



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 84 OF 2016

(CORAM: D. S. MAJANJA - J.)

BETWEEN

SAMUEL OTIENO KALASINGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 22nd July 2015 in Criminal Case No. 220 of 2014 in Siaya Law Courts before Hon. M.S. Kimani, SRM.)

JUDGMENT

1. The appellant, **SAMUEL OTIENO KALASINGA** and another accused were charged with the offence of gang rape contrary to **section 10** of the **Sexual Offences Act**. The particulars of the case against him and his co-accused were that on the night between 10th and 11th March 2014 [*particulars withheld*] Siaya County, jointly in association with each other intentionally and unlawfully caused their penis to penetrate the vagina of DAB without her consent. The appellant also faced an additional charge of causing grievous harm contrary to **section 234** of the **Penal Code**, unlawfully causing grievous harm on DAB on the same date at the same place.
2. The appellant was convicted on both counts and he now appeals against conviction and sentence. The thrust of his appeal is submissions in that the prosecution failed to prove the case beyond reasonable doubt.
3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***).
4. The complainant, PW 1, was walking home on the night of 10th March 2014 when she was accosted by two men. One was a stranger and the other was the appellant. PW 1 stated that she knew the appellant because they were neighbours and she knew his voice. The stranger, who was the 1st accused, beat her up, held her down and then proceeded to rape her after tearing her clothes. She stated that the appellant did not have sexual intercourse with her but he assisted the stranger beat her up. They left her until a good Samaritan assisted her to go home.
5. On the next morning at about 10.00am, PW 1 accompanied by one Susan Adhiambo Oyenje (PW 4) to the police station where they went to report the incident, PC Wilson Kipyegon (PW 5) testified that both PW 4 and PW 1 came to the Police Post. He recalled that at the material time, PW 4 was holding PW 1's hand as she could not see having been injured the previous night. PW 1 told him that a stranger raped her but that it is the appellant who beat her as she knew him. PW 4 was declared a hostile witness when she denied that she did not know the accused. Nevertheless, she is the one who accompanied PW 1 to the Police Post.
6. Since word had already gone out that the appellant was involved in the incident, he was arrested by members of the public and taken to the Assistant Chief, PW 3, who then took the appellant to the Police Post where he was re-arrested by PW 5. PW 5 issued the P3 form to PW 1. It was filled by the Clinical Officer, PW 6, on 13th March 2014. By the time he examined her at Siaya County Referral Hospital, she had a swollen face, there was tenderness and swelling on the neck and she had lost her voice. The elbows and shoulders had bruises and were tender. Her genitalia were inflamed and the vaginal orifice lacerated. He classified the injuries as grievous harm and opined that there was forced penetration.
7. In his defence, the appellant told the court, he was arrested on 11th March 2014 at 11.00am as he was working when a crowd came and arrested him accusing him of an offence he knew nothing about.
8. In this case, there is no doubt that PW 1 was assaulted and raped when she was attacked by two people. Her testimony on this point, which

did not require corroboration, was in fact corroborated by PW 5 who examined and confirmed her injuries. The issue is for consideration whether the appellant attacked her.

9. In considering this evidence, our courts have urged caution in considering the evidence of identification in difficult circumstances. However, this was a case of recognition as PW 1 knew the appellant and placed him at the scene. She was able to name him at the Police Post. She also identified his voice as he was known to her. The appellant, in his defence, admitted he was from the locality. His defence was a mere denial of the substance of the offence and focused on his arrest.

10. In my view, the issue is whether there was a common intention between the appellant and his co-accused to assault and rape PW 1. The issue of common intention is dealt with by **section 21** of the **Penal Code** which states as follows;

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

The East Africa Court of Appeal in **Wanjiro d/o Wamerio and Another v Regina [1955] 22 EACA 521** defined common intention as follows;

Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with.

11. The testimony of PW 1 is that appellant's co-accused raped her, there is no evidence that they acted in concert to rape her or that there was a pre-meditated plan. The evidence ascertained that the appellant assaulted PW 1 and caused her grievous harm and thereafter left.

12. I therefore quash the conviction and sentence on gang defilement and affirm the conviction on grievous harm. I also affirm the sentence of 5 years' imprisonment.

DATED AND SIGNED at SIAYA this 23rd day of March 2018

D. S. MAJANJA

JUDGE

Appellant in Person

Mr Okach, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.

Court Assistants: L. Odhiambo and B. Ochieng