



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 18 OF 2017

(Consolidating 16 & 17)

NICKSON KIRUI.....1ST APPELLANT

ERICK CHERUIYOT.....2ND APPELLANT

TITUS LANGAT.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in SO No. 30 of 2016 PM's court Bomet Hon. Achieng PM)

JUDGMENT

The three appellants above mentioned were convicted and sentenced to 15 years imprisonment for the offence of gang rape Contrary to Section 10 of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 29th day of July 2016 at around 9:30pm within Bomet County intentionally and unlawfully caused their penis to penetrate the vagina of W C without her consent.

This is the first appellate court. It has a duty to re-evaluate and re-consider the evidence on record so as to arrive at its own conclusion.

Bearing in mind that unlike the trial court it did not have the opportunity to observe the demeanour of the witnesses.

Brief Facts

The complainant's mother (PW1) testified that her daughter now deceased left home on 28th July 2016. She did not return and she said her sister one E C to look for her. E C returned and said that she had found her at the home of the 1st appellant. The complainant returned home on 1st August 2016 and appeared to have taken poison as she was vomiting. She took her to Tenwek Hospital but died on 3/8/2016. The witness denied that her daughter had been married by the 1st appellant and had been staying together for close to two years. It was her contention that the three appellants raped her daughter.

Emily Chepngetich Likwob (PW2) testified that the 1st accused was her son and that he had married the Deceased as his wife and that she stayed at her home from Friday. On Sunday she went to the house of the 1st accused.

The following day the complainant reported to her that Titus and Cheruiyot and others she did not know removed her from the house she was sleeping in and took her to another one at night. This was the house of Cheruiyot 2nd appellant. She alleged that she had been raped by the 2nd and 3rd appellants. Upon receiving that information she decided to go and report the matter at the County Administrators office. She was advised to take the complainant to Longisa Hospital but she did not find her.

Later in the evening she was told that the complainant had taken poison and was taken to Tenwek Hospital.

Gilbert Korir Kipkoech PW3 testified that on 31st July 2016 he was with Nicholas at Belgut market. At about 9:00 pm they went to his house where they found Erick (2nd appellant) who borrowed a phone from Nicholas and he went away. When he delayed they went in search of him and found him at the house of Nickson (1st appellant). They were in the company of a girl. The 1st appellant rose up and hit the

witness on the head and he decided to go away to inform Nicholas of what had happened.

He later met Titus Erick and the girl. They said that they were going to the house of Erick. He later heard that the girl had taken poison and had been taken to Hospital and later passed on.

The area administrator (PW4) testified that on 1/8/2016 the mother of the 1st appellant had reported that the complainant had been removed from her son's house and taken to that of the 2nd appellant where she was raped. She advised PW2 to take the complainant to Hospital and the matter to be reported to police.

Later in the evening she received information that the complainant had taken poison and had been taken to Tenwek Hospital.

PW5 Dr. Miriam Wanyala of Tenwek Hospital conducted a postmortem examination on the body of W C .There was clotted blood on the external genitalia. The patient was being managed for intended self poisoning. She produced a postmortem report to that effect. She also produced a P3 form which was filled by Dr. Baget with whom she was working with. It was alleged that the patient had taken poison.

A gynecologist examined her on 6th August 2016 and found no obvious detective injuries. External genitalia was normal. No injuries noted on the minor thighs. There were no injuries to the genitalia. The patient had normal menstrual bleeding.

This appeal is concluded by the prosecution on the part of the first appellant. It is the contention by the prosecution that there is inconsistency as to the date of the alleged gang rape by PW3 and PW6.

PW3 testified that the convent took place on 31/7/2016 at 9:00 pm whereas PW6 testified that it was on 29th July 2016.

In this case it's unfortunate that the complainant herself was not able to testify as she took poison with the intention of killing herself and she later succumbed to the effects of the poison. It is alleged that she was abducted from the house of the first appellant and taken to the house of the 2nd appellant where she was gang raped by the three appellants among others. If she was abducted from the house of the 1st appellant and taken to the house of the 2nd appellant, how did the 1st appellant participate in the gang rape? Indeed none of the prosecution witnesses testified to have seen the three appellants rape the deceased. All they stated was that they saw her in the company of the three and nothing else.

The doctors who carried a postmortem examination and who examined her before her death testified that the history given to them was that she had taken poison and they were treating her for that. Upon examining her they found no injuries on her body. The only significant finding they made was that there was clotted blood on her external genitalia and this was a result of menses (periods).

If the complainant was abducted from 1st appellant's house as alleged force must have been used. If she was gang raped by more than three people force must have been used, yet there is no evidence of torn clothes, bruises on her body and her genitalia. Unless she was drugged she could not have consented to have sexual intercourse with more than three men. At least she should have put up a struggle. I am in agreement with the prosecution that the evidence by the prosecution witnesses was contradicting at best hearsay. The medical evidence addressed does not corroborate that of the other witnesses. This case was not proved beyond reasonable doubt.

The conviction was not safe and the sentence was not lawful.

The appeal has merit and its allowed. The appellants are set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 28th day of September 2018 in open court and in the presence of learned counsel for the prosecution Mr. Wawire. Appellants in person present. Court Assistant Rotich.

M. MUYA

JUDGE

28/9/2018