



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO.57 OF 2017**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NOS.56 & 55 OF 2017**

**JARED OCHIENG AKUKU ..... 1<sup>ST</sup> APPELLANT**

**SILAS ODIWUOR ODHIAMBO .....2<sup>ND</sup> APPELLANT**

**NELSON OWITI OTIENO .....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Being an appeal from original conviction and sentence in Oyugis PM's Court Sexual Offences Act Case No.28 of 2016 - Hon. J.R. Ndururi, PM, dated 23<sup>rd</sup> June, 2017)

**JUDGMENT**

1. **JARED OCHIENG AKUKU**, is the appellant in this appeal No.57 of 2017, which was consolidated with Appeal No.56 of 2017, involving **SILAS ODIWUOR ODHIAMBO** and Appeal No.55 of 2017, involving **NELSON OWITI OTIENO** and heard together with **Jared** becoming the first appellant, **Silas** becoming the second appellant and **Nelson** becoming the third appellant.

2. The three appellants were charged before the Principal Magistrate at Oyugis with gang rape, contrary to **Section 10** of the **Sexual Offences Act**. It was alleged that on the 2<sup>nd</sup> December 2016, at [particulars withheld], Rachuonyo South, Homa Bay County, they had carnal knowledge of **M A B** without her consent.

In the alternative, they allegedly committed an indecent act with an adult contrary to **Section 11(A)** of the **Sexual Offences Act**.

3. After a full trial, the three appellants were convicted on the main count and sentenced to fifteen (15) years imprisonment each.

Being dissatisfied with the conviction and sentence they preferred the present appeal on the basis of the grounds in their respective petitions of appeal filed herein on 15<sup>th</sup> November, 2017 and 13<sup>th</sup> December 2017. They appeared in person at the hearing of the appeal as consolidated and each relied fully on their respective written submissions in support of their case.

4. The learned prosecution counsel, **MR. OLUOCH**, appeared for the State/Respondent which opposed the appeal and argued that the Core of the Appeal was the identification of the appellants as the culprits and in that regard, the complainant (PW1) indicates that she had previously known the appellant and that the offence occurred in broad daylight after the complainant was "**grabbed**" and taken away by the appellants who thereafter raped her in turns. That, the complainant saw the appellants and had opportunity to identify them as the incident occurred within a period of time.

5. The respondent further argued that the Clinical Officer confirmed that the complainant was raped and that the chief (PW2) arrested the appellant amid resistance from them which conduct was inconsistent with their innocence. That, in their defence, the appellants avoided to talk about the time of the offence.

The respondent contested that the appeal lacks merit and urged this court to dismiss it.

6. Having considered the appeal and the submissions by both sides in support or opposition thereto and also after considering afresh the

evidence adduced at the trial as is required of a first appellate court with full knowledge that the trial court had the advantage of seeing and hearing the witnesses, it is this court's opinion that the basic issue arising for determination was whether the ingredients of the offence of rape were duly established to sustain the charge against the appellants, any one of that or any other person.

7. Under **Section 10** of the **Sexual Offences Act**, a person who commits the offence of rape 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 is guilty of an offence termed gang rape.

The evidence by the complainant **M A B (PW1)** indicated that she was willingly or unwillingly in the company of the appellants and others when she was allegedly forced to engage in sexual intercourse with them in turns. As confirmed by **C O O (PW3)**, she was menacingly removed from his company by the three appellants. He parted company with her after being intimidated, threatened and assaulted by the three appellants. He only saw her again after she was allegedly rescued from the appellants by the area chief, **JAMES OINDI (PW2)**. She informed her rescuers that she had been taken round by the appellants who made her drink alcohol and raped her at different places.

8. A Clinical Officer at Rachuonyo District Hospital, **KIBET SEREM (PW4)**, examined the complainant and compiled the necessary medical report form (P3 form) (**Exhibit 2**), which he tendered in evidence (**P. Exhibit 2**). **PC PHILEMON LANGAT (PW5)**, investigated the case and preferred the present charge against the appellants.

However, the appellants in their respective defence denied the offence and alluded to a mistake in identifying them as those responsible for the complainant's woes.

9. Whereas the complainant's evidence was corroborated by that of **C O O (PW3)** was credible enough and sufficient in showing that the three appellants "**snatched**" her from **C O O** after bullying and intimidating him, it also indicated that she may have later accepted the "**snatch**" and decide to indulge in the drinking of alcohol with the appellants and was probably assaulted by them in the process. Although she alluded to sexual assault way of rape, this fact was never corroborated by any independent evidence whether direct or indirect. The medical report (P3 form) by the Clinical Officer (PW4) was negative with regard to a sexual assault in the form of rape but positive with regard to assault causing actual bodily harm and/or attempted rape.

10. It would therefore follow that the prosecution failed to establish the material ingredients of the offence of rape in terms of **Section 3 (1)** of the **Sexual Offences Act**. However, going by what was stated by the complainant in the light of the medical report by the clinical officer, what the prosecution established was the material ingredients of **Section 4** of the **Sexual Offences Act** i.e. the offence of attempted rape. In that regard, the appellants' defence was reasonably discredited.

This court therefore quashes the conviction of the appellants for the offence of gang rape contrary to section 10 of the Sexual Offences Act and substitutes it for a conviction of the offence of attempted rape contrary to Section 4 of the Sexual Offences Act.

11. The resultant effect of the new conviction would invariably be a reduction of the sentence of fifteen (15) years imprisonment imposed upon the appellants by the trial court to five (5) years imprisonment in terms of **Section 4** of the **Sexual Offences Act**.

In sum, this appeal as consolidated is allowed in terms of the variation in conviction and sentence.

An additional offence of assault causing actual bodily harm was disclosed against the appellants by the complainant's evidence and that of the Clinical Officer, but this court does not wish to convict and sentence the appellants of the same in view of the mandatory nature of the sentence imposed herein against them in terms of **Section 4** of the **Sexual Offence Act**. This court, says no more.

**J.R. KARANJAH**

**JUDGE**

**26.07.2018**

[Delivered and signed this 26<sup>th</sup> day of July, 2018]