



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NOS. 154, 155 AND 156 OF 2019

GEOFFREY MUTETHIA.....1ST APPELLANT

DICKSON MURANGIRI.....2ND APPELLANT

BONIFACE KIMATHI.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of Hon. H.N Ndungu in the Meru S.O Case No. 11 of 2017)

J U D G M E N T

1. **Geoffrey Mutethia, Dickson Murangiri, and Boniface Kimathi ('the appellants')** were charged with the offence of gang rape contrary to **section 10 of the Sexual Offences Act No. 3 of 2006**.
2. It was alleged that on 23/3/2017 at [particulars withheld] Police Station cells in Imenti North Sub-County within Meru County, the appellants jointly did intentionally and unlawfully cause their penis to penetrate the anus of LM a child aged 17 years old.
3. In the alternative, they were charged with indecent assault contrary to **section 11 (1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on the same day and place, jointly, they did intentionally and unlawfully cause their penis to come into contact with the anus of LM.
4. The trial court convicted the appellants on the first count and sentenced each to serve 15 years imprisonment.
5. Aggrieved by the decision, the appellants have appealed to this court against both conviction and sentence. They filed this appeal based on 5 grounds which can be collapsed into 3; **that the trial court; failed to conduct a fair hearing, convicted and sentenced the appellants based on a null and void Identification Parade and that the prosecution failed to prove their case beyond any reasonable doubt.**
6. As held in **Okeno v. Republic [1972] EA 32**, this Court as the first appellate Court must re-appraise the evidence afresh review the same and come up with its own independent findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses.
7. The prosecution case was that, on the material day **LM (Pw1)** was in custody at [Particulars withheld] Police Station cells. While having supper, three people approached him and introduced themselves as Dickens, Jeff and Boniface. They ate supper and later retired to their cells.
8. At about 11.30 pm, the 2nd appellant called him near the washroom in the guise that he wanted to ask him something. When he got to the washroom, he found the 1st and 3rd appellant. He recognized them from the air spaces that let in light from outside where there were electric lights. The 2nd appellant held him on the neck and forced him to bend while the 1st appellant held his hands. The 3rd and 2nd appellant inserted their penises into his anus in turns.
9. **Pw1** escaped and retreated to his cell where he locked himself until the following morning when he reported the incident. He was taken to Meru Level 5 hospital where he was examined and treated. **Stephen Chege (Pw2)**, a Medical Officer at Meru Level 5 hospital produced the P3, PRC and age assessment forms together with the treatment notes.
10. The examination of **Pw1** revealed that he had pain on the right side of the neck, bruises around the orifice. There was whitish discharge from the anal opening which had foul smelling.

11. **CPL Khadita Abdi (Pw3)** told the court that on 23/3/2017 as she was going to the cells, the complainant approached him and reported to her what had transpired the night before. **Snr Sgt. Domitila Mulwa (Pw4)** was on the same day informed that there was a juvenile prisoner aged 17 who had been defiled by other prisoners and was asked to investigate the matter. He interrogated **Pw1** who told him what had transpired. He confirmed the presence of the appellants as prisoners.

12. **IP Rotich Kiplangat (Pw6)** conducted I.D parades for suspects of gang rape on 4/4/2017. He paraded members of the public. He started with the 2nd appellant who gave his consent to the parade. He informed him that he could have a witness or friend. He agreed that the parade proceed. **Pw1** identified him.

13. **Pw6** repeated the same process with 1st appellant who also agreed to proceed with the parade without any witness or friend. However, the 3rd appellant did not consent to the ID parade. **Pw6** however went ahead and conducted the parade. In all occasions, **PW1** identified the appellants as the assailants.

14. When put on their defence the appellants chose to remain silent.

15. The appellants filed their submissions which the court has carefully considered. The respondent did not file any submissions.

16. The first and second ground were that, the trial court erred in failing to conduct a fair hearing and convicting and sentencing the appellants on a null and void Identification Parade.

17. The appellants contended that their case proceeded on various dates when the prosecution witnesses testified in the absence of their advocate. They further contended that the identification parade was a sham as the witness knew the names of the appellants and there was therefore no need for the parade.

18. **Article 50 of the Constitution** provides: -

“Every person has the right to have any dispute that can be resolved by the application of law, decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Article 50 (2) provides that: -

“Every accused person has the right to a fair trial.”

19. The record shows that, **Ms. Nelima** Advocate was recorded as appearing for the appellants. She appeared on 19/7/2017 when **Pw1** first testified. However, she never appeared on 6/11/2018 when the matter started de-novo and **Pw1** testified afresh. She also did not appear subsequently when **Pw3 and Pw4** testified. She once again appeared when **Pw6** testified.

20. There is nothing on record to show why the said advocate did not appear. The trial Court failed to inquire where the advocate was or whether the appellants wished to proceed in her absence. With due respect, the record should have revealed more than what it has.

21. One thing that is disturbing is that, the appellants did not complain about the absence of their advocate so that the trial Court could rule on it. Further, at all times that the matter proceeded in the absence of the advocate, the appellants conveniently did not cross-examine the witnesses.

22. On 6/11/2017 when the matter started de-novo, the appellants complained that they had not been supplied with witness statements. The trial Court only recorded; ***“Each accused to be supplied with the medical report. Hearing otherwise to start de-novo”***.

23. It is not clear whether the appellants were supplied with the witness statements they had complained about and if so, whether they were given any time to read them before the hearing commenced.

24. In view of the foregoing, I am of the view that the trial Court fell into error by proceeding as it did. The criticism against it on the ground of failure to conduct a fair hearing is not without merit. On this alone, the trial cannot stand. I do not wish to deal with the other two grounds.

25. In this regard, I declare a mistrial. The conviction and sentence is set aside. The appellants are to be retried afresh by another Court.

It is so ordered.

DATED and DELIVERED at Meru this 12th day of August, 2020.

A. MABEYA

JUDGE