REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

MISC. CRIMINAL APP. NO. 28 OF 2018

MOHAMED NOYI SHEKULE.....1ST APPELLANT

MOHAMED MAHADHI MAHMUD..... 2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Mwaure for the appellants

Ms. Mbali for the State

JUDGMENT

Mohamed Noyi Shekule and **Mohamed Mahadhi Mahmoud,** hereinafter referred to as the appellants were indicted for gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. Particulars of the offence in the indictment are that on 2.4.2018 in Lamu West, in association intentionally caused their penis to penetrate the vagina of **MNN** a child aged fourteen (14) years old. Each of the appellant denied the charge. The prosecution presented four witnesses to proof the charge beyond reasonable doubt.

In summary, this is what they told the trial court:

PW1 – MNN, the victim of the offence stated that on 2.4.2018, she had cycled to the river when she came into contact with the appellants. Her evidence was that she was ordered to disembark as the first appellant carried her towards a house where they placed her on the bed and in turns had carnal knowledge of her.

According, to the victim this sexual acts by the appellants occurred severally and on diverse times. She was however warned not to share the incidents with anybody. Further, the victim testified that on going back home she would not hold it back but to inform her grandmother, the reason why she delayed from fetching the water. Keeping in mind what had happened, the court therefore heard that the grandmother **(PW2) N** reported the matter to the police at Mokowe Station as confirmed by **(PW4) PC Daniel Kibet.**

According to (PW 4) on booking of the complaint from PW1 and PW2 he embarked on the assignment of investigating the gang rape incident by issuing the P3 and visiting the alleged scene of the crime. It was PW4 evidence that the appellants who had been identified by the victim were finally apprehended and charged with the offence. The P3 Form issued by PW4 to the victim (PW1) was filled by **PW3 – Ahmed Hassan of King Fahad**. In PW3 testimony he told the court that on examination of the victim (PW1) there was no evidence of penetration. This view was allegedly formed upon physical examination of the genitalia of the victim for any signs of lacerations, tears and or positive indicators of sexual contact with a male genitalia. The P3 Form was produced as exhibit in support of the medical examination findings.

At the close of the prosecution case, each appellant was placed on his defence under Section 211 of the Criminal Procedure Code. according to the 1st appellant he denied any knowledge of the offence save for the police arrest for an act he was not aware of until a charge that was read in court.

Further, the 1st appellant summoned the evidence of one **Abdulharman Asman (DW2)** who testified that appellant has been his employee. He gave evidence that on the alleged date of the offence, the appellant was on duty with effect from 7.00 a.m. to 5.00 p.m. He was however not able to account for the appellants whereabouts after 6.00 p.m..

The 2nd appellant on his part also testified and denied that he was involved in any way with the alleged offence of raping the victim (PW1). He only recalled that on 2.4.2018, the police went to their house where they effect an arrest without informing him what he had done to warrant arrest.

Based on the totality of these evidence, the Learned trial Magistrate convicted each of the appellant and did impose a sentence of twenty five (25) years imprisonment.

Being aggrieved with both conviction and sentence, the appellants through their counsel **Ms. Aoko holding brief for Mwaure** lodged an appeal based on the following amended petition of appeal:

(1). **The Learned trial Magistrate erred in Law and fact by convicting and sentencing the appellants to twenty five (25) years imprisonment by relying on a charge sheet whose ingredients and particulars were contradicted by the evidence of the complainant and the 2nd prosecution witness in terms of alleged time of the offence.**

(2). The Learned trial Magistrate erred in Law and fact ignoring and failing to consider the crucial fact that the alleged offence was not formally reported at Mokowe Police Station but the accused were arrested and detained.

(3). The Learned trial Magistrate erred in Law and fact by ignoring the evidence of 3rd prosecution expert witness who examined the complainant and made a conclusion that the complainant genitalia were normal and no medical evidence of penetration was seen.

(4).The Learned trial Magistrate erred in Law and fact by creating and importing her own evidence on the issue of demeanor of the 1st and 2nd prosecution witnesses.

(5). The Learned trial Magistrate erred in Law and fact fatally failing to analyze and critically digest the evidence tendered by the four (4) witnesses called upon by the prosecution which evidence was inconsistence throughout the hearing.

(6). The Learned trial Magistrate erred in Law and fact in convicting and sentencing the appellants by only analyzing and discrediting the appellants defence on the basis of an alibi.

(7). The Learned trial Magistrate erred in Law and fact by failing to appreciate the fact that the prosecution despite visiting the alleged scene of crime they didn't bring any material evidence and/or exhibits.

(8).The Learned trial Magistrate erred in Law and fact in convicting and sentencing the appellants by relying on a victim impact report and/or statement prepared by the Probation Officer which report was not shared with the appellants during or after the hearing denying the appellants an opportunity to test the same or cross-examine the said Probation Officer's report contrary to the provisions of Article 50 (1) (j) of the Constitution of Kenya 2010.

(9). The Learned trial Magistrate erred in Law and fact by demonstrating and exhibiting bias from the date of plea and throughout the hearing contrary to the provisions of Article 50 (2) (a) (b) (c) (g) of the Constitution of Kenya 2010.

(10). The Learned trial Magistrate erred in Law and fact by considering the charge sheet and P3 Form whose information was contradicting the evidence of the 1st, 2nd and 3rd prosecution witness.

Submissions on appeal

Learned counsel submitted that from the evidence of the four witnesses, the prosecution failed to discharge the burden of proof of beyond reasonable doubt that the appellants gang raped the victim. Further, counsel submitted that the testimonies of PW1 and PW2 was so inconsistent as to the time the alleged offence took place. It was argued by counsel that whereas the victim (PW1) alleged that she was raped at night the grandmother (PW2) spoke of an incident which occurred in the morning.

Relying on the principles in the case of **Paul Gitari v Republic and John Mutua Munyoki v R {2017} eKLR** counsel submitted that the nature of the inconsistencies and contradictions was such that no reasonable tribunal could safely convict the appellants for the offence.

Further, counsel raised the issue of the medical evidence by (PW3) which was clearly showed lack of penetration. Counsel contended that the positive findings from the medical examination carried out by PW3 was such that it was at variance with the evidence given by (PW1).

In light of the legal principles in the cases of **Dan Melly Maganga & Another v R {2014} eKLR and Joshua Mutua v R {2017} eKLR** counsel contended that there was no evidence that the victim's labia majora and vulva or vaginal canal were lacerated or penetrated within the time she alleged the offence occurred.

Mr. Mbali the Senior Assistant Director prosecution counsel opposed the appeal on three fronts:

(1).That the evidence on identification was not mistaken.

(2). The medical evidence being challenged found on the other hand that the vaginal canal of the victim had been penetrated sexually.

(3). The level of inconsistencies and contradictions was not fatal to the prosecution case.

Learned counsel for the state, therefore urged the court to dismiss the appeal.

Analysis and determination

In the instant appeal as a first appeal court, the case of **Okeno v R {1972} EA 32** illustrates the importance and duty of the court to subject the whole evidence to a fresh scrutiny and evaluation with a view of drawing its own inferences and conclusions.

In this conviction, given the circumstances of the case, as outlined in **Okeno case (supra),** it follows that in exercising appellate jurisdiction due, consideration as to the demeanor and credibility of witnesses would be appraised in the context of the trial court findings and assessment.

The central issue to this appeal boils down to one fundamental question:

"Whether the prosecution did discharge the burden of proof of beyond reasonable doubt against the appellants?"

This being the inquiry into the appeal, the evidence must display and satisfy the criterion on the standard of proof postulated in the case of **Woolmington v DPP {1935} AC.**

It is well established that the burden of proof, never shifts to the accused (read) appellant at any one time, for even in those statutory recognized exceptions, the basic norm of the prosecution discharging the burden of proof remains unimpeached.

In order for the prosecution to succeed against the appellants under Section 10 of the Sexual Offences Act, the evidence so presented ought to have proven the following ingredients:

(1).That the appellant jointly by association and with a common intention penetrated the genitalia of the victim.

(2). That the victim was aged below eighteen (18) years old.

(3). That the appellant, were positively identified as the principal offenders to the crime.

I have also examined the facts of this case as presented and defended before the trial court. It is my view that the impugned Judgment being a product of a hearing interpartes to safeguard against any possibility of misapprehension each of the ingredients be analyzed singularly.

(a). The element on penetration Section 2 of the Sexual Offences Act provides that:

> **"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

The case of **George Owiti Raya v R {2013} eKLR** fortifies this definition

> **"that penetration is considered to have taken place even without going past the hymen membrane."**

This court also endorses the reasoning in **Mwangi v R {1984} KLR 595** that the wide interpretation of the act of penetration should not be defeated by reason that there was no presence of spermatozoa in the vaginal canal. Be that as it may, it must be observed that for an accused person to be convicted of a sexual act of penetration in absence of a plea of guilty, the entire evidence must appear to demonstrate that sexual intercourse took place. It is not sufficient to just regard the testimony of the victim as credible without a proper scrutiny suggestive of positive penetration of her genitalia.

In the instant appeal, the prosecution case was dependent on the testimony of the victim above, in view of non-responsive of the medical evidence. Inconsistence and contradictions between the testimony of PW1 and PW2 it becomes inevitable for the court to resolve the doubt in favour of the appellant.

It is trite and permissible that a charge against an accused can be proved on the credibility of the evidence given by a single identifying witness pertaining to the commission of the offence. (See **Roria v R {1967} EA 583, Abdalla Bin Wendo v R {1953} 20 EACA 186)** in answer to this question.

The appellant challenged the prosecution case that the victim testimony was riddled with inconsistencies and contradictions which misrepresented the incident. It is important to note that the testimony by PW1 on the time and occurrence of the gang rape stands majorly to be at variance with that of PW2. Time is of essence for offences of this nature particularly where an alibi defence is raised to negative presence of an accused person at the scene of the crime. Hence, it is so evident that in answer to the prosecution case appellants relied on an alibi defence.

As I see it whatever be the merits and demerits of the arguments advanced by the respondent based on their evidence at the trial, the fact remains identification of the appellants is inevitably in doubt. The victim also cannot reasonably be expected to be believed that on one

single night she went through gang rape without her vaginal canal showing any signs of friction or lacerations. I say so, the victim at the time of gang rape was aged fourteen (14) years and therefore cannot be said to have being experimental sexual intercourse.

According to the principles in **Omuroni v R {2002} EA 508** the court held as follows:

> **"Trial courts can decide cases one way or the other on the basis of demeanor of a witness or witnesses particularly where the issue of credibility of such witnesses is decisive. In such a case, the trial Judge must point out instances of demeanor which he noted and upon which he relies. The trial court must point out what constituted the demeanor which influenced the trial Judge to make favourable or unfavourable impression about the credibility of a particular witness."**

This principle appears not to have been applied by the Learned trial Magistrate. In line with submissions by the respondent counsel in my opinion, it follows the subject matter of gang rape was never proved beyond reasonable doubt.

At this point, it is worth taking note that this was a joint venture bringing on force the provisions of Section 21 of the Penal Code on common intention. ***"This is when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with another and in the prosecution of such purpose, an offence is committed….."***

A careful examination of the evidence shows that the case for the prosecution immediately before or during the commission of the offence, failed to lead evidence on common intention. There was no lot of evidence on any illegal acts designed and executed together by the appellants as defined in Section 21 of the Penal Code.

It is obvious that the evidence in this case suffers from a threshold issue as contended by the Learned counsel for the appellants without considers the evidence led by the prosecution it is established that on the concerted conduct of the appellants there is no indication that they were acting with a common intention to commit the offence.

Further, the evidence in this case, casts a serious doubt as to the act of penetration having been committed against the victim. It is also apparent therefore, that if the victim was ever gang raped this court is satisfied that the alibi defence dislodges the quantum of evidence admitted in favour of the prosecution.

For the above mentioned reasons, I proceed to allow the appeal, quash the conviction and set the appellants free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 21ST DAY OF MARCH 2019

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R. NYAKUNDI

JUDGE