



REPUBLIC OF KENYA

IN THE HIGH COURT

AT SIAYA

CRIMINAL APPEAL NO. 49 OF 2016

BETWEEN

FREDRICK ODHIAMBO DIMO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R.M.

Oanda, SRM dated 3rd May 2016 at the Senior Resident Magistrates

Court at Ukwala in Criminal Case No. 503 of 2015)

JUDGMENT

1. The appellant **FREDRICK ODHIAMBO DIMO** was charged with the offence of gang rape contrary to **section 10** of the *Sexual Offences Act, 2006*. The particulars of charge were that on 30th July 2015 at [Particulars Withheld] Sub-location in Ugenya Sub-county of Siaya County, having a common intention to penetrate the vagina of EAP, a child aged 13 years, was in the company of WOM, who intentionally caused his penis to penetrate the vagina of the said EAP. The appellant denied the charge and after a full hearing, he was convicted and sentenced to 15 years' imprisonment. He now appeals against conviction and sentence.

2. In the petition of appeal filed on 10th May 2016, the appellant argued that the conviction was based on insufficient, unreliable and discredited evidence. In addition, he filed written submissions in which he argued that the prosecution did not prove its case. The respondent was of the view that the prosecution proved every element of the offence.

3. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and to come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic [1973] EA 32*). The evidence presented before the subordinate court was as follows.

4. The facts of the case are that at the time of the incident PW 1 was aged 13 years. The investigating officer, PW 4, produced her baptism card which confirmed that she was born on 18th March 2002. PW 1 testified that on 29th August 2015, she escorted her cousin, daughter of appellant, to their home where she spent the night. On the following day as PW 1 prepared to go back home, the appellant stopped her and

told her to stay. PW 1 recalled that the accused together with another man known as *Boyi* kept staring at her and she did not understand why. Later that evening at around 6.00pm the appellant requested her to accompany him to the nearby shops. On the way there the appellant grabbed her by the neck and took her to a nearby house where he left her with *Boyi*, the man who had been staring earlier. *Boyi* then proceeded to sexually assault her. Later on the appellant came and took PW 1 back home.

5. PW 1's grandmother, PW 3, testified that when PW 1 did not return home on 30th August 2015, she went looking for her at the appellant's home. On arrival she found the appellant's mother but the appellant and PW 1 were not there. Later on the appellant returned with PW 1. PW 1 informed her that the appellant had taken her to a house where she was defiled. She went with PW 1 home and the following day she took her to the Health Centre where she was examined by the clinical officer PW 2.

6. PW 2 testified that she examined PW 1 and found that strangulations marks on her neck. There were bruises on both labia and the hymen was broken. There was a whitish discharge from the genitals and a vaginal swab revealed epithelial cells. She then formed the opinion that there was penetration.

7. When the appellant was put on his defence, he denied committing the offence. He testified that on 30th August 2015, he left PW 1 at his mother's house and went to his own house where he had friends who had come to console him over the loss of his wife. He later received a call from PW 3 who told him that she wanted to talk to him at his mother's house. He went there and found that PW 1 was not there. Upon inquiry he was told that PW 1 had left with *Boyi*. He went out looking for her and found her in *Boyi*'s house and he took her home to her grandmother. He testified that he was later arrested and charged in court.

8. The appellant called three witnesses. The appellant's mother, Susan Achieng Dimo (DW 2) testified that the appellant came looking for PW 1 but she was not at home. Later her granddaughter Hellen Akinyi (DW 3) told her that PW 1 had left with *Boyi*. Florence Atieno Okoth (DW 4) also testified that the complainant left with *Boyi* and later the appellant came looking for her.

9. I have reviewed the evidence on record and the relevant law. **Section 10** of the *Sexual Offences Act* provides:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any other 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 than fifteen years but which may be enhanced to imprisonment for life.

10. From the evidence I have outlined, there is no doubt that PW 1 was subjected to sexual assault by *Boyi*. Her testimony was corroborated by the medical evidence which showed that she had bruises on the labia consistent with penetration. The essence of the offence of gang rape is that there must be more than one perpetrator who acts in association with others even though not all of them carry out the actual rape or defilement.

11. The issue then is whether the prosecution proved that the appellant was part of the scheme to take PW 1 to *Boyi* then return her. PW 1 narrated how the appellant asked to accompany her to the shops and on the way turned against her, strangled her and threatened her before taking her to a house where she found *Boyi* who defiled her. He later came to take her after she had been defiled. PW 1's testimony was corroborated by the evidence of PW 2 who testified that the complainant had strangulation marks on her neck which was consistent with PW 1's testimony.

12. PW also recalled that earlier in the day she had noticed the appellant and *Boyi* looking at her but she did not know why. Further nothing emerged from cross-examination to suggest that PW 1 was framing the appellant. Her testimony on what happened was resolute. The appellant's witnesses all confirm that PW 1 was at his home.

13. The conviction and sentence is affirmed.

14. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this 19th day of February 2018.

T. W. CHERERE

JUDGE

Appellant in person.

Ms Odumbe, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.