



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CRIMINAL APPEAL NO. 74 OF 2014**

*(An appeal from the Judgment and sentence of the Senior Resident Magistrate,  
Siakago in CMCR. Case No. 51 of 2012 on 19/12/2014)*

**ROBERT MWANGI NAMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. This is an appeal against the judgment of Siakago Senior Resident Magistrate delivered on 19/12/2014 in Criminal Case No. 51 of 2012. The appellant was convicted of the offence of gang rape and sentenced to serve fifteen (15) years imprisonment.
2. He was dissatisfied with the judgment and lodged this appeal. The original and supplementary grounds of appeal may be summarized as follows:-
  - a. *That the magistrate relied on inconsistent and uncorroborated evidence.*
  - b. *That no age assessment report was produced in court.*
  - c. *That the medical evidence was insufficient.*
  - d. *That the clothes worn by the complainant at the material time were not produced as exhibits.*
  - e. *That Section 77 of the Evidence Act was not adhered to production of medico-legal documents.*
  - f. *That Section 212 and 302 of the CPC were violated.*
  - g. *That the prosecution witnesses were coached.*
  - h. *That the appellant's defence was not considered.*
  - i. *That the appellant's constitutional rights were violated due to his incarceration in police custody contrary to the law.*
  - j. *That the charges were incurably defective.*

1. In his written submissions, the appellant expounded and explained his grounds of appeal. He submitted that there was uncorroborated and inconsistent and that there was an existing dispute between him and the complainant's family leading to the baseless allegations by the complainant.
2. The State Counsel Ms. Nandwa submitted that the age of the complainant was proved through the evidence of PW1 and PW5. On the ground that there was no spermatozoa found, the counsel argued that the most important thing to prove was that there was penetration. The prosecution adduced sufficient evidence to prove penetration. The respondent relied on the case of **MARK OIRURI MOSE VS REPUBLIC** where the court held that the presence of spermatozoa was not necessary provided there was evidence of penetration.
3. Ms. Nandwa further submitted that the evidence of the doctor was clear that the complainant was aged 15 years. The prosecution followed the procedure set out in Section 77 of the Evidence Act n producing the P3 form. It was in order for Dr. Margaret Ngari in tendering the report on behalf of Dr Ngare who had been transferred from Mbeere District Hospital.
4. She further argued that there was no violation of Section 302 of the CPC and neither did the appellant explain the alleged violation of the law. In his defence the appellant did not state where he was at the material time. It was further submitted that the magistrate considered the appellant's defence and rejected it for good reasons and the sentence imposed was lawful. The State urged the court to uphold the conviction and sentence.
5. The duty of the 1<sup>st</sup> appellate court was explained in the case of **OKENO VS REPUBLIC [1972] EA 32** as follows:-

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424.”*

6. PW1 testified that she was born on 24/3/1997 and that on 29/1/2012 at about 1.00 p.m. she was coming from her friends home. On the way and while she was about to cross a stream, the appellant emerged from a bush and held her hand. When she tried to scream he held her throat tightly. Someone else emerged from the bush and the two men pulled her to the same bush. The appellant forced her to the ground and removed her clothes namely the biker, skirt and under pants. The appellant lay on the complainant's chest and held her throat while his accomplice defiled her. When the other person was done, the appellant also started defiling her. PW1 bit his hand and this forced the appellant to set her free.
7. The complainant then dressed up and went to the appellant's home and reported to his wife what the appellant had done. The complainant then went home and later led her parents to the scene. PW1's father called the Assistant Chief who went to the appellant's home and arrested him before escorting him to Kiritiri Police Post.
10. PW1 was medically examined and treated at Embu PGH. She testified that she did not know the accomplice of the appellant and that her skirt got torn on the left side as it was being removed.
11. The father of the complainant PW2 testified that on 29/1/2012, he was at home with his wife at around 3.00 p.m. when PW1 came home crying with her clothes soiled and her skirt torn on one side. She informed them that the appellant and his friend had defiled her. PW2 and his wife went to the said stream accompanied by other people but did not find the appellant and his friend.

12. PW2 then called the Assistant Chief who came to the scene. The appellant was then arrested in his home. Before he was arrested, the appellant knelt before PW2 asking for forgiveness. He said that he was rescuing PW1 from another man who was a stranger. PW1 was taken to Kiritiri Health Center and thereafter to Embu PGH for medical examination. The torn skirt was left at the police station. PW2 said that he has never had a grudge with the appellant.

13. PW3 the Assistant Chief testified on how he arrested the appellant on 29/1/2012 after receiving a report from PW2 that his daughter had been defiled. He further stated that the appellant pleaded for pardon in the presence of many members of the public.

14. PW4 a police officer testified that on 29/1/2012 a defilement report was made at Kiritiri police station by the complainant and her parents. The matter was allocated to him for investigations. He received a birth certificate from the complainant's father and noted that the complainant was aged 15 years. He later charged the appellant with the offence.

15. PW5 Dr. Margaret Ngari a medical doctor attached to Mbeere District Hospital testified that the P3 form was filled by one Dr. Ngare who worked with her for 5 months at Embu PGH. She said she was conversant with her handwriting and signature and produced the P3 form. The state counsel made an application under Section 77 of the Evidence Act to produce the document. The defence did not raise any objection. Dr Ngare's finding was that the weapon causing the injury was blunt consistent with the penis. The complainant was tender on the entry of the vagina and the hymen was broken. The degree of injury was classified as harm. The post rape report was also produced.

16. The appellant in his statement of defence stated that on 29/1/2012 he first went to the market and later to church. He passed by Kiritiri market on his way home to buy some household goods and arrived home at around 3.30 p.m. He said that soon afterwards, the sub chief came accompanied by the complainant and her father came to his home and he was arrested and taken to Kiritiri police station. He was arraigned in court on 31/1/2012 and charged with this offence which he denied committing. The complainant is alleged to have been defiled by two people.

17. The law applicable herein is Section 10 of the Sexual Offences Act which provides:-

*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.*

18. The ingredients of the offence were explained in the case of **DOMINIC OCHIENG ODOYO & ANOTHER VS REPUBLIC [2015] eKLR** where the court held that the ingredients of the offence are proof of rape or defilement and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement with common intent.

19. In the case of **SAMSON APOPONG VS REPUBLIC [2013] eKLR** the court held that for the offence under section 10 of the Sexual Offences Act to be proved there must be more than one assailant who act in association with a common intention even though not all of them may carry out the actual rape or defilement.

20. Section 10 of the Act requires that the offence of rape or defilement be proved to have been committed by a person in association with another or others. The complainant was aged 14 years and the offence of defilement is key in this case.

21. Section 8(1) of the Sexual Offences Act provides that;

*A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

22. For defilement to be proved there must be penetration and it must be proved that the victim was below the age of eighteen years.

23. Section 2 of the Sexual Offences Act provides that;

*“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.*

24. The P3 form and the Post Rape Care report produced by PW5 shows that there was evidence of penetration which caused tenderness on the genitalia.

25. Although the original birth certificate was not produced there was the photocopy was tendered in evidence without any objection and was sufficient proof of age of the complainant coupled with the P3 and post-rape form. The evidence of PW2 the complainant's father on PW1's age was corroborated by the documents produced in court. I am satisfied that the age of PW1 was proved as required.

26. The testimony of PW1 and the history in the post rape report confirmed that there was evidence of penetration and sexual intercourse against the will of the complainant. The ingredients of the offence of gang rape were summarized in the **DOMINIC OCHING ODOYO case** (*supra*) thus:-

*proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.*

27. The testimony of PW1 that the appellant was in the company of another person at the material time was not rebutted by the defence and stands as proof that the appellant was in association with another when he committed the offence.

28. The appellant alleged that his Constitutional rights were violated for he was remanded in police custody for over 24 hours. The charge sheet shows that the appellant was arrested on 29/1/2012 and was taken to court on 31/1/2012.

29. Article 49 (1) (f) of the Constitution provides that *an accused person has a right to be brought before a court as soon as reasonably possible, but not later than—*

*(i) twenty-four hours after being arrested; or*

*(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

30. The 29/1/2012 was on a Sunday and hence it was expected that the appellant would be arraigned in court the following day which was on a Monday. He was taken to court for plea on 31/01/2012 which shows that there was delay of one day. The proceedings do not indicate that the issue of delay was ever raised before the trial court to give the prosecution an opportunity to explain the cause.

31. It is trite law that the violation cannot lead to a trial being declared a nullity and that any damage suffered maybe compensated by way of general damages in civil proceedings. The appellant is at liberty to claim damages under the law. I am guided by the case of **MUSEMBI KULI VS REPUBLIC [2013] eKLR** where the court held that:-

*The violation of the right to be brought to court within the constitutional time limits cannot lead to a conclusion that the entire trial becomes a nullity as counsel tried to persuade us. Such a conclusion is not to be found in the constitutional text itself and nor can a logical and practical approach to the issue permit it. The violation of the right if proved can only found an action for damages.*

32. The the record shows that the prosecution complied with the provisions of Section 77 of the Evidence Act in producing the P3 form through PW5. The counsel for the appellant did not object to the tendering of the said document in evidence. I am satisfied that a basis for the said production of the was laid as required by the law.

33. The appellant argued that the charges were incurably defective. The appellant has not explained what defects were in the charge for the consideration of this court. Neither has he demonstrated that any injustice was occasioned to him in the course of the trial.

34. It was also argued that there was no penetration. I rely on the case of **MARK OIRURI MOSE VS REPUBLIC [2013] eKLR** where the Court of Appeal held that:-

*“penetration does not necessarily end in release of sperms into a victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason the law doesn't require that evidence of spermatozoa be availed”.*

35. I find that the argument that there was no penetration cannot stand in view of the above decision and of the evidence of the doctor documented in the P3 form and the post rape report.

36. The appellant said that Section 302 and 212 of the Criminal Procedure Code were violated. Section 302 of the CPC provides that;

*"The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution."*

37. It is important to note that the appellant was represented by an advocate throughout the trial. There is no evidence of violation of this section for the record shows that the prosecution witnesses were all cross-examined by the appellant's advocate.

38. Section 212 of the Criminal Procedure Code provides that;

*"If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."*

39. The appellant did not raise any new matter in his defence save for an alibi which Section 202 does not address. The court has already dealt with the alibi defence of the appellant. The appellant has therefore not demonstrated how Section 212 was violated.

40. In the case of **PETER KIHIA MWANIKI VS REPUBLIC [2010] eKLR** the court of appeal held that it is important to produce the exhibit but that failure to produce the same is not fatal to the prosecution case provided there is sufficient evidence to support conviction.

41. In the case before me, I find that the prosecution's evidence was overwhelming against the appellant and that failure to produce the exhibits did not cause any failure of justice.

42. I have carefully considered the judgment of the trial magistrate and I find that all the relevant issues were dealt with and the evidence adequately evaluated. The appellant's defence was also considered and rejected due to the overwhelming evidence of the prosecution.

43. I reach a conclusion that the conviction was based on cogent evidence and it is therefore safe. The sentence was within the law and was neither excessive or unreasonable.

45. In effect, the appeal is here by dismissed, the conviction and the sentence upheld accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MARCH, 2016.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Appellant**

**Ms. Nandwa for respondent**