. They proceeded to the said house accompanied by PC Kioko (PW9) and PC Kirimi (PW3). They arrested the 2nd and 3rd Appellants who were identified by the complainant, and took them to Korogocho Police Post. PW3, PC Haron Mwenda Kirimi and PW9, PC Isaiah Kioko, corroborated PW2's testimony.

PW4, PC Christine Imali was attached at Korogocho Police Post at all material times. She investigated the case. She was on duty on 19th December 2015. The complainant came to the police post and reported that she had been raped by four men known to her. She recorded the complaint and also took down the complainant's statement. The complainant gave her the local nicknames of the four men who had sexually assaulted her as well as medical documents from Nairobi Women's Hospital. She had been admitted at the said hospital from 12th to 18th December 2015. She escorted the complainant to the police doctor who filled her P3 form. On 10th January 2016, the complainant called her and informed her that she had seen the men who had sexually assaulted her. She advised the complainant to go to the police post and report to the officer who was on duty. The 2nd and 3rd Appellants were arrested by PW2 and PW3 later that day.

PW4 further testified that the 1st Appellant was later arrested on a different offence. The complainant identified him as one of the men who sexually assaulted her. She had given his name to the police when she recorded her statement. PW4 stated that she tried to contact LN who had assisted the complainant on the material night. However, the said witness refused to record a statement indicating that she had been threatened by family members of the Appellants. PW4 also visited the scene of crime and recovered clothing items that the complainant was wearing on the material night *i.e.* bra, panty and trouser. She afterwards preferred the present charges against the Appellants.

PW5, Edward Mbugua was a clinical officer at Nairobi Women's Hospital. He examined the complainant on 13th December 2015. The complainant was alleged to have been sexually assaulted the previous day on 12th December 2015. PW5 stated that the complainant's face was swollen. She was in a lot of pain. She sustained a cut on the right side of her lip. She had bruises on her neck and chin. Her external genitalia was normal. Her vaginal walls were reddened. There was presence of soil particles inside her vagina. Her hymen was broken with old tears. Her anal region was normal. He produced the complainant's Post Rape Care Form before the trial court. PW6, Dr. Shako of Police Surgery examined the complainant on 6th January 2016. This was approximately three weeks after complainant was alleged to have been sexually assaulted. PW6 stated that complainant had a healing stitched laceration on the right side of her upper lip. Her hymen was broken with old tears and there were no signs of injury noted. The doctor produced the complainant's P3 form in evidence.

PW7, PC Richard Ratemo was attached at Kariobangi Police Station. He received a report from Korogocho Police Post that the 1st Appellant, who was under their custody, was required at Korogocho Police Post in regard to a case of gang rape. Accompanied by PC Nancy, he escorted the 1st Appellant to Korogocho Police Post and handed him over to the investigating officer. The 1st Appellant had been arrested by PW8, Cpl. Galgalo of Kariobangi Police Station on 12th July 2016. He arrested the 1st Appellant, among others, on suspicion that he had committed a traffic offence. The complainant later identified the 1st Appellant as one of the men who sexually assaulted her.

The Appellants were put on their defence. In his unsworn statement, the 1st Appellant stated that he resided in Korogocho and worked as a garbage collector. On 12th July 2016, he went to buy garbage bags when he was arrested by a police officer known as Lewis. Cpl. Galgalo (PW8) interrogated him and asked him why he had been arrested. As he interrogated him, a lady approached PW8. They stepped aside to talk. She gave PW8 a piece of paper. He was later arraigned before the trial court on charges of gang rape. He denied the charges against him.

In his unsworn statement, the 2nd Appellant stated that he resided in Korogocho and that he operated a motorcycle taxi. He testified that the rape incident happened near his plot. He however stated that he was not present when it happened. He averred that the complainant may have seen him leaving his house. He had gone to take the day's earnings to his employer. He was arrested on his way back home. The complainant pointed him out to police officers who arrested him. She claimed that he was part of a gang that raped her. He was later arraigned before the trial court.

The 3rd Appellant also gave an unsworn statement. He stated that he resided in Dandora. On the day he was arrested, he had attended an interview. He got the job and was required to report to work on the following day. He passed by his grandmother's house in Korogocho to inform her of the good news. On his way back home, he saw a group of people being arrested. He was also arrested. They were all taken to the police station. The police did not inform him the reason for his arrest. The following day, a lady came to the station and pointed him out as one of the men who had raped her. The 3rd Appellant asserted that he did not commit the offence since he did not live in Korogocho. He stated that the knife he was alleged to have used on the material night was not produced into evidence. He testified that on the material day of 12th December 2015 he was out looking for a job. He maintained that he did not commit the offence.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32)**. In the present appeal, the issue for determination is whether the prosecution established the charge of **gang rap**e contrary to **Section 10** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. It has also considered the rival submission made by the parties to this appeal.

Section 10 of the **Sexual Offence Act** provides thus:

> ***"Any person who commits the offence 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 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."***

The prosecution is required to establish the ingredients forming the offence of rape (or defilement), and that the perpetrator acted in association with another or others with common intention. In a case of rape, the onus is on the prosecution to establish that there was penetration, that there was absence of consent from the victim and finally, the identity of the perpetrator. In the present appeal, the first issue for determination is whether the prosecution established the ingredients forming the offence of rape. With regard to the element of penetration, the complainant was candid that the Appellants together with one Robby (not before court) waylaid her and took turns in sexually assaulting her. They forced her to the ground. They used a knife to secure her co-operation. The 1st and 2nd Appellant undressed her. Robby raped her while the other men held her down. After he was done, the 3rd Appellant penetrated her and then the 2nd Appellant took his turn in sexually assaulting her after the 3rd Appellant was done. After he was done, the 1st Appellant undressed and just as he was about to penetrate her, members of the public came to her rescue forcing the four men to run away.

This court is of the view that proof of penetration was established by medical evidence. The complainant was examined at Nairobi Women's Hospital by PW5 on 13th December 2015, a day after the sexual assault occurred. PW5 stated that her external genitalia was normal. Her vaginal walls were reddened. There was presence of soil particles inside her vagina. Her hymen was broken with old tears. The complainant was also examined by PW6 on 6th January 2016, approximately three weeks after the complainant was alleged to have been sexually assaulted. She testified that the complainant's hymen was broken with old tears and there were no signs of injury noted. The medical evidence of reddened vaginal walls and the presence of soil particles in the complainant's vagina corroborated the element of penetration as narrated by the complainant. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

On the issue of consent, according to the **Proviso** to **Section 42** of **Sexual Offences Act**, ***a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice***. In the case of **Republic V. Oyier [1985] eKLR**, the Court of Appeal held as follows:-

> ***"The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist."***

In the present appeal, it was the complainant's testimony that the Appellants coerced her into having sexual intercourse with them. They waylaid her and pushed her to the ground. The 3rd Appellant had a knife which he used to threaten the complainant and prevented her from raising an alarm. The complainant stated that he cut her on the right side of her lip using the said knife. This injury was later seen and treated by the doctor who examined the complainant after the ordeal. She tried to resist but the Appellants overpowered her. They hit her on her knees with stones to ensure she kept her legs wide open as they took turns sexually assaulting her. The trial court noted that the scar on the complainant's face where she was cut was visible. The complainant's evidence was additionally corroborated by the testimony of PW5 and PW6 who examined the complainant after the incident had occurred.

PW5 told the trial court that the complainant's face was swollen and that she was in a lot of pain. She sustained a cut on the right side of her lip. She also had bruises on her neck and chin. There was presence of soil particles inside her vagina. PW6 averred that when he examined the complainant, she noted that she had a healing stitched laceration on the right side of her upper lip. The nature of the injuries sustained by

the complainant corroborated her assertions that the Appellants beat her up. She complied out of fear. This court is of the opinion that the complainant yielded to the sexual intercourse out of fear. She did not give her consent. The prosecution was therefore able to establish the element of absence of consent.

The third issue is the identity of the perpetrators. The evidence of identification was that of a single witness. This court has warned itself of the danger of relying on the testimony of a single witness to secure the conviction of the Appellants. From the evidence on record, the incident occurred at about 7.30 p.m. The complainant stated that as she approached the corridor, she saw four men. They were known to her. She identified them as Nicholas who was known as **"Wayne"** (1st Appellant) and Chege (2nd Appellant). They were infront of her. Aggrey also known as **"Bumbee"** (3rd Appellant) and Robby (not before court) were on the opposite side. Her source of light was the moonlight. The evidence of identification was by recognition and not that of a stranger. The complainant narrated in detail the part played by each of the Appellants during the sexual assault. She stated that she was not afraid to approach the Appellants since she knew them and did not think they would harm her. The complainant asserted that they all grew up together in the same neighborhood. The Appellants were therefore well known to the complainant prior to the sexual assault. The fact that the complainant gave the nicknames of her assailants in her first report to the police also goes to show that she indeed positively identified her attackers.

From the above, it is clear that the complainant was able to positively identify her assailants. The investigating officer testified that the complainant gave a description of the Appellants as well as their local nicknames and assisted with their arrests. The complainant described in detail what role each Appellant played and even gave the names of the fourth assailant, Robby, who was not before court. The defence raised by the Appellants was a mere denial and did not dent the otherwise strong cogent prosecution evidence against them. The 2 nd Appellant stated that the incident occurred near their plot. He averred that he was not around when it happened but in a contradictory statement, claimed that maybe the complainant saw him as he was leaving the house. His evidence was inconsistent and not reliable. The 3 rd Appellant said that he was looking for a job on the material day when the incident occurred. However, the documents he produced into evidence did not support his alibi defence since the said documents were mere certificates and recommendation letters that do not establish where the 3rd Appellant was at the material time. This court is therefore satisfied to the required standard of proof that the identification of the Appellants was sufficient for a conviction.

The prosecution proved through the testimony of the complainant that the Appellants acted in concert. They accosted her and pushed her to the ground. They took turns in sexually assaulting the complainant. The complainant stated that Robby was the first one to rape her. He penetrated her as the others held her down. The 3rd Appellant took his turn after Robby was done, followed by the 2nd Appellant. They all sexually assaulted her. After the 2nd Appellant was done, the 1st Appellant undressed and lay on top of the complainant. The complainant was however rescued by members of the public just as he was about to penetrate her. The Appellants' actions establish that they all acted in concert.

Section 21 of the **Penal Code** provides that:

> ***"Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such persons an offence is committed of such nature that its commission was a probable consequence of such purpose, each of them is deemed to have committed the offence."***

This court therefore finds that the Appellants had a common intention and that the offence of **gang rape** was duly proved. Their conviction by the trial court is hereby upheld.

The Appellants were each sentenced to serve a custodial sentence of twenty (20) years. The minimum sentence prescribed under **Section 10** of the **Sexual Offences Act** is a term of not less than fifteen (15) years' imprisonment which may be enhanced to life imprisonment. The recent decision of the Supreme Court in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** held that the mandatory death sentence prescribed for the offence of murder by **Section 204** of the **Penal Code** was unconstitutional and that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. The reasoning in the **Muruatetu** case was also extended to mandatory sentences imposed by the Sexual Offences Act in recent decisions by the Court of Appeal in **Christopher Ochieng vs R [2018] eKLR and Jared Koita Injiri vs R [2019] eKLR.** The Court of Appeal in **Jared Koita Injiri (**supra) held thus;

> ***"...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***
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> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life impos***_ed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."_

Guided by the aforestated decisions of the Supreme Court and Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellants to determine whether the sentence that was meted on them was deserved or another sentence ought to be imposed.

In the present appeal, the Appellants spent two years in custody prior to their conviction before the trial court. This court also notes the aggravated nature of the offence committed by the Appellants. The complainant sustained physical injuries in addition to the sexual assault ordeal. In the premises, this court sets aside the custodial sentence of twenty years (20) years given by the trial court. The same is substituted with an order of this court sentencing each of the Appellants to serve fifteen (15) years imprisonment with effect from the date they were

sentenced before the trial court *i.e* 4th October 2018. This court has taken into consideration the period that the Appellants were in lawful custody both before their conviction and after their conviction by the trial court. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF MARCH 2020

L. KIMARU

JUDGE