**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 14 OF 2018**

**ELLY OTIENO ALOSE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau,***

***Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 38 of 2017 delivered on 27/04/2017)***

**JUDGMENT**

1. **Elly Otieno Alose,** the Appellant herein, was jointly charged with another before court with the offence of **Gang Rape** contrary to **Section 10** of the **Sexual Offences Act** No. 3 of 2006. He faced an alternative count of committing an indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act.** The Appellant faced a second count of **Committing Gang Rape in view of a Child** contrary to **Section 7** of the **Sexual Offences Act.**

2. The particulars of the offences of Gang Rape were as follows: -

> ***On 11th day of September 2016 in Migori County within the Republic of Kenya, jointly within another before court intentionally and unlawfully caused his penis to penetrate the vagina of SN without her consent.***
>
> ***On 11th day of September 2016 in Migori County within the Republic of Kenya intentionally caused your penis to penetrate the vagina of SN without her consent within the view of VA, a child aged 8 years.***

3. The Appellant denied the charges and a trial was held. Five witnesses testified in support of the charges. The complainant in the first count one **SN** testified as **PW1.** The complainant in the second count one **VA** testified as **PW2. PW3** was **No. 219608 C.I. Cyprian Matheta** who was the OCS Awendo Police Station. **No. 63085 Corp. Stephen Mulumba** attached at Awendo Police Station was the investigating officer who testified as **PW4**. **PW5** was a Clinical Officer from Awendo Sub-County Hospital. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for PW1 whom I will refer to as ' **the Mother'** and PW2 whom I will refer to as '**the Daughter'** respectively.

4. At the close of the prosecution's case the Appellant was placed on his defense and opted to give an unsworn statement. The Appellant was then found guilty of the two main charges and was convicted. He was sentenced to 15 years' imprisonment on each count which sentences were to run consecutively.

5. Being aggrieved by the said convictions and sentences, the Appellant preferred an appeal through **Messrs. Nelson Jura & Company Advocates** where he raised the following five grounds: -

> ***1. That the learned trial magistrate erred in law and facts when he convicted the appellant based on the identification parade which was not properly conducted as required by the laws.***
>
> ***2. That the learned trial magistrate erred in law and facts when he disregarded the appellants defense and instead went ahead to convict and sentence the appellant.***
>
> ***3. That the learned trial magistrate erred in law and facts when he convicted the appellant with the two offence yet the age of the complainant was not proved and is not even known.***
>
> ***4. That the learned trial magistrate erred in law and facts when he sentenced the appellant for 15 years for each of the counts and ordered that sentences to run consecutively in total disregarded to the circumstances of the case and rules of sentencing.***

***5. The learned trial magistrate was biased against the appellant***

6. Directions were given and the appeal was disposed of by way of written submissions. The Appellant duly filed the submissions whereas the Learned State Counsel **Mr. Kimanthi** tendered oral submissions in opposition to the appeal.

7. This being the Appellants' first appeal, the role of this 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.

8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the counts of gang rape and those of committing gang rape in view of a Child were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions and I must say that both the prosecution and defence evidence was well captured in the judgment under appeal and I hereby incorporate that part herein by reference.

9. 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 as follows: -

> ***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.***

10. 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.

**Was the offence of rape committed?**

11. **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."***

12. **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.***

This position was fortified in 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).

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

14. In demonstrating this particular ingredient of the offence, the Mother narrated how her husband kicked her out of their house at night of 10/09/2016. That, she packed her belongings and left with her two children; the Daughter and a young child aged around 8 months old one **LO**. That, reaching the main road the Mother met a friend of her husband one **Oyugi** whom he knew so well. On asking what had happened, the Mother narrated the preceding events and Oyugi offered to assist them find a place to put up for the night before they left for Kitale the following morning. Instead, Oyugi took them to a friend's house and after talking to the friend, who is the Appellant herein, the Mother and her two children were given a room to spend in as Oyugi, the Appellant and another man went to sleep in another house.

15. The Mother further had the following to say: -

> ***…I went and locked it [the door]. I then went to bed and joined with my children. I did not switch off the light. At around midnight I heard a noise. I woke up to find someone standing beside the bed. I heard someone say 'SN Nipatie'. He had a torch……he removed a panga. I looked and saw it was Oyugi. He put the panga on my neck and said that if I did not do what he wanted he would kill me. He then ordered me to remove my jeans trousers. I undid. He pulled them off. He was also wearing jeans. He removed the trouser up to knee level…….Oyugi then got on the bed…He pushed me back forced open my legs and inserted his penis into my vagina and had intercourse with me. ….. He ejaculated and then rested…... He then had intercourse with me a second time……***

> ***…...He [Oyugi] told the man who stood guard to also have sex with me. Oyugi insisted. The young man gave the panga to Oyugi. Oyugi held V…. The young man came onto the bed. He is the accused person. ……Oyugi told him to use a condom and handed him one. The young man unzipped his trousers and removed his penis. He then slipped the condom on and got on top of the bed. He inserted his penis into my vagina and had intercourse with me. He continued thrusting for a long time while he said in Dholuo that he was unable to ejaculate. He withdrew with the condom still on and got off he bed….***

16. The daughter corroborated the evidence of the Mother and even stated that when Oyugi told her Mother to have sex with her she told Oyugi to leave her mother alone and she was threatened. She then saw the Appellant walk into the room holding a panga who told her that if she screamed she would suffer. That, she got off the bed and the panga was put near her neck as she was about to scream. The Daughter further narrated how Oyugi and the Appellant had sex with the Mother in turns as she watched.

17. The Clinical Officer (PW5) confirmed that on examination of the Mother's vagina she found some bruising and scratch marks on upper part of her both thighs. There was tenderness on the genitalia and a laboratory high vaginal swab revealed the presence of epithelial cells. PW5 confirmed that the Mother had engaged in a sexual act and produced the P3 Form as an exhibit.

18. The Mother was a married woman who was with her two children on the alleged date and time. PW5 estimated her apparent age as 24 years old. The Mother 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 Mother's vagina by a male organ.

19. **On the age of the Mother**, I wish to observe that under **Section 10** of the Act it seems 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.

20. However, as already stated PW5 accessed the apparent age of the mother as 24 years old. The trial court was as well satisfied that the Mother was an adult. The police who issued the P3 Form also indicated the age of the Mother as an Adult. I hence find that the Mother was an adult of around 24 years old at the commission of the offence.

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

> ***For thepurposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice***

**Sections 43, 44** and **45** of the Act goes into great detail in describing instances where one's consent cannot be said to have been obtained.

22. From the above statutory description of the consent and going by the testimony of the Mother and the Daughter it can be clearly seen that the Mother never consented to the sexual activity with the assailants. The attackers were armed with a panga and threatened the Mother and the Daughter with death on raising alarm or resisting any command given. The daughter testified that the panga was put next to her neck and she was really frightened. Further, it is clear that the assailants took advantage of the desperate situation the Mother was in that night. The use of threats and a panga coupled with the fact that the Mother was pushed onto the bed by Oyugi are some indicators that indeed the assailants used force and threats on the Mother as opposed to her consenting to the act. I therefore find that the Mother did not consent to the sexual acts as it all happened against her will.

27. This Court therefore comes to the finding that the offence of rape was committed on the complainant.

28. Since the offence the Appellant is facing is gang rape, I will now consider the other limb as to whether there were joint assailants and if so if they had a common intention in the commission of the offence.

29.The offence was committed during the night inside the house of the Appellant. The Mother and daughter narrated how Oyugi and the Appellant who had sex with the Mother in turns. Subject to identification, Oyugi committed the offence in association with another person who is alleged to be the Appellant. The two had common intention.

30. On **identification**, the Mother and Daughter readily recognized Oyugi when they met him at the main road. It was Oyugi who took them to the house of the Appellant. The Appellant so confirmed in his unsworn defence. The Mother told the police that it was Oyugi who was in the company of another man whom she described who were the assailants. Both the Mother and the Daughter testified that the house was lit with a lamp which was not put off and that when the assailants went into the room they were sleeping in, Oyugi had a very bright torch which was placed facing upwards and the whole room was well lit. Further, Oyugi and the other person walked with the Mother and her two children for quite a time until it was 07:00am. That, it was Oyugi and the other person who organized for two motor cycles to ferry the Mother and her two children with their luggage to the bus stage for Kitale. Both the Mother and Daughter contended that they had ample time with the assailants and saw them so well that their identification was not in error.

31. There was also issue of the identification parade. PW3 testified that he was requested by PW4 to conduct a parade for the Appellant who was by then in police custody. That, he picked the suspect from the cells and prepared the parade by looking for nine other people who were of equal or similar size and appearance as the Appellant. At the end of the parade PW3 filled in a Parade Form which was duly signed by the Appellant. A look at the evidence of PW3 and the Parade Form shows that the Appellant was explained to the purpose of the parade and he had no objection. He signed the Parade Form at Page 2 in such acknowledgement. He was also asked whether he needed to call a friend or a solicitor to be present during the parade and he indicated that he did not intend to call any such. He again signed the Parade Form at Page 2 in such acknowledgement. There were 10 members of the parade whose names were indicated in the Parade Form and again the Appellant did not have objection on the arrangements or any person on the parade.

32. When all the preliminaries were settled the Mother, who was held at the Sony Sugar Hotel and out of view of the parade, was called and PW3 told her that the assailant may or may not be in the parade. The Mother managed to identify the Appellant in the parade by touching. PW3 then disbanded the parade and reconstituted another one in the absence of the Mother. The Appellant changed his clothes and chose a different position. When the Mother was called, she managed to identify the Appellant again by touching. Satisfied with the parade the Appellant signed the parade form which was produced as an exhibit.

33. There being two modes of identification I will first deal with the identification parade. I have perused the Parade Form and noted that the name of the police officer who was In-Charge of the parade was one **Cpl. Stephen Makhokha** and not PW3. Infact the name of PW3 did not feature anywhere in the Parade Form. Therefore, the evidence of PW3 was at variance with the Parade Form produced. According to the Parade Form PW3 did not conduct any parade for the Appellant, but one **Cpl. Stephen Makhokha**. The contents of the Parade Form produced as an exhibit are of no probative value at all and are hereby rejected. That being so, the evidence of PW3 becomes highly doubtful as it appears like the parade was performed on his behalf. Having failed to produce the Parade Form on the parade which PW3 alleged to have presided over, his evidence was but hearsay.

34. The only remaining evidence on identification was that of the Mother and the Daughter. The circumstances under which the identification was allegedly done must be carefully tested. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

35. The Court of Appeal has also discussed this issue at length. (See **Wamunga vs Republic (1989) KLR 426, Nzaro vs Republic (1991) KAR 212, Kiarie vs Republic (1984) KLR 739** among others).

36. The Appellant admitted that the Mother and Oyugi went to his home on the day in issue. What is at variance is whether he took part in the acts complained of. The Appellant contended that he never returned to his house when he gave it out to Oyugi and the Mother to spend as Oyugi told him they were lovers and they were avoiding the sister to the husband of the Mother who lived near Oyugi's home. The Mother gave the description of the owner of the home she spent in. She first saw him when they arrived at the home. The Mother then saw the owner of the home again when he returned with Oyugi at the heart of the night. The bedroom had the lantern lamp and Oyugi carried a bright torch which was put facing upwards and the whole room was well lit. The Mother saw the owner of the house carrying a panga which he placed near the Daughter who stood next to the bed she was on to silence her.

37. That was however not the end of the meeting. When the assailants had finished having sex with the Mother both left the home in the company of the Mother and her two children and walked to the bus stage where the Mother was to take a bus to Kitale. They walked all along until 07:00am when the assailants organized for two motor cycles which carried the Mother and her two children. The Mother and Daughter hence had the opportunity to see the assailants well as it was day time.

38. The evidence of the Mother was duly corroborated by the Daughter. She also narrated the events as they unfolded until they reached the place where the Mother and her boarded the two motor cycles.

39. By placing the prosecution's evidence and the defence side by side and on the guidance of the binding case law I find that the Mother and the Daughter had ample opportunity to see the assailants both at the home they spent in and on the road in the morning of the following day and that the defense is outweighed by the prosecution's evidence. The identification of the Appellant herein as the one who was in the company of Oyugi when they jointly and in turns had sex with the Mother is hence without any error.

40. The upshot is therefore that the offence of gang rape was proved in law and the appeal on conviction is hereby dismissed.

41. As to whether the offence of Committing Gang Rape in view of a Child was proved, the starting point is whether the Daughter was a child in law. An Age Assessment Report was produced as an exhibit which stated that the age of the Daughter was 10 years old. That evidence was not controverted and settled the issue. The Daughter was a Child of tender age when the offence of Gang Rape was committed.

42. On whether the Daughter was within the view when the Mother was gang raped, the evidence of the Mother and that of the Daughter come to play. They both testified that the Daughter stood next to the bed where the assailants had sex with the Mother. The Daughter saw the assailants climbing on top of the Mother in turns as the assailants held the panga near her neck in turns so as to threaten and silence her. The evidence of the Daughter was so clear that she saw the assailants having sex with her Mother.

43. The Appellant however stated that when the Appellant came to his home she was not in the company of the Daughter but the baby. The inevitable question therefore is where the Daughter was if not in the company of the Mother. The trial court saw the demeanor of the witnesses as they testified and believed their testimonies. I must give an allowance to that. There being no challenge to that finding and having reconsidered the evidence I am satisfied that the Daughter and the Mother were truthful and that the Daughter was with the Mother when the Mother was gang raped. I hence find the position taken by the Appellant that the Daughter was not in the company of her mother as untrue and is hereby rejected.

44. I also find that the offence of Committing Gang Rape in view of a Child was proved and the Appellant rightly found guilty and convicted. The appeal on conviction is hence dismissed as well.

45. The Appellant also vehemently challenged the sentences rendered. The Appellant was sentenced to the minimum sentence of 15 years' imprisonment on the offence of gang rape. The Appellant was also sentence to 15 years' imprisonment on the offence Committing Gang Rape in view of a Child. **Section 7** of **the Act** provided a minimum sentence of 10 years' imprisonment on conviction. The sentences were ordered to run consecutively.

46. 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 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. 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.

47. The sentences rendered were 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.

48. As to whether the sentences were to instead run concurrently, I must acknowledge the general policy that sentences for offences committed in the same transaction ought to run concurrently. However, that is a general position and each case must be decided on its own merit.

49. In this case I am in agreement with the sentencing court for the reason that the Daughter was a child of tender age and memories of how her mother was gang raped in her presence would definitely have a long term effect on her life. That was a factor which negated the general policy on concurrent sentences. I hence find that the sentences were proper and that they should run consecutively as ordered. The appeal on sentences equally fails and is hereby dismissed.

50. I therefore affirm the decision of the Learned Magistrate and the appeal be and is hereby dismissed.

**DATED, SIGNED and DELIVERED at MIGORI this 28th day of March 2019**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Mr. Jura,** Counsel for the Appellant.

**Mr. Kimanthi** Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyne Nyauke** – Court Assistant