



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 127 OF 2015

JUSTUS KIPROTICH KOECH.....1ST APPELLANT

EZEKIEL OLE MION.....2ND APPELLANT

VERSUS

REPUBLIC.....STATE

JUDGMENT

The two appellants namely **JUSTUS KIPROTICH KOECH** (hereinafter referred to as the 1st appellant) and **EZEKIEL OLE MION** (hereinafter referred to as the 2nd appellant) have both filed this appeal challenging their conviction and sentence by the learned Chief Magistrate sitting at the Molo Law Courts.

The appellants were charged jointly with a third suspect who was dealt with under the provisions of the Children's Act 2001 with the offence of **GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:

“Julius Koech Kiprotich on the 21st day of September 2012 in Molo District within Nakuru County, in association with Robert Kibet Sang and Ezekiel Ole Moin (the 2nd appellant herein intentionally and unlawfully caused his penis to penetrate the vagina of N C L.”

Each appellant also faced alternative charge of **COMMITTING AN INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(A) OF THE SEXUAL OFFENCES ACT, 2006**.

Both appellants pleaded ‘**Not Guilty**’ to the charges. Their trial commenced on 11th September 2013. The prosecutor **CHIEF INSPECTOR MUTETI** called six (6) witnesses in support of the case.

The Complainant **N C** told the court that on 21st September 2012 at about 4.00p.m she was walking home from the market. She met three men who caught up with her and engaged her in a conversation. One of the men began to seduce the complainant. She rejected his overtures and told the men that she was married. One of the men then grabbed the complainant by the hand. The 1st appellant then pulled out a scarf and covered the complainant's eyes. She began to scream.

The men dragged her into a nearby maize plantation. The complainant was carrying a child on her back and the child was taken away. The men pinned her to the ground. They removed her under clothes and proceeded to rape her in turns. The complainant lost consciousness.

PW2 E K was the husband to the complainant. He told the court that on the material day he was at Elburgon marked with his wife. After purchasing food stuffs the couple parted ways and the complainant left for home.

Later **PW2** was alerted that a lady had been attacked in their area. He rushed to Elburgon Hospital where his wife had been taken and found she was unconscious. Since the doctors were on strike at the time. **PW2** took the complainant to a private hospital.

Later after she regained consciousness the complainant named Justus (1st appellant) and one Robert as the men who had raped her.

The matter was reported to the police. After conclusion of police investigations the two appellants were arraigned in court and charged.

At the close of the prosecution case each appellant was found to have a case to answer and they were each placed onto their defence. Both appellants gave sworn statements in which they each denied having raped the complainant.

On 20th April 2015 the learned trial magistrate delivered his judgment in which he convicted each appellant for the offence of gang-rape. After listening to their mitigation each appellant was sentenced to serve fifteen (15) years imprisonment. Being aggrieved the appellants filed this appeal. **MR. CHECHE** Advocate argued the appeal on behalf of the appellants while the learned state counsel opposed the appeal.

In **AJODE Vs REPUBLIC 2004 (2) KLR 81**, the court of appeal held that:-

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inference and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that.”

In this case only two issues emerge for determination:

- i. Was the complainant gang-raped as she has alleged.
- ii. Have the two appellants been properly identified as the perpetrator(s) of the offence.

Section 10 of the Sexual Offences Act 2006 which provides for the offence of Gang-Rape states that:

“Any person who commits the offence of rape or defilement under this Act 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 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.”

The complainant told the court that on the material day she was walking home from the market when three men approached her. The men engaged her in a conversation and one of the men attempted to seduce her. The complainant rejected the advances. The men then pulled the complainant into a nearby maize plantation where they raped her one after the other. The complainant gives an account of the incident at page 7 line 15:

“.....they dragged me into the plantation. They pinned me to the ground my face was covered with the scarf. I felt them remove my biker and underpants. I was carrying this child. Someone had taken him away. I then felt a man’s penis enter my vagina. He rose and another entered me. He also rose and I felt the 3rd one rape me. I felt them ejaculate in my vagina. After they were through they fled.....”

The complainant was an adult woman and had even borne a child. Clearly she had experienced sexual intercourse before. She gave a vivid account of what happened to her despite the blindfold on her eyes then. In her evidence the complainant told the court that the police collected her clothes from the scene.

PW5 P.C. REBECCA NAMWAI who was the investigating officer confirms that she visited the scene which was in a maize plantation. There **PW5** recovered a soiled and torn biker and petticoat **P. exh1** and **P. exh 3**. Earlier on police had recovered a blouse, a white shoe and a black under pant at the same scene. All these items were produced as exhibits. The recovery of torn clothes at the scene is further evidence that the act was not consensual – this is clear evidence of the use of force by the rapists. The complainant was able to detect that these different men had sexual intercourse with her in turns. The complainant was able to tell that each rapist ejaculated into her vagina. This incident as described by the complainant involved three different men raping her one after the other in turns. This amounts to a gang-rape as defined by Section 10 of the Sexual Offences Act.

It is highly unlikely that the complainant would claim to have been raped by three men if no such incident had actually take place. She had nothing to gain by making up such a story. Indeed in the conservative Kenya society she risked being shunned by family and friends.

PW2 the husband of the complainant and **PW3 DAVID KIBET BOR** who was a village elder both told the court that they received information about the rape. **PW3** told the court that he rushed to the scene at the maize plantation where he saw a disturbance at the scene.

PW2 and **PW3** both traced the complainant to hospital where they found her injured and unconscious. The complainant later regained her senses and informed her husband that she had been raped. The evidence of **PW2** and **PW3** corroborates the testimony of the complainant regarding the part of the rape.

PW4 ANN CHEROTICH clinical officer based at Elburgon Maternity Home testified that she examined the complaint after the incident. **PW4** confirmed that the complainant was admitted in their facility from 21st September 2012 to 1st October 2012.

Upon examination the complainant was found to have a colourless stain on her thigh and her clothes. The whitish discharge was seen on her vulva. **PW4** filled and signed the P3 Form which was produced as an exhibit **P.exh1**. As stated earlier the complainant was a mature adult woman who had been sexually active before this incident. As such there would have been unlikely to have been tears and/or bruising on her genitals. **PW4** gave her conclusion as follows:

“In my opinion there was rape.”

This was expert medical opinion evidence which corroborates the allegation by the complainant that she had been raped. The medical evidence showed that sexual activity had occurred. If the complainant had engaged in consensual sexual intercourse, then she would not have lost consciousness, she would not have gone to hospital and there would have been no need for her to be admitted.

From the weight of the evidence available, I find that the fact that complainant had been gang-raped has been proved beyond reasonable doubt.

The next issue requiring proof is the identity of the offenders. Has sufficient evidence been adduced to prove that the two appellants were amongst the three men who gang-raped the complainant?

In her evidence the complainant stated that the two appellants were amongst the men she met as she was walking home. The complainant told court that she knew all the three men well as they hailed from her home area. Under cross-examination the complainant states:

“All the accused persons hail from our area but they are not immediate neighbours. Accused 1 lives one shamba away. Accused 2 lives 4 homesteads away and Accused 3 is a neighbor to accused 2.”

Thus the complainant clearly knew the two appellants very well and even knew the homes where they lived.

The incident occurred at 4.00p.m. It was broad daylight and visibility was good. The appellants engaged the complainant in a conversation as they walked together. The men only turned hostile when the complainant rejected the advances of one of them. In her cross-examination at page 8 line 18, the complainant says:

“The three men in the statement are the accused. They were behind me. We walked together. They caught up with me about ½ kilometers from Elburgon. When we got to a maize plantation Robert tried to seduce me. He spoke to me in Kipsigis. I gave the police the names of the accused person. I used the ‘sekea’ who is accused 1, Robert who is accused 2. I do not know accused 3’s names.”

The complainant goes on to state at page 9:

“In my statement I used the names of Robert and Ezekiel. I know the people who raped me. I am not mistaken.....”

The complainant is clear and positive in her identification of the appellants. She remained unshaken under cross-examination. Although the men approached from behind her, they caught up with the complainant and walked some distance while chatting with her. She clearly had ample time and opportunity to see and identify the appellants.

PW2 confirms that the complainant did give me the names of the men who had raped her. Under cross-examination **PW2** stated at page 10 line 23;

“N called me and gave me the names Robert and the son of Augustin. Augustin has 3 sons. She used the name Robert, son of Chemoget and Justus. Justus is accused 1, Ezekiel is accused 3. N may not know their names very well.”

The fact that the complainant may not have known the names of the men who raped her does not take away from her identification. In rural areas, it is common to identify people by the names of their parents or children. The important fact is that the complainant was able to physically identify her assailants to the police.

PW3 the village elder also confirms that the complainant identified her attackers using the names of their parents.

PW5 the investigating officer confirms that the complainant physically pointed out to her the men who had raped her. **PW5** stated in her evidence at page 15 line 12:

“After the complainant was discharged, the complainant and her husband led us to Robert (Accused 1), Ezekiel and Justus.....”

Under cross-examination, **PW5** states at page 16 line 5:

After 3 days, the complainant only mentioned Robert. Later she gave the other names. This was after she was discharged. She gave the name Justus then Ezekiel. She did not give me the full names. When we arrested them, the complainant identified them fully.”

Counsel in his submission made much of the fact that the complainant did not know the names of her attackers. He suggests that the complainant was pushed into identifying the appellants by her husband who suggested their names to her.

Firstly no reason is given why the complainant or her husband would want to falsely accuse the

appellants. There is no suggestion of a pre-existing grudge against the appellants by the couple.

Secondly the evidence is clear that the complainant did physically identify the men who raped her. She may not have known their full names but the names were not as important as the physical identification.

In her narration the complainant described the role which each man played in the attack; Robert (not before this court) is the man who tried to seduce her. She identified that 1st appellant is the one who tied a scarf over her eyes. Despite this attempt to blindfold her, the complainant had already seen and recognized the 3 men as they spoke to her.

I am satisfied from the evidence that the complainant saw, recognized and identified the men who gang-raped her. The fact that the complainant did not know the name of each appellant does not in any way negate her recognition and identification of the appellants. They were fellow villagers and men she knew well, thus I find there was no possibility of a mistaken identity. I am satisfied that the 1st and 2nd appellant were properly identified as amongst the men who gang-raped the complainant on the material day.

In their defence the appellants claim that they were amongst those who came to the rescue of the complainant after the incident. Their defence does not in any way weaken the prosecution case. As stated earlier the complainant holds no motive to fix the appellants. There is nothing in the defence to vitiate or to cast any doubts on the prosecution case. Based on the overwhelming strength of the prosecution case I find that the defence case hollow and must be dismissed.

Based on the foregoing, I am satisfied that the prosecution proved the charge of gang-rape beyond reasonable doubt. The conviction of the two appellants was sound and I uphold that conviction.

Following their conviction the appellants were each accorded an opportunity to mitigate. The learned trial magistrate took the precaution of having an age assessment conducted for the appellants. Each was confirmed to have been above 18 years at the time they committed the offence. They were each then sentenced to serve 15 years imprisonment in accordance with Section 10 of the Sexual Offences Act. The sentence was lawful and I do confirm that sentence.

Finally this appeal fails in its entirety and is hereby dismissed.

Dated in Nakuru this 30th day of October, 2017.

Mr. Cheche for Appellants

Mr. Motende for DPP

Maureen A. Odero

Judge