



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 41 OF 2015
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 42 & 43 OF 2015

BETWEEN

JAMES KANGA MARK OLOO1ST APPELLANT

KENNEDY OCHIENG MBIWA 2ND APPELLANT

ISAACK OMONDI OKELLO3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 154 of 2015 at Senior Resident Magistrates Court at Ndhiwa, Hon.B.R.Kipyegon, RM dated 22nd September 2015)

JUDGMENT

1. The appellants **JAMES KANGA MARK OLOO (A1)**, **KENNEDY OCHIENG MBIWA (A2)** and **ISAACK OMONDI OKELLO (A3)** were charged with the offence of gang rape contrary to **section 10** of the *Sexual Offences Act, 2006*. The particulars of Count 1 were that on 4th June 2015 in Ndhiwa District of Homa Bay County, the appellants in association with others intentionally caused their penis to penetrate the vagina of RAO, a woman aged 40 years. They also faced an alternative count of committing an indecent act with an adult contrary to **section 11A** of the *Sexual Offences Act, 2006* based on the same facts.
2. In Count 2, the appellants were charged with burglary contrary to **Section 304(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of that count were that on the night of 4th June 2013 in Ndhiwa District of Homa Bay County, they jointly broke and entered into the dwelling house of ROA and stole therein. In Count 3, the appellant were accused of stealing contrary to **section 279(b)** of the *Penal Code*. The particulars were that the appellants jointly stole five plastic chairs and thirty plates, all valued at Kshs. 6,000/-, the property of RAO. The appellants were convicted on both the first and second counts and sentenced to serve 15 and 10 years imprisonment respectively on each count, with both sentences running consecutively.
3. Each appellant filed a separate appeal contesting the conviction and sentence but the same were consolidated as they arose from the same facts. The thrust of their respective petitions of appeal

was that the prosecution did not prove the case against them to the requisite standard.

4. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and to come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). The evidence presented before the subordinate court was as follows.
5. The complainant, PW 2, testified that on the night of 4th June 2015, she was sleeping in her house in which she resided with her son (PW 6). At about 3.00am, when she was asleep, she heard a loud bang. It was a huge stone that was used to break the door and she saw two people enter. They had torches. As they entered the house, she was able to recognize A1 whom she knew as Kaguria as the torch lit his face. She did not identify the other assailant. PW 2 narrated how A1 dragged her from the bed by the neck and took to a nearby sugarcane plantation as she screamed. Her screams attracted a neighbour who came to rescue her but he was hit by one of the assailants causing him to flee. Another man arrived at the scene. They put soil in her mouth and eyes, removed her inner clothes and took turns to have sexual intercourse with her. After the assailants had left, some villagers found her in the plantation, among them PW 4 and PW 5. She was taken to Pala Health Centre for treatment and examination and later reported to the matter to Ndhiwa Police Station where she was issued with a P3 form. She recalled that she later went to her house and found several items missing.
6. PW 2 was examined by a clinical officer (PW 3) at Ndhiwa Sub-County Hospital on 6th June 2015. He confirmed that she had been treated at Pala Health Centre on 4th June 2014. He noted that she was in pain and had blunt injuries which he classified as harm. He did a high vaginal swab but could not confirm penetration as he had examined her after 72 hours since her ordeal.
7. The complainant's 10 year old son, PW 6, testified on oath after a *voire dire* examination. He testified that on the material night, he was sleeping in the house with PW 2 when three assailants entered the house by breaking the mabati door using a stone. He recalled that there was moonlight and that A1 had a torch, A3 was standing guard while A2 was standing at the door. He knew the assailants as they were from the area. He saw the assailants grab PW 2 and drag her away as she screamed for help. As there was a funeral nearby, he rushed to seek help and found PW 4 whom he informed of what was happening.
8. PW 4 testified that he was at a funeral when PW 6 came and reported that his mother had been taken away. PW 6 told him that he did not know the assailants but knew their facts. He took to the micro-phone and told the mourners that an assault had taken place. People left to go and look for PW 2. PW 5 was one of the mourners who went to look for PW 2. He recalled that they first went to PW 2's house and found that the door was open. They began to search for her in the nearby sugar cane plantation. PW 5 testified that he saw A1 coming out of the plantation buttoning his pants. PW 4 also joined them and they heard the voice of PW 2 whom they found with soil in her eyes and mouth. She was holding her panties and there was sperm and condoms on the ground. One of the ladies in the group was asked to assist PW 2. The group arrested A1 and forced him to sit down. They began interrogating him whereupon he mentioned A2 and A3. A1 led the group to the homes of A2 and A3 where they were arrested and taken to the Chief, Koguta Location (PW 1).
9. PW 1 recalled that at about 5.00am, a group of people including PW 4 and PW 5 came to his home and told him that they had arrested two people who are alleged to have raped PW 2. They were A1 and A3. A2 was brought later as they proceed to the AP Camp at about 6.00am. PW 2 arrived later and was referred to the Pala Health Centre while the police officers from Ndhiwa Police Station collected the suspects. The investigating officer (PW 7) collected A1, A2 and A3 from Pala AP Camp on 4th June 2016 at about 1.40pm and brought them to Ndhiwa Police Station. After conducting investigations, PW 7 caused them to be charged.
10. When put on their defence, the appellants elected to give unsworn testimony without calling any

witnesses. A1 testified that he was a sugar cane cutter and that on 4th June 2015, he the tractor taking him home could not move as it had rained heavily. He had also missed a boda boda to go home so he had to walk. At Pala, he passed by a disco matanga when he heard people call him. They interrogated him and left him to go. As he was heading away he met PW 4 carrying a rungu and spear. He was assaulted and taken to the disco matanga where he found PW 5. He was left there and a while later, they came back with two boys. The boys denied that they knew him. While being taken to the Chief's office, he heard that a woman had been found in the sugar cane plantation.

11.A2 denied the allegations against him and stated that he was woken up and taken to the Chief and later to the Police Station. A3 also denied the allegations against him. He stated that on 5th June 2015, he was asleep when he was woken up at about 4.00am. When he opened the door he saw many people who got hold of him and took him to the Chief's Camp and thereafter to Pala AP Camp. He was later taken to the Police Station.

12.Gang rape is provided for under **section 10** of the **Sexual Offences Act** which states;

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.

13.The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in **Section 3(1)** of the **Sexual Offences Act, 2006**;

A person commits the offence termed rape if –

- a. *He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.*
- b. *The other person does not consent to the penetration; or*
- c. *The consent is obtained by force or by means of threats or intimidation of any kind.*

14.From the evidence I have outlined, I find that the prosecution proved the essential elements of the offence of gang rape. The testimony of PW 2 was clear and consistent on her ordeal on the material night. She narrated how she was attacked in her house, dragged to the sugar cane plantation and raped by three men. The sexual intercourse took place not only without her consent but also by force. Her testimony was corroborated by that of her son, PW 6, who saw her being dragged out of her house and the testimony of PW 4 and PW 5 who confirmed that she was found in the sugar cane plantation after the ordeal.

15.Although PW 3 testified that the medical examination did not prove penetration, I am satisfied on the basis of the complainant's own testimony of her ordeal that there was in fact penetration. As the Court of Appeal held in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (UR)** ;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

16. The central issue in this appeal is whether the appellants were identified as the assailants. The learned magistrate correctly observed that in *Cleopas Otieno Wamunga v Republic* [1989] KLR 424, the Court of Appeal sounded a word of caution in matters of identification of suspects at night so as to avoid possible miscarriage of justice through mistaken identity. The Court urged careful examination of evidence in order to minimize risk of error which is possible even in the case of relatives or friends. The Court of Appeal also noted in *Anjononi & Others v Republic* [1980] KLR 59 that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it nevertheless must be examined because mistakes can also be made. At all events, such evidence and recognition must be watertight to justify conviction.
17. As regards A1, PW 2 testified that she recognized him when he came in with a torch which shone his face. They were close enough and he is the one who held her and dragged her away. He was not a stranger to her as she knew him from the locality and used to see him. Likewise, PW 6 saw him when he came as he had his torch on. PW 6 was also able to see him since there was moonlight from the outside. He was clearly recognized by PW 6 as he is the one who came in and assaulted PW 2. Although PW 2 did not see A1 and A2, PW 6 recalled that he saw them standing at the door. A2 whom he knew as Atoti was standing by the door while A3 whom he knew as Isa was standing watching near the door. A2 and A3 were sufficiently close to PW 6 for him to recognize them. In addition to the evidence of recognition, the appellants were arrested so soon after the event.
18. The unsworn statement of A1 put him at the locus in quo and while A2 and A3 denied involvement and they confirmed that they were arrested on the material morning. Their defence, in light of the direct and credible evidence of recognition, could not water down the prosecution case. In coming to the conclusion that the case against the appellants was watertight, I have disregarded the statements made by A1 to PW 4 and PW 5 implicating A2 and A3. These were clearly statements made by an accomplice and could not be relied upon given that the co-accused did not have the opportunity to test testimony of A1 by cross-examination. I am of the firm view that there was independent evidence implicating A2 and A3 as they were clearly recognized by PW 6 at PW 2's house. I therefore find that the appellants committed the offence of gang rape as charged.
19. As regards the offence of burglary, the charge stated that the same was committed with intent to steal. The evidence is clear that the assailants broke into the house but that they did not intend to steal. They intended to assault and rape PW 2. When they broke into her house, they dragged her out to rape her, they did not leave with anything and there is no evidence that they returned to steal. Although PW 2 found her items missing from her house when she returned, I would give the appellants the benefit of doubt on this score and acquit them on the second count of burglary contrary to **section 304(2)** of the *Penal Code*.
20. The minimum sentence for the offence gang rape under **section 10** of the *Sexual Offences Act* is not less than 15 years which may be enhanced to life imprisonment. I therefore affirm the 15 years sentence which is the minimum sentence under the *Act*. I would also note at this stage that the learned magistrate erred in imposing consecutive sentences when the offence arose out of the same facts or transaction (see *Sentencing Policy Guidelines, 2016 para. 7.13*).
21. In conclusion, the appeal is allowed to the extent that I set aside the conviction and sentence on Count 2. The convictions and sentence for gang rape contrary to **section 10** of the *Sexual Offences Act* are affirmed.

DATED and DELIVERED at HOMA BAY this 27th day of May 2016.

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.