



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 59 OF 2019**

**WILLIAM MUTISYA KANYIRI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment dated 20<sup>th</sup> November, 2019 by Hon. D.W Mbuteti Resident Magistrate*

*at Garissa S.O. Criminal Case No. 26 of 2019)*

**JUDGEMENT**

1. William Mutisya Kanyili the appellant was charged with two counts, each with an alternative count. The first count is commission of the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars were that on 1<sup>st</sup> July, 2019 at show ground area in Garissa township within garissa county, jointly with another not before court, willfully and unlawfully caused his genital organs that his penis to penetrate the genital organs, that is the vagina of DNM without her consent. He also faced an alternative count of committing an indecent act with an adult Contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006.
2. The second count is Robbery with violence contrary to section 296(1) of the Penal Code. The particulars being that the appellant on 1<sup>st</sup> July, 2019 at show ground area in garissa township within garissa county, jointly with another not before court robbed DNM Techno Mobile phone and Kshs 7800/= and immediately thereafter threatened to use actual violence to the said DNM. The alternative charge is handling stolen property contrary to section 322(1)(2) of the penal code.
3. The appellant denied the charges and the case proceeded to full hearing after which he was found guilty, convicted and sentenced for the two counts. In regard to count 1 he was sentenced to 40 years' imprisonment and Count 2 to seven (7) year's imprisonment to run concurrently.
4. He was aggrieved by the judgment and filed this appeal raising the following grounds as amended in his submission that the trial court erred both in law and fact by failing to consider violation of his rights protected under Article 49(h), article 27(1)(4) and 159(2) of the Constitution. In addition, he alleges that the trial court failed to evaluate and consider the evidence tendered by prosecution witnesses.
5. The summary of the case before the trial court was that P.W.1 DNM a business lady selling boiled eggs within garissa town on 1<sup>st</sup> July, 2019 while going about her business of selling eggs met the appellant in the company of another man and after buying eggs from the complainant, they informed her that there was a construction site where the complainant would be able to sell more eggs to those working on the site. And with a promise to take her to the site, they exchanged phone contacts.
6. The complainant went and prepared more eggs and later contacted the appellant and his friend, they met where in the pretext of taking her to the construction site led the complainant into the forest where they jointly with his friend gang raped the complainant and forcefully stole from her.
7. It is the complainant case that after pleading with them they spared her life, where she found her way out of the forest to a house and informed those she met of the ordeal, who immediately conducted a search of the perpetrators ending up with the nabbing of the appellant at the river banks of Tana River, where the appellant friend managed to escape by swimming and his whereabouts remains unknown to date.
8. The appellant was nabbed after his attempt to swim across River Tana failed as he was on the verge of drowning. The complainant identified the appellant, recovered her stolen phone, reported the matter to the police and attended hospital culminating into the appellant being charged and convicted herein. She was categorical that it was the appellant who committed the offence and that the phone was recovered during the arrest of the appellant.

9. **PW2 Mwena Mwenda** in his testimony recalled that he met the complainant with another Old man, where she alleged that she had been raped by two people who also stole from her. He joined the search with other members of the public and that in the process found the appellant in the company of another man, and on seeing the complainant the appellant and his friend ran and started swimming across Tana River, however the appellant was not a good swimmer and began drowning and called for help, they apprehended him and handed him over to the police.

10. **PW3 Jeremiah Musubei** testified that he is a clinical officer Reproductive health based at PGH Garissa Hospital and attended to the complainant PW1. It was his testimony that after examining the complainant genitalia he found a fresh wound in the posterior vaginal wall. The wall was reddish and hyperemic.

11. He concluded that the complainant was raped from the history and physical wound. He did tests but did not find traces of spermatozoa. He produced the P3 Form signed on 2<sup>nd</sup> July, 2019. PW4 Charles Sammy Wambua testimony is similar and corroborates the testimony of PW2. He was part of the members of public who participated in the search that culminated with the nabbing of the appellant.

12. **PW5 No. 83735 Cpl. Peter Odhiambo** from Garissa police station investigated the case. He told the court that the appellant was brought to the station on 1<sup>st</sup> July, 2020 by members of the public who had arrested him. He was in the company of the complainant. The complainant explained to him what had transpired.

13. He escorted the complainant to PGH Garissa Hospital for examination and treatment where P3 form was filled and he charged the appellant. He produced Techno Phone belonging to the complainant that was recovered from the appellant, the Identity cards that were recovered one belonging to the appellant and another to his friend who disappeared.

14. When placed on his defence the appellant elected to give an unsworn statement with no witness to call. He told the court he was a construction worker. He denied committing the offence.

15. The appellant argued his appeal by way of written submissions. His submissions are a repetition of the above grounds of appeal. He contended that the evidence by the prosecution witnesses were not analyzed by the lower court and that his rights under Article 49(h), 27(1) (4) and 159(2) of the Constitution were not accorded. He urged the court to allow the appeal set aside the conviction and sentence and set him free.

16. Learned counsel Mr. Mulati for the state opposed the appeal on the ground that there was sufficient evidence to support the conviction. That the witnesses account was clear on the commission of the offence, the victim identified the appellant who was found with the victim's phone. He submitted that the clinical officer evidence confirmed that the victim had been gang raped, as she had injuries in her genitalia and that there was no evidence to the effect that the appellant cohabited with the victim or frame up.

#### **Analysis and determination:**

17. This being the first appellate Court, this court is expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis, bearing in mind that it never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

**“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

18. I have carefully considered the evidence, grounds of appeal and the submissions by both parties, as is expected of this court. The issue for consideration therefore is whether the ingredients of the offence of gang rape and robbery facing the appellant were proved to the required standard.

#### ***Whether the elements of the offence of gang rape were proved?***

19. Section 3 of the sexual Offences Act defines **Rape** as:

***(1) A person commits the offence termed rape if –***

***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***

***(b) the other person does not consent to the penetration; or***

***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***

20. The appellant is charged with Gang rape, which is defined under Section 10 of the Sexual Offences Act as:-

**“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 fifteen years but which may be enhanced to imprisonment for life.”**

21. The same Act defines **gang** as, “**means two or more persons**”.

22. I have carefully considered the evidence tendered herein, and it clearly points to the complainant being penetrated without consent. PW3 the clinical officer who examined the complainant confirmed that there were injuries on her genitalia consistent with rape.

23. Additionally, the evidence of the Investigating Officer corroborated by the evidence of PW3 and PW4 points out that the appellant was in the company of another person who luckily escaped after swimming across Tana River leaving behind his identity card, thus my finding that the offence of gang rape was established. There is no reason for not believing the complainant in this regard. The evidence tendered as whole is consistent and points to the guilt of the appellant in this regard.

24. It is therefore my finding that PW1 vagina was penetrated by more than one male organ inclusive of that of the appellant without consent thus meeting the ingredients for offence of gang rape.

#### **On Identification:**

25. The position in law is that where the only evidence against an accused is that of a single identifying witness, the court should exercise great caution and carefully scrutinize that evidence before making it the basis of a conviction due to the likelihood of a miscarriage of justice. In the case by **John Mwangi Kamau v Republic [2014] eKLR**, the Court of Appeal observed:-

**“Time and time again this court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested.”**

26. In this case the appellant’s conviction was without a doubt, based on the evidence of identification by the complainant. I take cognizance of the fact that the appellant was arrested during the same day when the alleged offence happened and therefore the likelihood of the complainant confusing him with someone else was minimal and the circumstance in which the appellant was arrested and his attempt to run away is sufficient prove of his guilt.

#### ***Whether Robbery was established?***

27. On the basis of the above evidence, I am satisfied that the appellant was positively identified as one of the people who robbed the complainant. The fact that stolen items were found in his possession soon after the robbery is an indication of his involvement, as is sufficient to connect him with the offence. As was held in the case of **Maina v Republic, Criminal Appeal No.11 of 2003**, evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence.

28. In my view, the fact of robbery was proved because the appellant was identified, arrested and stolen items recovered from him. For the offence of robbery with violence to be proved, it must be established that the appellant was armed, or was in the company of more than one person or that he threatened to use violence against his victim. It is not disputed that the appellant was in the company of another who luckily escaped.

#### **Conclusion:**

29. I am satisfied that the learned trial magistrate arrived at the correct decision in convicting the appellant. On sentencing, it is trite that pursuant to the Supreme decision in **Francis Muruatetu case**, the court is not bound by the minimum or maximum sentence imposed by the statute. In this case the trial court after considering the appellant mitigation sentenced him to 40 years and 7 years respectively for count 1 and 2. It is noteworthy that the minimum sentence for gang rape under section 10 of the Sexual Offences Act is 15 years’ imprisonment which may be enhanced to life imprisonment. The appellant is a young first offender, and in my view a 15 years sentence for count 1 would suffice. As a young man, I hope he will reform and get back to the society and positively contribute to nation building I would not disturb the 7-year sentence for count 2.

30. Thus the court makes the following orders;

***(i) The appeal on conviction is dismissed, and conviction is upheld.***

***(ii) The appeal on sentence succeeds in count 1 and sentence of 40 years is substituted with sentence of 15 years.***

***(iii) The sentence of count 2 of 7 years is dismissed and same is upheld.***

***(iv) The sentences to run concurrently***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 24TH DAY OF SEPTEMBER, 2020.**

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**C. KARIUKI**

**JUDGE**