



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO.5 OF 2020

BRIAN OBURA ODUOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(appeal from the judgment, conviction and sentence in Siaya PM's Court SO Case No7 of 2019 on 7/8/2020 by Hon. L.Simiyu, Principal Magistrate)

JUDGMENT

Introduction

1. The Appellant herein BRIAN OBURA ODUOR was charged before the Principal Magistrate's Court at Siaya in Sexual Offense Case No. 7 of 2019 with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars are that on the 15th January 2019 at [particulars withheld] A' sub-location in Siaya district within Siaya County, the appellant and another not before court jointly, intentionally and unlawfully caused their penises to penetrate the vagina of JAW without her consent.

2. The trial magistrate, Hon. L. Simiyu after hearing four prosecution witnesses and the appellant's sworn testimony, she found the appellant guilty of the offence as charged and after mitigation, sentenced him to serve 15 years imprisonment.

3. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:

- a) **That the trial court failed to observe that the nothing linked him with the alleged offence.**
- b) **That the trial court failed to observe that the sentence imposed was against the weight of the evidence adduced.**
- c) **That the trial court failed to appreciate that the Prosecution case was full of contradictions hence unsafe to base a conviction upon.**
- d) **That the Honourable court be pleased to serve him with a copy certified trial records to enable me erect more grounds.**

Appellant's Submissions

4. The appellant filed written submissions on 27/10/2020 asserting that his right to a fair trial under Article 50 (2) (m) of the Constitution was violated as the language that was used during plea taking (Swahili) was not used during the testimony of PW1, PW2 and PW4 where the language used was English with no form of interpretation recorded to have been applied thus amounting to a miscarriage of justice against him.

5. It was further submitted that the trial court flouted court procedure by erroneously appreciating the prosecution's application to step down PW1 which application was made without any legal basis whereas PW1 in her conduct proved that she was an incredible and untrustworthy witness. Reliance was placed on the case of **Ndungu Kimani v R(1979) KLR 282**, where the appellant quoted the Court of Appeal as stating that:

"The witness in a criminal case whose evidence is proposed to rely should not create an impression in the mind of court that he is not a straight forward or raise a suspicion about trustworthiness, or do(or say) something which indicates that he is a person of doubtful integrity and therefore unreliable inordinate witness which makes it unsafe to accept the evidence."

6. The appellant submitted that the medical examination report which was produced in court had gaps hence was unsafe to base a conviction

upon it. He submitted that the kind of injury that was allegedly caused by the rape by a single person was unrealistic and as such the evidence was unsafe to base a conviction upon.

7. He further submitted that the trial court failed to appreciate that the prosecution case was poorly investigated as the investigations were on going in the course of the hearing which caused a prejudice to the appellant's defence and further as it was not clear how the second accused person was released and or discharged from the case only after PW1 had been coached to change her version of the evidence in chief thus totally prejudicing the appellant's defence.

8. The appellant submitted that section 10 of Sexual Offences Act provides for a mandatory minimum sentence of 10 years' imprisonment which curtailed the discretion of the trial court to mete out a sentence that is commensurate with the circumstances of his case thus going against the holdings of the Supreme Court in the case of **Francis Kariuki Muruatetu & Another v Republic (2017) eKLR** and further as held by the Court of Appeal in the case of **Christopher Ochieng v R (2008) eKLR**

Analysis & Determination

9. This being the s first appeal, the role of this first appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the count of gang rape was proved and as required in law; beyond any reasonable doubt.

11. Revisiting the evidence adduced before the trial court, the prosecution's case was as follows: PW1, the complainant [name withheld] testified that she was at her sister-in-law's home when at about 6pm, one Brian, whom she identified as the appellant herein and who was well known to her went and asked her to accompany him to Nyandorera for drinks. It was her testimony that Brian had a motorcycle and was in the company of two others and that she boarded the motor bike but instead of proceeding to Nyandorera, the motorcyclist branched off towards Migingo and stopped near a bush. It was her testimony that she tried to walk away but Brian caught her and pushed her to the ground where she was gagged and raped by Brian and his accomplices one by one. She testified that one man who was not in court held her mouth and the other held her hands as Brian raped her after which the assailants fled and she was left bleeding so she left for her uncles' home where she met her cousin and uncle and reported the matter to them. That the matter was reported to police and she was treated at Rwamba hospital and was later issued with a P3 form and a Post Rape Care Form was filled.

12. In cross-examination by the appellant, PW1 admitted that she had initially changed her story during her first examination in chief leading up to her being stood down as she had been threatened with harm to her person as well as that of her family whilst in the court premises not to mention the appellant as her assailant. She stated that the appellant had been her boyfriend with whom they regularly communicated and who had previously asked her to visit his home but she had refused.

13. PW2 CMA testified that he was called back home by his daughter who informed him that the complainant had been raped. He testified that he asked one H to talk to the complainant who was then bleeding and the complainant indicated that the accused/appellant herein had raped her and she also gave the telephone number of the appellant which they called but the appellant denied the allegations. It was his testimony that the complainant was taken to hospital and the chief followed them after which they proceeded to Rwamba AP line where the accused was traced and arrested. He further testified that the complainant described the other accomplices and one Tyson was arrested. In cross-examination, PW2 reiterated his testimony in chief and stated that he came to know of the appellant on the day he was arrested.

14. PW3 No. 63680 PC Benson Otieno Owede, attached to Nyandorera Police Patrol Base in Siaya, investigated the case. He testified that on the 16/1/2019 at 10.40am the appellant and his co-accused were taken to the police station by the Assistant Chief of Nyandorera, Mr. Sylvester Mwok. He testified that he booked the case and established that on 15/1/2019 at around 18hours the complainant JW who was the girl friend to the appellant had been gang raped by three people after which she was taken to Rambwa hospital by the uncle.

15. It was his testimony that he went to the Hospital and visited the complainant, recorded her statement and established that she was gang raped by 3 men. He further testified that the area assistant chief managed to arrest the two suspects, the appellant herein and his co-accused after which PW3 charged them. He produced a copy of the complainant's birth certificate which indicated that she was born on 8/8/1998 as Exhibit 3.

16. In cross-examination, PW3 stated that he entered the case as OB 5/16/11/2019 and filled the P3 form on the same day. He further stated that he indicated the date as 16th January 2019 which was an error as it was supposed to read 15/1/2019. He further stated that he visited the crime scene but did not get any tangible evidence as it had rained after the offence had been committed. It was his testimony that he did not find it necessary to take the appellant for medical examination since the complainant knew him as her boyfriend.

17. PW4 James Luka Mabeya a Clinical Officer at Rwamba Sub County Hospital who attended to the complainant testified that the complainant was seen at night on 15/1/2019 and further that she was bleeding vaginally and had blood on legs and hands. He testified that the complainant had a vaginal tear of about 10cm that was repaired for management. The witness produced the P3 form as Exhibit 1, treatment notes as Exhibit 2 and post rape care report form as exhibit 3.

18. In cross-examination he stated that he filled the P3 form and that the approximate age of the injury was 3 hours. He reiterated that he attended to the complainant on the 15/1/2019, and that she went to the Hospital accompanied by her uncle and the aunt. It was his testimony that he did not examine the appellant as the latter was not taken for medical examination and further that the witness had never seen the appellant. The prosecution then closed their case.

19. Placed on his defence, the appellant testified on oath that he was arrested on 16/1/19 while at the stage by two people who identified themselves as police officers who asked for Brian. He stated that the officers did not give another name yet there were 3 persons known by the name Brian. It was his testimony that he was taken to the AP base where he met two other boys who were strangers to him together with the Chief and PW2 and the appellant was informed that together with the two strangers, they had gang raped the complainant whom he also stated was a stranger. He further testified that later on one of the boys was released after a discussion between his parents, the Chief and Police and that the next day he asked to be taken for medical examination but was instead sprinted to court. He stated that there was a dispute on the date of the alleged offence. In cross-examination, he stated that he knew Nyadorera and that he used to reside in Samia. He denied knowing the complainant.

Determination

20. I have carefully reassessed the evidence adduced before the trial court, the grounds of appeal and submissions by the appellant as the Respondent did not file any submissions. The offence of gang rape is provided for under Section 10 of the Sexual Offences Act (hereinafter referred to as 'the Act'). The said section states:

“10. 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. Under **Section 10 of the Act**, the key ingredients of the offence of **Gang Rape** include:

- a) Proof of rape or defilement;
- b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

Therefore, Was the offence of rape committed?

22. Section 3 of the Act defines 'rape' as follows:

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

- (a) he or she intentionally and unlawfully commits an act which cause 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.**

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.”

23. 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.”

24. In **Mark Oiruri Mose** the Court of Appeal stated:

“...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).”

25. This therefore means that it is not a must that medical evidence be availed to prove penetration, but as long as there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

26. In demonstrating this particular ingredient of the offence, the complainant narrated how the appellant who was her boyfriend lured her on false assertions that they were going for drinks in Nyadorera only for him to divert the motorcycle and head towards Migingo where they did not reach as they stopped at a bush where the appellant raped her as his accomplices held her down. PW2 testified that he received information that the complainant had been raped and when he reached home he saw the complainant who was bleeding and who confirmed that she was raped.

27. The Clinical Officer (PW4) confirmed that on examination of the complainant's vagina he noticed the complainant bleeding vaginally and with a vaginal tear of about 10cm thus confirming that the complainant had engaged in a sexual act and produced the P3 Form and treatment notes as exhibits. PW3 produced the complainant's birth certificate which showed that the complainant was born on 8/8/1998 and was thus 21 years old at the time of the incident.

28. The complainant definitely knew what sex was all about and described the events with certainty and clarity. Therefore, on consideration of the evidence on this issue in totality, I find that indeed there was penetration of the complainant's vagina by a male organ.

29. On the age of the complainant, I observe that under Section 10 of the Act it appears that the age of the victim is immaterial since the offence of gang rape is proved on inter alia the commission of either rape or defilement, by more than one person. However, as already stated, PW3 produced the complainant's birth certificate which showed her date of birth as the 8/8/1998 thus placing the appellant at 21 years old. I therefore find that the complainant was an adult aged 21 years old at the time of commission of the offence.

30. On the question of the consent, Sections 42, 43, 44 and 45 of the Act deals with that aspect at length. Section 42 states as follows:

“For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.”

31. Sections 43, 44 and 45 of the Act describes instances where one's consent cannot be said to have been obtained.

32. From the above statutory description of what consent is and going by the testimony of the complainant it can clearly be seen that she never consented to the sexual activity with the assailants. The appellant and his accomplices lured the complainant then forcefully held her down as the appellant raped her. In my considered view, the use of force by the appellant and his accomplices was a clear indication that the complainant did not consent to the sexual acts as it all happened against her will. Accordingly, the offence of gang rape was proved to have been committed on the complainant.

33. On whether there were joint assailants and if so if they had a common intention in the commission of the offence, the offence was committed in the evening at about 6pm as it was not dark. The complainant knew the appellant as her boyfriend and therefore saw him very well. There is no question of mistaken identity. The complainant also narrated how the appellant who was her boyfriend for some time lured her to the scene of crime and how the appellant was in the company of two other boys who held her down as the appellant raped her and that they raped her in turns. The complainant further stated that the appellant had previously tried to get her to visit him at his home but she had declined. She stated that they continually communicated with the appellant even when she was away in Uganda. On his part the appellant denied knowing the complainant or his accomplices and referred to them as total strangers.

34. Analysing the prosecution's evidence and comparing it with the evidence adduced by the appellant, I find that the complainant had ample opportunity to see the assailants as well as recognize and positively identify the appellant who was well known to her. The identification of the Appellant herein is hence without any error as it was one of recognition. In addition, the appellant's accomplices who held her as he raped her were no doubt his partners in crime as they aided and abetted the commission of the heinous act of raping the complainant. Furthermore, they also raped her in turns. They were therefore equally to blame. I find that the offence of gang rape was proved beyond reasonable doubt against the appellant who sought help of his friends to lure and hold the complainant on the ground as he raped her and they in turn raped her injuring her seriously as per the P3 form and treatment notes produced as exhibits.

35. The appellant also faulted the trial court's judgement on grounds among others that it infringed his constitutional right under Article 50 (2) (m) of the Constitution as the language that was used during plea taking (Swahili) was not used during the testimony of PW1, PW2 and PW4 where the language used was English with no form of interpretation recorded to have been applied thus amounting to a miscarriage of justice against him.

36. Article 50 (2) (m) provides for the provision of an interpreter where an accused person does not understand the language being used in court. I have perused the court record and do note that the Coram during each of the proceedings provided for an option detailing the language used during trial and whether there was an interpreter. In some instances, the record reveals that the appellant preferred a Swahili interpretation whereas in other instances the record does not specify whether the interpretation was done. I also note that in instances raised by the appellant, the appellant had the opportunity, which he took, to fully cross-examine the witnesses. In the circumstances, I find that the appellant's rights as alleged were not in any way violated.

37. It was the appellant's case that the medical evidence adduced had gaps and as such could not sustain his conviction. Section 124 of the Evidence Act (a proviso thereof) is clear that a trial Court can convict the accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See **George Kioyi v R Cr. App. No. 270/2012 (Nyeri)** and **Jacob Odhiambo Omumbo v R. Cr. App No. 80 of 200 (Kisumu)**).

38. In the instant case, the trial court convicted the appellant on the sole evidence of PW1 the complainant, which evidence was corroborated by the evidence of PW2 and PW3 as well as PW4. Based on the evidence adduced and on record, I find no reason to interfere with the trial court's conviction of the appellant. The trial court believed the complainant, having had the opportunity to test her demeanor. I find no reason to differ with that finding of fact.

39. The appellant further impugned the trial court on account that the trial court followed a faulty procedure by standing down the complainant in her initial examination in chief. In my considered opinion there was no impropriety in the trial court's conduct of its proceedings. In all the instances the appellant had the opportunity to raise a query as to the procedure and opted to remain silent proceeding on with his defense. Furthermore, the complainant in cross examination clarified that she and her family had been threatened and that when she first appeared in court she was not comfortable testifying against the appellant. I find no prejudice occasioned to the appellant in those instances. I find the complaint as one of mere procedural technicality which does not go to the root or substance of the charge or evidence adduced against the appellant. The complaint is found to be devoid of substance and is hereby dismissed.

40. It was the appellant's further complainant that the evidence adduced by the prosecution was full of contradictions not sufficient to sustain his conviction. The appellant failed to specify what contradictions he referred to. In **Erick Onyango Ondeng' v Republic [2014] eKLR** the court held:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

41. In the instant case, I have carefully examined the evidence of the complainant and PW2 who assisted her to get treated and to make a report and the documentary exhibits and the evidence by the appellant on the varying dates. It is my finding that there is no confusion apparent in the dates. I note that the complainant stated that she was raped on 15/1/2019 at about 6pm. PW2 stated that he took the complainant to hospital on the same date of 15/1/2019 at 10:30 pm. The medical treatment notes clearly show that the complainant was seen at 3:00 am which is the time indicated at the close of the initial treatment notes. A further perusal of the record reveals that lab results were minuted on 16/1/19. PW3 further explained the discrepancies on the date as recorded stating that he indicated the date as 16th January 2019 which was an error as it was supposed to read 15/1/2019. I am persuaded that this was a human error owing to the transition of time in the night which error did not in any way affect the substance of the prosecution case and neither did it prejudice the appellant in any way. That ground therefore fails.

42. The Appellant also challenged the sentence rendered claiming that he was given mandatory minimum contrary to the spirit and letter of the Supreme Court decision in **Francis Karioko Muruatetu v Republic [2017] e KLR**. The offence of gang rape attracts a minimum sentence of 15 years’ imprisonment and a maximum of life imprisonment on conviction. The Appellant was sentenced to 15 years’ imprisonment. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence, the trial Court did not consider a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

43. The sentences rendered by the trial court in this case was lawful and there was no demonstration that the sentencing court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case the sentence is harsh and excessive. The **Muruatetu (supra)** and **Christopher Ochieng (supra)** case as cited by the appellant do not apply to the instant case as the sentence for gang rape allows the sentencing court to exercise its discretion based on the circumstances of the case. the trial court in sentencing the appellant considered his mitigation and the serious injuries sustained by the complainant which involved tears of her vagina. I decline to interfere with lawful sentence imposed commensurate with the offence charged.

44. The upshot therefore is that the appeal herein against conviction and sentence is found to be devoid of merit. The same is dismissed. The appellant was on bond during trial and therefore I would not invoke the provisions of section 333 (of the Criminal Procedure Code. The sentence will therefore run from the date of sentencing in the lower court.

45. Orders accordingly

Dated, Signed and Delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE