REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 58 OF 2015

RICHARD OCHIENG OUSO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. P. K, Rugut, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 25 of 2015 delivered on 06/07/2015)

JUDGMENT

Background:

1. When **RICHARD OCHIENG OUSO,** the appellant herein, was arraigned before the Senior Resident Magistrate's Court at Rongo for purposes of taking a plea on 22/01/2015, that did not happen. Instead the prosecution prayed for and were granted some more time to complete its investigations.

2. The plea was subsequently taken on 29/01/2015 where the appellant was formally charged with the offence of ***'Rape'*** contrary to ***Section 3[1][a][b][3]*** of the ***Sexual Offences Act No. 3 of 2006*** and whose particulars were as follows:

> ***'On 21st day of January 2015 at [particulars withheld], Migori County in the Republic of Kenya, intentionally and unlawfully caused his penis to penetrate the vagina of one female adult who is deaf and dumb and whose name is unknown without her consent.'***

3. The appellant was also charged with an alternative count of committing an indecent act with an adult contrary to ***Section 11(A)*** of the Sexual Offences Act No. 3 of 2006. He denied both counts.

4. The prosecution called five witnesses in a bid to prove the charges against the appellant. **PW1** and his wife **PW3** were eye-witnesses**. PW2** was the Clinical Officer while **PW4** was the victim's father and guardian since the victim was deaf and dumb. The Investigating Officer testified as **PW5**.

5. The evidence of PW1 was recorded on 19/03/2015 and the matter was adjourned to 27/03/2015. Come the said 27/03/2015 the prosecution made an application to substitute the charge as it had then obtained the victim'sname and the application was allowed. A fresh charge was presented and the appellant called to plead to after the court had explained to the appellant of his right to recall the witness who had earlier on testified. The particulars of the subsequent charge were as follows:

> ***'On 21st day of January 2015 at [particulars withheld] in Central Kamagambo Location, Migori County in the Republic of Kenya, intentionally and unlawfully caused his penis to penetrate the***

vagina of S.M.O. who is deaf and dumb without her consent.'

6. The appellant denied the substituted charge and a plea of not guilty was recorded. Since the appellant did not elect to recall PW1 who had previously testified the case proceeded on with the hearing. On application by the prosecution, the court summoned a sign language interpretor from the Kisii Law Courts who examined the victim and encountered a communication barrier since the victim had not attended any formal special school. PW4 confirmed that the victim dropped out of a special school and the family only communicated with her on small things like water and food. The victim did not therefore testify due to the inability to communicate but the court, rightly so, observed her and dispensed with her testimony. I have also noted from the record that the victim remained in court throughout the trial and witnesses identified her as such.

7. At the close of the prosecution's case the trial court placed the appellant on his defence. The appellant opted to give unsworn defence without calling any witnesses and thereafter the court rendered its judgment on 06/07/2015. The appellant was found guilty as charged on the principal count of rape and was sentenced to the minimum 10 years imprisonment.

The Appeal:

8. Being dissatisfied with the conviction and sentence, the appellant preferred an appeal by filing the undated Petition of Appeal on 20/07/2015 where he challenged the findings that the victim was raped and if so, that it was him who was the perpetrator.

9. At the hearing of the appeal the appellant appeared in person and relied on the written submissions he filed on 21/04/2016 in urging the Court to allow the appeal and set him at liberty. The appeal was opposed by the State hence this judgment.

Analysis and Determinations

10. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of rape, or alternatively those of the offence of committing an indecent act with an adult, were proved and as so required in law; beyond any reasonable doubt.

12. The starting point is how the offence of rape is described in law. **Section 3** of the Sexual Offences Act ***(the Act)*** defines **'rape'** as follows:

'3(1) A person commits the offence termed rape if-

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for

a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

13. It can therefore be safely said that the ingredients of the offence of **rape** are as follows:

(a) proof of the age of the victim.

(b) proof of penetration.

(c) proof that the appellant was the perpetrator of the act.

(d) proof that the consent was obtained by force or by threats or intimidation of any kind.

14. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) <u>On the age of the victim:</u>

15. The victim in the case did not testify. However PW4 who was the father and the guardian of the victim did. PW4 told the trial court that the victim was born in 1993 and got sick in 1998. Going by that, the victim was around 22 years old at the time of the alleged incident. PW4 however did not produce any documentary proof of the victim's age.

16. It was PW2 who produced the P3 Form which had the victim's approximate age as 18 years. On its part the trial court had an opportunity and observed the victim but did not make any note on the victim's general appearance.

17. Under **Rule 4 of the Sexual Offences Act, (Rules of Court) 2014** which came into force on 11/07/2014 vide Legal Notice No. 101, a victim's age can be determined by way of a Birth Certificate, any School documents, a Baptismal Card or ***'any other similar document'.*** Since in this case there was no Birth Certificate, any school document or a baptismal card in proof of the victim's age and that the victim's age was not assessed, then the P3 Form which dealt with the age of the victim fell within the category of the documents described as ***'any other similar document'.*** From the evidence of PW4 and the contents of the P3 Form, there is no doubt that the victim was not a minor. The trial court was hence right in treating the victim as an adult, I so find.

(b) <u>On the issue of penetration:</u>

18. Section 2 of the Sexual Offences Act defines 'penetration' and 'genital organs' as follows:

'<u>penetration</u>' the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

'<u>genital organs</u>' includes the whole or part of male or female genital organs and for purposes of the Act includes the anus'.

This position was fortified in the case of **<u>Mark Oiruri Mose vs R (2013)eKLR</u>** when the Court of Appeal stated thus:

'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. <u>So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ</u>….' (emphasis added).

19. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

20. In demonstrating this ingredient, PW1 stated as follows:-

> ***"...On 21/01/2015 I was at home sleeping on that night.....I had a scream, the person screaming raised the voice promptly (sic) us to go out. It was a woman's voice, I was horrified , the person was not talking but shouting it was from 10-11:30pm, at midnight it started again. The noise was about 40 metres away, it was not far it came from ascertain home Nyondaga's home..... I rushed to that home, I found door locked from inside, the screams were still on, it was a lady screaming. I tried knocking the door the accused brother came we tried knocking door again but it was not opened, we forced to break the door, inside the house, we found a man, the accused person, Richard I know him, he was raping a woman. The woman is in court (points out at complainant). The house had one sofa, they were laying there, and we did not enter the other room. The accused person had the same shirt he has today, his trousers were on his knees, he pretended that he was not having sex, we removed his underwear, he penis was still leaking with sperms, and the lady's clothes were wet. She was laying on the floor she could not even stand. The accused person led us to another house, where he alleged three other people had raped the lady. Inside the house there was a mat and a lady's pants.....the lady took it away. I took the lady to my home where she slept until morning, I was then summoned to the police the following day to give my statement. She was then taken for treatment.....The accused person escaped.....there was a used condom in the room, the accused told us his friend had used the condom while he did not use the protective...."***

21. The evidence of PW1 was corroborated by that of PW3 who was PW1's wife. PW3 confirmed hearing the screams from a nearby house and that PW1 rushed there leaving her behind. She then followed PW1 later and found the victim in a house with PW1, the appellant, the appellant's brother and another person who later on escaped. PW3 noticed that the victim's clothes were blood-stained and also found some blood-stained condoms and a pant in the house. PW3 took the victim to her house where she spent the rest of the night with and took the victim to the police station the following morning.

22. There was also the evidence of PW2, the Clinical Officer attached at Rongo Sub-County Hospital. She testified that on 21/01/2015 the victim was taken to the hospital in company of PW5 with history of sexual assault. Although the victim was deaf and dumb, she was sober. PW2 examined the victim's private parts and noted that the victim was in her menses and therefore bleeding. PW2 however noted that the victim had a tender scratch on the right thigh and so indicated in the P3 Form. PW2 also noted that the victim's hymen was broken and made an entry in the Post Rape Care Form. She then filed in the Post Rape Care Form and the P3 Form which she produced them in court as exhibits.

23. The appellant wondered how penetration could be proved and yet the victim was on her menses. That sounds to be a logical question, but going by what the law defines 'penetration' to be, the issue as to whether or not the victim is in her menses is rendered irrelevant.

24. From the evidence of PW1, PW2 and PW3 and on careful perusal of the exhibits, this Court has no doubt that indeed penetration was proved.

c) <u>On whether the appellant was the perpetrator:</u>

25. The appellant vehemently denied any involvement in the alleged offence and wondered why he was charged. As I stated above the victim did not testify due to the communication barrier. There was however the evidence of PW1 and PW2 which touched on the identity of the appellant. PW1 stated that when he heard the noise from the neighbor's house which was about 40 meters away, he rushed to that house and after forcefully gaining entry he saw the appellant whom he knew very well as his neighbour and who was also known as Juma. The appellant was inside the house with the victim. The appellant was engaged in a sexual act with the victim just at the sitting room. PW1 confirmed that the appellant had the same shirt in court which he wore at the time of the sexual encounter. The appellant's trousers were however on his knees. But the appellant pretended that nothing had happened between him and the victim who lay helplessly on the floor. PW1 who was then in the company of the appellant's brother pressed the appellant as to know what had happened between the appellant and the victim since to them it

was clear that the appellant had been engaged in a sexual act with the victim having found them right on it, PW1 and the appellant's brother then removed the appellant's underwear which was already exposed since his trousers were down. They saw the appellant's penis still wet and leaking with some fluid which he described as 'sperms'. On being pressed further the appellant disclosed that he had been in the company of three other men who had earlier engaged in sex with the victim in another house and offered to take them there. PW1 accompanied the appellant who led him, the appellant's brother and the victim to the other house.

26. On entering inside the other house, PW1 saw a mat on the floor and a lady's underpant which was blood-stained. When the victim saw the underpant she readily recognized it as hers and took it away. PW1 also saw some used condoms in the room which the appellant said were used by his friends.While still in the house PW1 found one of the people whom the appellant alleged to have also taken part in the ordeal in one of the rooms. PW1 did not however recognize that person. As PW1 was still in the house PW3 and other neighbours came into the house. PW3 confirmed all what PW1 said about what and who was in that house. PW3 also recognized the appellant who was their neighbour and well known to her.

27. As PW1 and PW3 conferred on how they were to assist the victim further, the appellant and the other person found in that house escaped. PW1 and PW3 then took the victim to their house where she spent the rest of the night there and in the morning PW3 sought the assistance of another woman (not a witness) and took the victim to the police station. When PW3 took the victim to the police station in the morning of the following day and as she was still there she witnessed the Area Sub-Chief and one Ochieng bring the appellant to the station where the appellant was handed over to the police.

28. The appellant contended that the evidence of PW1 and PW3 ought not to be believed as the incident allegedly occured at night and there was no evidence as to any lighting and as such it was impossible that the perpetrator of the offence could be identified in that state of darkness, It is true the record is silent on the issue of lighting and it is equally true that the incident occurred at night. I will look at that issue in light of all the events taken together. PW1 and PW3 did not know the victim but they knew the appellant quite well being neighbours. That is the reason why PW3 further readily recognized the appellant at the police station when he was taken there by among others, the area Chief. The appellant also confirmed knowledge of PW1 in his defence. PW3 took the victim to the police and it is the police who managed to get PW4 with the aid of the media. PW4 confirmed that the victim was his daughter who was deaf and dumb and generally vulnerable. PW4 further confirmed that the victim had gone out to play with her fellow children and got lost from their home in Ogembo. PW4 had reported the victim's disappearance at the Ogembo Police Station and also in the local churches. PW4 later learnt that the victim was at Rongo Police Station from a local radio station and proceeded there.

29. The police who undertook the investigations did not come up with any other way on how the victim found her way to the police station save what PW1 and PW3 laid bare before them. I therefore find that the victim was rescued by PW1 and PW3 from the appellant and taken to the police station. Further it is the appellant who led PW1 to the other house where there was evidence of sexual activity and where PW3 and the other neighbours gathered. It is also in that house where the victim recognized and recovered her underpant. All that chain of happenings could not have taken place without the witnesses being able to see the one they were dealing with and that it was the appellant. This Court is hence satisfied that the identification of the appellant in the particular circumstances of this case was free from error. In reaching that finding this Court is alive to the need for caution in cases of identification at night. (See the case of **R –vs- Turnbull & Others (1973) 3 ALL ER 549).** This Court is equally aware of several decisions of the Court of Appeal which upheld identification of suspects at night. For instance in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** the Court of Appeal had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that F, J and R were familiar with the appellants; that F and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them...."***

30. As the appellant raised a defence in the trial, it is worth consideration so as to ascertain if that defence can overturn the above finding. The appellant gave an unsworn statement without calling any witnesses. He contended that the case against him was but a set up by PW1 who had wanted to buy part of their land and had indeed agreed with the appellant's brother but the appellant refused and frustrated the sale hence the grudge.

31. The trial court considered the defence in its judgment and found it not to be holding as the same was brought too late in the day and no basis was laid during the examination of the witnesses. I have likewise considered the defence and do agree with the trial court's finding on the same. I say so because the appellant only made bare allegations which are not holding in law. Without being seen as shifting the burden of proof to the appellant, it isclear that the prosecution's case stood the test of the defence. I am of that position since there is no evidence that the appellant raised the issue with the police so as to offer an opportunity to the police to investigate the allegation. Raising such a serious issue at the end of the trial and having even not cross- examined any of the witnesses on it can be reasonably seen as an afterthought.

32. The trial court also saw the witnesses testify before it. That court believed the witnesses to be truthful and credible. Given that there is nothing placed before this Court to shake those observations and the findings of the trial court, I find no reason to disagree with that court.

d) <u>The issue of the consent:</u>

33. Sections 42, 43, 44 and **45** of the Act deals with the aspect of the consent of the victim at length. **Section 42** states as follows:

> ***'For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice*** **Sections 43, 44** and **45** of the Act goes into great detail in describing instances where one's consent cannot be said to have been obtained.

34. From the above statutory description of the consent and going by the evidence on record, it can be clearly seen that the victim never consented to the sexual activity with the assailant. The victim was deaf and dumb and had been reportedly lost from her home in Ogembo and was later found in Rongo. According to PW4 the victim did not understand what happened around her and performed only very small chores at home and communicated on small issues like water and food. That is however not to say that one who is deaf and dumb cannot engage in a consensual sex but thecircumstances and the evidence in this particular case points otherwise. The victim was vulnerable due to the multiple challenges she had. In such a state of affairs one cannot reasonably presume that the victim would understand a sexual act so as to concede to it. Indeed PW4 confirmed that the victim could not understand such an issue.

35. Further the issue of the victim raising alarm that attracted PW1, PW3 and other neighbours does not connote a conduct becoming of one who has voluntarily consented to such an act. All factors taken into account and in consideration of the law, this Court finds that the victim did not consent to the sexual act with the appellant.

36. Closely related to the foregone is the appellant's contention that if truly the victim was dumb then she could not have raised alarm so as to attract the attention of PW1 and PW3. I do agree with the appellant to the extent that a dumb person is unable to speak. However that does not mean that such a person cannot produce any form of sound. On the evidence on record, it isnot alleged that the victim spoke but rather that the victim raised alarm and it is what attracted the attention and intervention of PW1 and PW3. Indeed no one stated that the victim was not in a position to produce any form of sound. The appellant's contention cannot stand and is for rejection.

37. That finding brings the Court to the end of the last ingredient of the offence of rape. Having dealt with the main ingredients of the offence of rape, I wish to address some few other issues which the appellant raised and which cannot be wished away.

Other issues raised:

38. The appellant contended that in view of the serious nature of the offence he ought to have been provided with a legal Counsel at state's expense and that he was highly prejudiced by the lack of such a Counsel.

39. It is a fact that the appellant was unrepresented during the trial. The appellant is also not on record as having informed the trial court that he could not afford the services of a legal representative and as such needed the court's intervention. The importance of a Counsel's participation in a criminal trial was reiterated by the Court of Appeal in ***David Njoroge Macharia vs Republic; Criminal Appeal No. 497 of 2007*** where it delivered itself thus:-

> ***"The counsel's role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in Pett-vs Greyhound Racing Association (1968) 2 ALL E.R 545, at 549. He had this to say:***
>
> *'it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue –tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task."*

40. According to the Constitution, the right to legal representation to an Accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result. The Court of Appeal in the case of **David Macharia Njoroge vs. Republic (2011) eKLR** analysed several aspects of this right and as regards the applicability of Article 50 of the Constitution, the Court held as follows:-

> ***"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigend to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.***
>
> ***We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."***

41. More recently, the Court of Appeal differently constituted in the case of **Karisa Chengo & 2 others vs. Republic Criminal Appeal Nos. 44, 45 and 76 of 2014** at Malindi had a detailed discussion on this right and in finding that the appellants' right was not infringed for want of proof that the appellants could not afford legal representation, the Court had this to say:-

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be***

occassioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of <u>Moses Gitonga Kimani vs. Republic, Meru Criminal Appeal No. 69 of 2013</u>, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:-

"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution.

The problem of lack of legal representation for persons charged with capital offences cannot be wished away, it is here with us and there is therefore need to have legislation in place as it would guide how that right would be achieved and be in line with the internationally acceptable standards. To that end, we strongly urge Parliament to fast track the enactment of the envisaged legislation under Article 261 of the Constitution. The legislation would entail a comprehensive approach that would address the issue of realization of the right to legal representation at the state's expense and should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in Articles 9 and 10 of the Constitution. The Attorney General must therefore move with speed and jump start the process leading to the enactment of that legislation. However, we take comfort in the fact that the draft legal aid bill is in the works. We believe this would be crucial in enabling the State to meet and fulfil its obligations with regard to the fulfilment of the Bill of Rights under Article 19 of the Constitution.

As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in <u>Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008</u> has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of

their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail."

42. The appellant was not charged with a capital offence. He also actively participated in the trial and subjected witnesses to intense examination. He did not show any incapacity in conducting his defence. He hence failed to demonstrate how he suffered injustice in the circumstances of the case. I hence find that no injustice was occasioned to the appellant by the State's failure to accord him any legal representation.

43. There was the issue of failure to produce a medical document of the victim. If I properly gathered what the appellant meant by that submission, the appellant referred to the failure to produce a psychiatric report given that the prosecution had indicated to do so in court. Respectfully, the offence the appellant faced did not require a psychiatric report to be proved and as such the failure to produce such a report was not fatal to the prosecution's case.

44. As to why the prosecution did not produce the underpants and the used condoms found at the scene as exhibits, equally that was not such a mandatory requirement and I do not see how the prosecution's case suffered from such a failure.

45. On the submission that the appellant was not issued with any witnessstatements so as to prepare himself well for the trial, it is noted that the appellant never made such a request for the same. On an equal footing the appellant actively participated in the trial and subjected witnesses to intense examination. That ground therefore fails.

Disposition:

46. From the above analysis it is clear that the appellant was properly found guilty of the offence of rape and duly convicted. He was also sentenced to the minimum sentence in law. Infact the appellant should remain grateful to the State that it did not persue the issue of enhanced sentence as the case had aggravated circumstances since the victim was so challenged such that the appellant obviously took advantage of her and that the appellant was not alone in the act. That would have called for a more stiffer penalty but since the matter was not raised on appeal, I say no more.

47. Consequently the appeal is devoid of any merit and is hereby dismissed.

DELIVERED, DATED and **SIGNED** and at **MIGORI** this **20th** day of July 2016.

A. C. MRIMA

JUDGE