



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL APPEAL NO. 17 OF 2016
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 48 OF 2016

BETWEEN

N O A.....1ST APPELLANT

E O O.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal from original conviction and Sentence
of Hon. S.O. Ongeru, SRM, in Mbita PM's Court Criminal*

Case No.829 of 2014 dated 15/07/2015)

JUDGMENT

1. **N O A** (the 1st appellant) and **E O O** alias **O** (the 2nd appellant) were convicted on a charge of gang rape contrary to **Section 10** of the **Sexual Offences Act** and each sentenced to serve 15 years imprisonment.

The charge against them was that on 13th November 2014 in **MFANGANO NORTH in MBITA** District, within **HOMA BAY** County they in association with each other intentionally and unlawfully caused their penis to penetrate the vagina of **L A C N**.

Both appellants denied the charge.

2. On 12/11/2014 at 11.00 p.m. **L A N** (PW1) reported off from her work place (being a hotel in **RINGITI**), she went to collect the key to the house from her sister who was inside a bar. On her way home, she meet two people who beamed a torch on her then dragged her to another lodge and had sex with her, outside the lodge. She stated:-

“The first accused tore my skirt and under pant. He had sex with me, and then the second

accused had his turn. The first accused came back and had sex again.”

3. She initially stated that she could not see the people she met as it was dark but it seems when they dragged her to the next lodge she was able to see them with the aid of the street lights.

4. She raised an alarm and was rescued by **ODONDI** and **KAJWAN’G** and she was taken to **MBITA** district hospital and treated. Her attackers fled. She further stated that it was her first time to meet the appellants. She was categorical that she had not consented to the sexual act and explained upon re-examination that:-

“They forced to have sex with them ... I could not identify them but the people who came to my rescue identified them.”

5. **DUNCUN ODONDI** (PW2) was asleep in his house within **RINGITI** on 13/11/13 at about 12.30 a.m., when he heard some noise, he heard men’s voices who were demanding Kshs.600/= and Kshs.1000/= from a girl and threatening to kill her by stabbing her with a knife. PW2 woke up lit his mobile phone light and came out.

6. He found the 1st appellant, who threatened to hit him with a stone and ordered him to go back to his home. He noticed a girl who was naked and who was being dragged away by 2 people. Pw2 called police and requested them to come and rescue the girl.

7. Members of the public also arrived and tried to rescue the girl, but the 1st appellant threw stones at them. Eventually police arrived and arrested the 2nd appellant, but 1st appellant fled away.

8. PW2 explained that apart from his phone light, the place was dark and the two men appeared drunk.

9. **CPL FREDRICK OJWANG** (PW3) of **RINGITI** police patrol base confirmed receiving a phone call from PW2 who informed him that there was a woman calling for help as she was being raped. He summoned two other police officers and rushed to the scene. As they approached the scene, he could hear a woman screaming while crying for help. He also saw two men struggling with a woman who was trying to escape. PW3 intervened and tried to arrest them, but in the course of the struggle he fell down and one of the men escaped, but he managed to arrest one. He stated:-

“The girl had a petticoat and naked the rest of the body. She had injuries to the rest of the body... I first saw them 20 metres away. There were some security light vehicle assisted me (sic) to see them... I arrested the second accused at the scene. I was able to recognize the first accused because he wrestled with me ...”

10. PW1 was examined by **PW4 DAVID KINARA MATHERI** (a clinical officer) who testified that upon examination he observed injuries on her upper limbs and the back as a result of being pulled on rocky surface. She also had bruises on the back with tenderness on the shoulders. She had a swelling on the right hand with limited movement. There was inflammation on the private parts and the labia minora and majora had secretions.

11. She has a puvagical discharge which was yellowish and foul smelling and was reported to be HIV positive. There was evidence of rape revealed by laceration in the back and vaginal cavity - the injuries were 12 hours old.

12. The 1st appellant in his unsworn defence stated that he did not know PW1 and only woke up on 12th November 2014 to be met by police officers who arrested him for reasons he did not know.

13. On cross examination he said that on the night of 12th November he was sleeping inside his house alone.

14. The 2nd appellant in his sworn defence stated that he'd gone fishing on 13/11/2014 at the lake and was on his way home when police arrested him and told him he'd be charged for loitering. He said he did not know the complainant.
15. The trial magistrate in his judgment held that the appellants were positively identified by PW2 and PW3 who went to the scene and there was sufficient light to enable them see the two men. He also found that the medical evidence corroborated what PW1 said about her ordeal and showed that there was forceful penetration evidenced by the injuries she sustained.
16. The appellants challenged the findings saying their constitutional right to a fair trial under **Article 50 (2)** were violated as they were not provided with witness statements and other relevant documents.
17. They also argued that the evidence did not prove the case beyond reasonable doubt as they were not subjected to medical examination to confirm that they had sex with PW1.
18. They also contended that the opportunity for identification was not favourable and their defences were not considered.
19. They filed written submissions whose contents were similar wherein they argued that there was contradiction in the prosecution case because PW1 said she was raped on the night of 12/11/2014 yet the charge sheet referred to 13/11/2014.
20. They also cast doubts as to whether the incident really took place, saying no one from the lodge came to testify.
21. **MR. OLUOCH** on behalf of the State conceded the appeal saying there was a violation of the appellants' rights under **Article 50(j)** as read with **25 (c)** of the **Constitution of Kenya** as on the date of plea, the trial court ordered prosecution to provide the appellants with witnesses' statements yet there was no evidence to confirm compliance. Further that after three witnesses had testified, the 1st appellant still lamented about lack of witnesses statements.
22. He however urged the court to order for a retrial saying that all the conditions necessary for a re-trial had been met.
23. The appellants were opposed to a retrial, arguing that they have gone through many processes.
24. Under **Article 25 (c)** of the **Constitution of Kenya** provides that the right to a fair trial shall not be limited. This must then be considered alongside **Article 50 (2) (j)** which provides that:-
- “Every accused person has the right to a fair trial which includes the right – to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”**
25. Indeed this was the appellant's first ground of appeal. As pointed out by **MR. OLUOCH** the court had directed on the first day of plea for the appellants to be provided with witness statements but as late as 3/02/2015 after three witnesses had testified, the appellants had not been given any witness statements. This clearly violated their rights under **Article 50 (j)** and thereby compromised their entitlement to a fair trial.
26. I have considered the evidence on record and I am persuaded that the remedy lies in finding that there was a mistrial and the conviction be and is hereby quashed and the sentence set aside.
27. The evidence on record persuades me that justice will be upheld both for the appellants and the victim only by having a retrial. Since prosecutions have not expressed any likelihood of facing challenges in getting witnesses I allow the request.

28. The appellants shall appear before the magistrate in Mbita for trial directions on day of **23rd October, 2017**.

29. This matter shall be heard by a magistrate other than the one who heard and determined this matter.

Delivered and dated this 16th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE