



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO.18 OF 2016**

**1. DISMAS OWINO OWUOR**

**2. FREDRICK OWINO ODHIAMBO**

**3. VINCENT OUMA.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case No. 1924 of 2013 of the Chief Magistrate's Court at Busia by Hon. M. Wambani – Chief Magistrate)*

**JUDGMENT**

1. **DISMAS OWINO OWUOR, FREDRICK OWINO ODHIAMBO and VINCENT OUMA** the appellants herein, were convicted for the offence of gang rape contrary to section 10 of the Sexual Offences Act No.3 of 2006 and for the offence of grievous harm contrary to section 234 of the Penal Code.

2. The particulars of the offences were that on the night of 26<sup>th</sup> and 27<sup>th</sup> June 2013 in **BUSIA** County, one after another, intentionally and unlawfully caused their penises to penetrate the vagina of **EAO**, a child aged 16 years. On the same day and at the same place and time, they unlawfully caused grievous harm to **EAO**.

3. Each appellant was sentenced to serve 15 years imprisonment in count one and 7-years imprisonment in count two. The sentences were ordered to run concurrently. They have appealed against both conviction and sentence.

4. The appellants were represented by the firm of Marisio Luchivya & Company Advocates. They raised nine grounds of appeal which I have summarized as follows:

- a) That the learned trial magistrate erred in law and in fact by failing to note that the two charge sheets (sic) were not properly drafted;
- b) That the learned trial magistrate erred in law and in fact by relying on contradictory evidence;
- c) That the learned trial magistrate erred in law and in fact by relying on the evidence of one eyewitness to convict;
- d) That the learned trial magistrate erred in law and in fact by convicting the appellants without sufficient evidence;
- e) That the learned trial magistrate erred in law and in fact by relying on medical evidence that lacked probative value;
- f) That the learned trial magistrate erred in law and in fact by failing to note that the appellants were not taken for medical examination; and
- g) That the learned trial magistrate erred in law and in fact by meting a harsh sentence.

5. The state filed a cross appeal and prayed for the enhancement of the sentences which was argued to be too low. The state was represented by Mr. Omayo, learned counsel.

6. The facts of the prosecution case were briefly as follows:

On the material night after dancing to disco matanga music the complainant left for home at about 11p.m. The appellants and three others accosted her but she ran away. They however caught up with her. They defiled her and then threw her into a pit latrine. She sustained grievous injuries.

7. The three appellants conceded that they were at the disco matanga but denied any involvement in the offences.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. One of the complaints by the appellants is that the charges were erroneously drafted. Rules for the framing of charges and informations are provided for under section 137 of the Criminal Procedure Code as follows:

*The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—*

*(a) (i) Mode in which offences are to be charged. —a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;*

*(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;*

*(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;*

Article 50(2) (b) of the Constitution provides as follows:

*Every accused person has the right to a fair trial, which includes the right—*

*a) ...*

*b) to be informed of the charge, with sufficient detail to answer it;*

In their written submissions, the appellants raised issue with count two only which they claimed was ambiguous. This contention is however misplaced for there are two ingredients of the offence of causing grievous harm namely **causing grievous** and the act being **unlawful**. Both ingredients were captured in the charge. This ground therefore lacks merit.

10. The appellants contended that the learned trial magistrate erred by relying on contradictory evidence to convict them. What was the evidence adduced by the prosecution in respect of the two offences in which the appellants were convicted? There are two broad versions, one by the complainant **EAO (PW1)** and the other by her companion **AOO (PW4)**. According to **EAO**, she left the disco matanga at about 11pm to go home alone. Some six men followed her from behind while others came from her front. She heard Fredrick Owino's (appellant 2's) voice but did not get what he said. She however later said that he was calling the others, "**Kujeni twende**" meaning "**come let us go**" In her evidence she said that there was no light and that she did not see the physical appearance of the six. When Fredrick threw a club past her, she started running away. They pursued and caught up with her near some cassava. They defiled her and then threw her into a pit latrine. She was not able to identify her defilers.

11. While in the pit latrine, she screamed and one Salim went and rescued her. It was Salim who told her how to get out of the pit.

12. When she was taken to the police and to the dispensary, she did not complain of defilement. To the police she said she failed to do so for they were all men.

13. The version of **AOO (PW4)** contradicted that of the complainant. According to this witness the incident occurred while together with Japheth, were escorting the complainant to her home. This is what **JKM (PW3)** testified to. After they were attacked, each ran away alone. Anthony testified that after about five minutes, he found the complainant who informed him that she fell into a pit as she was running away. She informed him that no one had assaulted her.

14. After the attack, according to the evidence of **JKM (PW3)**, they all ran to the same direction following each other. If this was true, then he and **AOO (PW4)** could have been in a position to tell what befell the complainant. This however contradicted the complainant and **PW4** who testified that they ran into different directions.

15. The evidence of **JKM (PW3)**, is self-contradictory in some material aspects. In his evidence in chief, he said that the first appellant hit him on the head with a club however during cross examination he changed and said that he did not identify the person who assaulted him.

16. If we can momentarily pause at this point, we notice a lot of material contradictions that cannot be logically reconciled. It is easy to appreciate why the complainant could be reluctant to report to male police officers about the alleged ordeal. This contention however contradicts her conduct. There was no reason why she could not disclose to **AOO (PW4)** who has been held out by the evidence on record as her lover. When she was taken to Musibiri dispensary by her mother, she never informed the nurse about the alleged defilement nor did she confide in her mother. No explanation was proffered. The nurse at the dispensary was **Judith Akinyi Omondi (PW6)**. She gave her a history of falling down as her boyfriend chased her and that the boyfriend did not do anything to her. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**(Madan, Miller and Potter JJA) held:

*The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.*

The complainant and her key witnesses painted a picture of people who cannot be relied upon to tell the truth.

17. Whenever an incident that is subject to trial occurs when conditions for identification or recognition are not favourable, care must be taken so as to ensure that no miscarriage of justice is occasioned. This was stated by Lord Widgery CJ, in the celebrated case of **R v Turnbull and others [1976] 3 All ER 549**. He stated as follows:

*Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.*

He went on to say:

*Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.*

In the instant case, I will endeavour to establish whether the conditions obtaining at the time of the incident were favourable for positive identification.

18. Contrary to the contention by the complainant that the incident took place at 11pm, the evidence of her companion **AOO (PW4)** and other evidence on record show that it was at about 3 a.m. This is in the evidence of **Salim Omwonyo Okhango (PW7)** whose testimony was that he was attracted by screams of a lady at about 3 a.m. **Mary Anyango Omwonyo (PW13)** testified that the complainant was taken to her home at about 3.30 a.m. for the reporting of the incident. This is therefore our starting point. Ordinarily, around this time of the night for a person who has not slept, judgment would not be accurate due to heavy toll of fatigue occasioned by sleep.

19. According to the complainant's evidence, she had seen the appellants at the disco matanga. When she left for her home, she was alone. At the time of the incident she testified that there was no light. She further said that she did not see the appearance of the six men. She only heard the voice of Fredrick (second appellant). She however contradicted herself when moments later during cross examination purported to have seen the physical appearance of Fredrick and went on to describe what he was wearing. Her oscillation does not make her evidence believable. The Court of Appeal on voice recognition held that care must be taken to avoid miscarriage of justice. This was in the case of **Simeon Mbelle vs. Republic [1982] IKAR 578**. The Court said:

*In relation to the identification by voice, one it would obviously be necessary to ensure: -*

*(a) That it was the accused person's voice;*

*(b) That the witness was familiar with it and they recognized it and*

*(c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.*

The complainant did not seem to be consistent. This is what she said:

*I heard the voice of one of the six young men. I heard Fredrick Owino's (accused 2) voice I did not get what he said. Accused 2 was calling others "Kujeni twende"*

We cannot be sure from this kind of evidence whether the voice she heard and which she purported to recognize was that of the second appellant. Her evidence cannot pass the test prescribed in the case of **Simeon Mbelle vs. Republic**.

20. The other person who purported to have recognized the appellants was **AOO (PW4)**. He said he did so with the help of the moonlight. This contradicted the complainant who said there was no light. However, **Salim Omwonyo Okhango (PW7)** testified that there was bright moonlight. If we assume that there was bright moonlight, we must interrogate further the evidence of this witness to establish whether he was in a position to recognize any of their attackers.

21. According to this witness, the attackers were in two groups; one group was in front of them while the other group was behind them. The evidence by this witness was very skimpy and the learned trial magistrate had nothing at her disposal to evaluate and make an informed conclusion whether he was in a position to recognize any of the attackers as alleged. The evidence lacked the following details:

- a) What distance was each group from him;
- b) Whether the group in front of him was walking away from him or was approaching him; and
- c) Whether or not he turned to look back and if so for what duration.

In his evidence he testified that even at the time he was running away, he never looked behind to see who was pursuing him. I therefore make a finding that there was no evidence of either identification or recognition against any of the appellants.

22. One of the ingredients of the offence of defilement is penetration. The complainant in her evidence testified that her attackers removed her pair of pants and proceeded to defile her. This is how she described the incident:

***Those young men who chased me from the road are the ones who defiled me before throwing me into the unconstructed pit latrine. I do not know how long the incident took. I lost my consciousness at the time they held me. One young man held my head the other held my legs. They put me down I screamed while in the unconstructed pit latrine. Salim and his brother came to my rescue. Salim's home is after the unconstructed pit latrine.***

Her evidence does not give any indication of penetration. Penetration is more than what she testified to. Her failure to report to her mother (PW2), the nurse who first saw her (PW6) raises doubts if indeed there was any defilement. It is instructive to note from the evidence of **Dr. Hillary Mabeya (PW5)** that the injury to her back contributed to urine and faeces incontinence. He however saw some old tears on the vaginal wall. Unfortunately, these injuries could not be a basis of a finding of penetration. I therefore find that the learned trial magistrate had no evidence at her disposal to enable her conclude that there was penetration.

23. The complainant herein suffered grievous injuries after she had fallen into a pit. Certainly, had the identity of the people who chased her been established, they would have been held liable criminally or otherwise. Since I have made a finding that the appellants were not identified to be part of the men who chased her, there was no evidence to connect them to the second count.

24. From the foregoing evidence on record, I find that the convictions of the appellants on both counts cannot stand. I accordingly quash the convictions and set aside the sentences. Each appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 28<sup>th</sup> day of November, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**