



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 54 OF 2014

K M 1ST APPELLANT
MOSES NGOLUA M'MUITHU..... 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

K M and Moses Ngolua M'Muithu (1st and 2nd appellants) were jointly charged and convicted for the offence of gang rape contrary to **Section 10 of the Sexual Offences Act**. They were each sentenced to serve 20 years imprisonment. Being dissatisfied with the conviction and sentence, they filed CRA 9/2015: K M v Rep and CRA 54 of 2014: Moses Ngolua v Rep, which were consolidated to proceed in CRA 54/2014.

The grounds of appeal on which the appellants rely are that:

- (1) The conviction was based on a single identifying witness;**
- (2) That the prosecution evidence was contradictory and uncorroborated;**
- (3) That the trial court failed to consider the appellant's defences;**
- (4) That the appellants were not positively identified as the perpetrators of the offence;**
- (5) That the case was not proved to the required standard.**

The appellants filed written submissions in which they reiterated the above grounds.

Mr. Mulochi, Learned Counsel for the State opposed the appeal for the following reasons: that the offence was committed in broad daylight at 12.30 p.m.; that the 1st appellant is a cousin to the complainant; that she talked to the 1st appellant; that PW2 to 4 corroborated PW1's evidence; that 2nd appellant kept watch outside the house as 1st appellant raped the complainant and was seen by PW4; that the conviction is well founded and should not be disturbed; that the sentence is lawful and can even be enhanced to life imprisonment.

As the first appellate court, it is required of me to examine all the evidence adduced in the trial court

afresh, analyse it and arrive at my own findings and conclusions, but bearing in mind that this court did not have occasion to see the witnesses testifying to assess their demeanor. **See Okeno v Rep (1972) EA.**

In the trial court, the prosecution called a total of five witnesses. The complainant testified as **PW1 M.K.** She recalled that on 16/12/2012 a Sunday, and about 12.30 p.m., when coming from feeding the cow, somebody blindfolded her from behind, strangled her on the neck and was forced into the house; that the people cornered her, placed her on the bed. She recognized the voice of her cousin who told the other person with him to wait outside and close the door; that he forcefully removed her pants and raped her; that before raping her, he removed the scarf and she asked him why he was raping her and yet they are cousins but he replied that they did not share one mother. After he left, PW1 called her father on phone. Later, she learned that 2nd appellant had been arrested. She did not recognize the 2nd appellant. PW1 denied having framed 1st appellant or knowing whether her father owed any money to 1st appellant but knew him as her cousin.

PW2, J G is PW1's father. He was away in church when he was informed by a child that his daughter had gone to Police Station at Mikinduri; that PW1 informed him that Ken had raped her. He went in search of the perpetrators and he managed to arrest 2nd appellant on the same day but 1st appellant disappeared for 22 days after which he was arrested at Mulika market.

PW3, D K told the court that on 19/12/20112 about 11.00 a.m., he saw 2nd appellant seated outside PW2's homestead. He later found the 2nd appellant having been arrested by PW2 and that is when he learnt of the complainant having been raped. He did not know the 2nd appellant before.

PW4 PC Albert Kiprop, the Investigations Officer in the case received the rape report, visited the scene and took possession of PW1's under pant and biker.

PW5 Dr. Silas Ontita of Mikinduri District Hospital examined the complainant on the same day at Consolata Hospital, Nkubu and found that there were no injuries in the complainant's private parts but spermatozoa were present which was evidence of deep penetration of the complainant.

When called upon to defend himself, the 1st appellant gave unsworn evidence when he stated that he was at his place of work on the date of the alleged offence; that he had given PW2 KShs.20,000/= in 2010 to buy for him land but he did not do so and that is why he has been framed.

The 2nd appellant testified on oath and denied committing the offence but that he was found attending a crusade and it was alleged he was with Ken - 1st appellant and he denied knowing the 1st appellant.

No doubt, the complainant had taken part in a sexual act on the alleged date of 16/12/2012. She was examined on the same day and spermatozoa were found in her genitalia which is evidence of deep penetration.

The offence of gang rape is defined under **Section 10 of the Sexual Offences Act** as:

“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 fifteen years but which may be enhanced to imprisonment for life.”

The question is who is the perpetrator? The offence took place in broad daylight at 12.30 p.m. PW1 however, explained that at first she was blind folded from behind and taken into the house. She said however, that the person who raped her spoke to her and she recognized the voice as that of her cousin whom she has known since childhood. PW2 corroborated PW1's evidence that the 1st appellant is his sister's son. There was only one identifying witness to this incident. This court therefore warns itself that

the condition for identification were not favourable.

In the case of ***Roria v Rep (1961) EA 583***, the court held that a fact may be proved by the testimony of a single identifying witness but that does not lessen the need for testing with great care the evidence of a single identifying witness in respect of identification if conditions favouring identification are difficult.

Regarding the evidence of voice identification, the court said the following in ***Mbelle v Rep 1984 KLR 626***: The court should ensure that;

(a) The voice was that of accused;

(b) The witness was familiar with the voice and recognized it;

(c) The conditions obtaining at the time it was made were such that there was no mistake in testing as to what was said and who said it.

In ***Karani v Rep (1985) KLR 290 at page 293*** the Court of Appeal said:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification”.

Again in ***Anjononi & Others v Rep (1976-80) 1 KLR 1566 at page 1568*** The Court said:

“Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

In this case, the 1st appellant was very well known to PW1, being a cousin she knew from childhood. She heard him talk to his accomplice to get out and close the door. She also told the court that he removed the blind fold (scarf) and it's when she asked why he was raping her yet they were cousins only for him to say that they did not have same mother. That conversation was long enough for PW1 to recognize the cousin's voice. Besides, they were in close proximity during the ordeal. It is not stated whether there was enough light in the house for PW1 to see the assailant but I am satisfied that the conversation between the two was sufficient for recognition. There is no evidence that there was any other distraction around them that would make PW1 not recognize the voice.

I find that the conditions were favourable to the complainant recognizing her own cousin's voice whom she has known since childhood.

From the evidence on record, the 2nd appellant did not take part in the actual act of raping the complainant. The prosecution could only associate him with the offence upon proof that he had a common intention with the person who committed the actual Act.

PW1 did not have a chance to see the 2nd appellant. PW3 said that he saw the 2nd appellant seated on a stool outside the homestead of PW2. PW3 did not speak to the 2nd appellant and he did not know him before. PW3 did not tell the court what made him recognize him as the person he had seen seated outside PW2's home and from how far he saw the 2nd appellant. PW2 said he arrested the 2nd appellant because he had seen him with 1st appellant earlier that day but he never explained how he knew the 2nd appellant to be the one who kept guard as the 1st appellant raped PW1. PW2 said he was told it is 2nd appellant who kept watch but he did not say who told him the 2nd appellant was 1st appellant's accomplice. In the end, I find the identification of 2nd appellant as 1st appellant's accomplice to be wanting. The identity of the 1st appellant's accomplice is not watertight and I find that the trial court erred in finding 2nd appellant

guilty of the offence.

It is the duty of the prosecution to prove its case beyond any doubt and that burden does not shift to the appellant at any time. In this case, the 1st appellant alleged that he was framed but his defence was not plausible. At first, he said he was framed because he gave PW2 KShs.20,000/= to buy for him land but PW2 did not do so. Later in cross examination, he alleged that the KShs.20,000/= was for PW2's business but PW2 failed to repay. Then he also claimed that he was framed over a phone. I do not think that PW2 arranged with his daughter PW1 to go and be engaged in a sexual activity so that they could frame the 1st appellant. I did not find any serious contradictions in the prosecution case. I find that the trial court correctly dismissed the 1st appellant's defence as untenable.

There is ample evidence on record that the 1st appellant was arrested over a month after the incident because he had gone underground. It was not, therefore, possible for him to undergo a medical examination to ascertain whether the spermatozoa found in PW1 belonged to him. In any event, there is no longer requirement in law that there has to be medical evidence to prove a sexual offence. It is sufficient that the court believes the complainant and gives reasons for it. **(See Section 124 of the Evidence Act).**

An offence of rape is committed when:

- 1. An accused intentionally and unlawfully commits the act which causes penetration into her/his genital organ;**
- 2. That the other person did not consent to the penetration; or**
- 3. That the consent was obtained by force or by means of threats or intimidation of any kind;**

In this case, there were spermatozoa found in the vaginal swab taken from the complainant. Even if there were no injuries to her genitalia, she testified that apart from being blindfolded for a while, she was strangled. The doctor who examined the complainant confirmed that there were marks of strangulation on her neck (see P3 Form); her outer clothes were soiled which was a sign of a struggle which signifies force.

In the end, I am satisfied that it is the 1st appellant who raped the complainant without her consent. He was properly identified. His defence was properly rejected. The conviction was well founded and I confirm it. In regard to the 2nd appellant, he was not properly identified. The conviction of 2nd appellant is an error and it is hereby quashed, sentence set aside and he is set at liberty forthwith.

The minimum sentence under **Section 10 of the Sexual Offences Act** is 15 years imprisonment. The appellant was handed 20 years imprisonment. In my view, it is not excessive in the circumstances and I find no reason to interfere with the sentence. The appeal in respect of 1st appellant is dismissed in its entirety. For the 2nd appellant, the appeal is allowed and he is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

25/02/2016

PRESENT

Mr. Musyoka for State

In Person, Appellant

Peninah/Ibrahim, Court Assistants