REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 18 OF 2015

(CORAM: J. A. MAKAU – J.)

KEVIN OUMA OCHOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an appeal against both the conviction and the sentence dated 8th October, 2014, in Criminal Case No. 97 of 2014 in Bondo Law Court before Hon. M.M. Nafula – S.R.M.* (Ag.)**

JUDGMENT

1. The Appellant **KEVIN OUMA OCHOLA**, with the others were charged with an offence of **Gang Rape contrary to section 10 of The Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 18th day of January, 2014 at around 3.00 a.m. at [particular withheld], Siger Sub-Location, within Rarieda District in Siaya County, the Appellant in association with others before court, intentionally and unlawfully caused his penis to penetrate the vagina of PAO without her consent. The Appellant also faced an alternative charge of **Committing an Indecent Act With an Adult Contrary to Section 11(1) of The Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 18th day of January, 2014 at around 03/00 a.m. at [particular withheld],, Siger Sub-Location in Rarieda District within Siaya County, intentionally touched the vagina of PAO with his penis against her Will.

2. After full trial the Appellant was found guilty on the main charge and the alternative charge, but convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.

3. The Appellant was aggrieved by both the conviction and sentence and lodged this appeal on 4.3.2015 setting out five(5) grounds of appeal namely:-

a) That the trial court relied on corroborative evidence of the prosecution witness.

b) That the trial court relied on irregular medical evidence tendered.

c) That the prosecution stage-managed its evidence and witness to suit their case and defeat justice.

d) That the trial court depended entirely on the circumstantial evidence and the evidence of a single witness.

e) That the trial court disregarded the entire defense evidence and mitigation handing a sentence which was hard.

4. I am the first appellate court, I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu & Another V. R (2005) 1 KLR 174** where the Appellate court held thus:-

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."***

5. The facts of the prosecution case forms part of the record of appeal and I need not reproduce the same as it can easily be accessed from the record of appeal herein however I shall proceed to very briefly summarize the prosecution's case and the defence.

6. The prosecution's case is that, the complainant PAO a student at KCA, attended a funeral vigil at her home village and that at around 3.00 a.m. she decided to go home in company of C her cousin, however on the way, she saw three (3) men following them and moving very fast, one of whom had a panga. The three men caught up with her, one of them held her by her neck, as the other stood by with a panga and chased her cousin C away. The complainant was able to see the assailants very clearly. The complainant testified while the 1st accused held her by her neck, Fredrick the 2nd accused was armed with a panga, as 3rd accused chased C. The 1st accused dragged the complainant PAO into the bush together with the 2nd accused person. The 1st accused told the complainant PAO to remove her clothes. The 2nd accused cut complainants trouser and her thigh. The 1st and 2nd accused ordered the complainant to remove her upper clothes, her pants, and lie down. That Kevin the Appellant herein inserted his penis into the complainant's vagina and had intercourse with her for 5 minutes, that then Fredrick, the Second accused inserted his penis into the complainant's vagina and had sex with her for 10 minutes and then the 2nd accused released sperms inside the complainant. The assailants put on their clothes, ordered complainant to put on her clothes and ordered her not to tell anyone what they had done. They escorted the complainant to the road. The complainant left for her home and on arrival found her siblings waiting for her and she told them what the assailants had done to her. The complainant proceeded to Lwak Hospital then Bondo District Hospital. That on 21.1.2014 she reported the matter to Lwala Kolinde Police Station, was then issued with a P3 form exhibit 3. The matter was investigated, the complainant identified her assailants and the Police officers from Kotiende Police Station arrested the suspects separately, charged them separately but eventually the charges were consolidated.

7. The Appellant denied the charges. He stated that on 17th June 2014 at 11.00 a.m. he was to attend a funeral but at 2.30 p.m. he was called by a certain man whom he had a grudge with. He was told he was needed at the chief's camp and on attendance he was told he had committed an offence. He was arrested taken to Ndori Patrol Base, then Lwak Kotiende Police Station. He was subsequently arraigned in court and charged with these offences.

8. At the hearing of the appeal the Appellant appeared in person whereas Mr. E. Ombati, learned State Counsel appeared for the State.

9. The Appellant in support of his appeal relied on his written submissions in which he urged that the trial court did not inform him of his rights, that he was not furnished with the witnesses statements, that the charge was defective as the age of the victim was not disclosed, that the name of the victim was in variance with the evidence, that the assailants were not positively identified, that vital witnesses were not availed to testify that penetrations was not proved and that the defence of alibi was not challenged.

10. Mr. E. Ombati, learned State Counsel strongly opposed the appeal urging the incident occurred on

18/1/2014 and was reported on 21.1.2014. That assailants were identified, that penetration was proved and that there was no consent on the sexual intercourse. He urged the appeal lacks merits and sought the same be dismissed.

11. The Appellant in ground No. 1 of the appeal urges that the trial magistrate erred in law by failing to observe that there was no sufficient evidence on the prosecution's case. In the instant case the Appellant and others were charged with an offence of gang rape.

12. **Section 10 of the Sexual Offences Act** 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 fifteen years but which may be enhanced to imprisonment for life."***

13. That the prosecution in proving an offence of gang rape is required to show that the accused person with common intention in company of another or others or in association with and/or others intentionally and unlawfully committed an act which causes penetration with his genital organs into genital organ of another, that the other persons did not consent to the penetration or the consent was obtained by force or by means of threats or intimidation of any kind.

14. In the instant case PW1 testified that on 18.1.2014 at 3.00 a.m she was in company of her cousin C (PW2) when she was attacked by three assailants, that the 1st accused and the 2nd accused intentionally and unlawfully forced her to undress and raped her, the 1st accused raped her for 5 minutes and the 2nd accused for 10 minutes. She was forced to have sexual intercourse with the two as the 3rd accused guarded them while armed with a panga. PW1 did not consent to the act. The 1st accused was in company of two others. The offence was committed by the 1st accused in association with others. PW1's evidence on penetration is corroborated by evidence of PW4 who filled the PW1's P3 form and who noted that the hymen was absent, that there was no bruises in the labia manora but there was whitish discharge. P3 form, P exhibit 3 confirmed that there was penetration to PW1's genitalia. PW2 testified that he saw the appellant on 18.1.2014, and this placed him at the scene of the crime. He corroborated the evidence of PW1. PW3 testified that PW1 reported to the Police on 20.1.2014 at 2.00 p.m. and that she was able to identify the suspects physically. She assisted Police in apprehending the suspects. PW1 gave description of the suspects to PW3 but she did not know their names. PW3 used the information to arrest the suspects. I have evaluated and analyzed the evidence and I find that there was sufficient evidence connecting the appellant with this offence. I therefore find no merits in ground No. 1 of appeal.

15. The Appellant underground No. 2 of the appeal contents that the trial magistrate erred in law by failing to notice that the critical exhibit e.g. inner panty was never presented before the court. I have perused the trial court's record and note indeed the complainant's inner wears were not produced before the trial court. There is no evidence on record that PW1 presented any of her inner wear to police or doctor. It would have been good if the same were subjected to forensic tests to confirm whether the Appellant's DNA would have been found there and which would have been additional good evidence connecting the Appellant to the offence, nevertheless that failure do not weaken the prosecution's case as there was evidence of PW1 and PW2, an eye witness and evidence of PW3 and PW4 which was sufficient to support a charge of gang rape. The innerwear could only have been additional evidence to support the charge and it cannot be said it was the only available evidence and that the failure to produce the same would have made the prosecution's case unsustainable. I find that such failure do not weaken the prosecution's case nor was the appellant prejudiced in anyway by such failure as the case was based on the available evidence which in my view supported the prosecution case to the required standard of proof.

16. The Appellant contends that he did not get fair trial as the trial court failed to furnish him with witnesses statements before the case proceeded to hearing as per **Article 50 (1) (2) (b) (e) and (j) of the Constitution of Kenya**. The purpose of furnishing the accused with witnesses statement is to show the

evidence the prosecution intends to rely on and to enables the accused to have reasonable access to the evidence and ensure that the accused is not caught unawares by the prosecution evidence. This enable the accused to know the evidence that would be adduced against him and prepare his defence. It is a constitutional right for the accused to be availed in advance with evidence the prosecutions intends to rely on failure whereof the accused constitutional rights to fair hearing is violated or breached or infringed.

17. In the instant case there is no evidence of the Appellant having sought to be furnished with the witnesses statements nor is there evidence of him being supplied with the witnesses statements, However, the record reveal that on 28.3.2014 the accused was ready with the hearing. That on 17.7.2014 when the criminal case No. 374 of 2014 was consolidated with criminal No. 130 of 2014 and 97 of 2014 and plea taken, the court directed each of the accused to be supplied with copies of charge sheet and witness statements at their cost. On 14.8.2014 the Appellant informed court thus "I am ready to proceed." and case proceeded to hearing. He did not raise the issue of not having been supplied with witnesses statements. He did cross-examine PW1 without raising the issue of statements. I have perused the court proceedings and I have noted the Appellant was able to cross-examine the prosecution witnesses without any difficulties and at length. Even in his defence he did not raise the issue of not having been supplied with witnesses statement. I therefore find that the appellant was not prejudiced in anyway and did effectively take part in the proceedings. I find no merits in this ground of appeal.

18. The Appellant contends the trial court erred in law by failing to observe that inventory form was not availed before the trial court of law to show the items recovered during the alleged offence. The appellant did not raise the issue of inventory form before the trial court nor was there evidence to show that there was an inventory form of the recovered items which was completed and by who. The appellant has not stated why the inventory form was necessary in this case of gang rape. For the prosecution case to succeed in case of gang rape there is need to prove identification of the assailants, that the appellant was in association with another or others and that there was penetration without victim's consent. That there was penetration into the genital organs of the complainant and that there was no consent. The prosecution needed to call evidence of the victim and any other relevant evidence such as evidence of an eye witness and medical report, if any. It was not necessary for inventory form, if any. It was not necessary for production of any inventory form to show the items recovered during the alleged offence if no such form was prepared. I find no merits in this ground of appeal.

19. I now turn to the issue of identification or recognition of the appellant by prosecution witnesses. The evidence from PW1 is that she was on her way home at 3.00 a.m. in company of her cousin PW2 C O O. PW1 had not known the appellant before the incident of 18.1.2014. She stated there was struggle with the appellant, who held her by her neck while Fredrick the 2nd accused chased PW2 away with a panga. The Appellant dragged her into a bush together with the 2nd accused. The Appellant told PW1 to remove her clothes while the 2nd accused cut her trousers and thigh. They ordered her to lie down. Kevin, the appellant had sexual intercourse with PW1 for 5 minutes whereas the 2nd accused for 10 minutes, they then told her to dress after they had finished raping her and told her to tell no one. PW2 testified he knows the Appellant and on 18.1.2014 he saw the appellant among the group that was following them. PW2 confirmed that he saw the appellant on that day and that he saw him strangle PW1 by her neck and dragged her to the bush. PW3, investigation officer testified that PW1 told him she was able to identify the suspects physically and that she assisted the police to apprehend the suspects. PW1 testified that she saw the appellant very clearly because the moon was shining so well and she was able to properly identify the appellant.

20. It is settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In the case of **R V Turnbull and Others (1976) 3 AII ER 549, Lord, Widgery C.J**. has this to say:-

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility***

that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance? ….....

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

21. PW,1 PAO testified she had not known the appellant before and that it was her first time to see the appellant on that day with the help of moon light. PW2 testified he knew the appellant and had seen him before and there was moonlight which enabled the appellant to recognize him during the incident and explained in detail the role played by the appellant at the time complainant was attacked and dragged into the bush PW1 in her first report to PW3 she stated she was able to identify the suspect physically and assisted in the arrest of the Appellant. PW3 stated that PW1 told him she was able to identify the suspects physically. PW3 confirmed that PW1 told him she was able to identify the assailants and she assisted them to arrest the Appellant. PW1 had a very close encounter with the Appellant as at zero range, so she was able to clearly see the appellant and she did give description of her assailants in her first Report to the Police.

22. PW1 testified she was able to identify the appellant with aid of light from the moon. In the case of **Maitanyi V R (1986) KLR 198 the Court of Appeal** addressed itself thus:

"The strange fact is that many witnesses do not properly identify another person even in daylight … It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into …. See Wanjohi & Others -vs- Republic (1989) KLR 415."

23. In this case PW1 testified there was clear moonlight which enabled her to see the appellant clearly as it shone on him. In the rural set up people are able to walk with minimum light or with no light and be able to reach their homes without difficulty or falling because they are used to very minimum light. It is possible with moonlight they would be able to see and identify one another as they pass one another along the road as the witnessing events unfold, however courts should be cautious in dealing with evidence of identification using source of moonlight in criminal cases as all cases should be proved beyond any reasonable doubt. In this case PW2 knew the Appellant and/or at the material time the Appellant pointed at PW2 with a panga and saw him attack and strangle PW1 by her neck. PW1 saw the appellant hold her by her neck, he dragged her to a bush together with another, ordered her to remove her cloths and ordered her to lie down. He raped her for 5 minutes at zero range. There was bright moonlight. The period PW1 was under attack by the appellant was sufficient enough for her to identify her assailants. PW1 gave PW3 description of her assailants. I find from the evidence of PW1 and PW2 the Appellant was placed at the scene at and crime was properly identified and recognized.

24. In this regard I once again go back to the case of **Maitanyi V R (Supra)** where the Court of Appeal had the following to say on testing identification evidence:-

"There is a second of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant aid or to the police."

25. Based on the evidence given by PW1 and PW2 who had the first encounter with the appellant and his team, I find that the complainant and PW2 were able to give some description or identification of the assailants, to her siblings and to PW3, the investigating officer. In the P3 form it is stated the complainant was Raped by two men who she knows physically. That PW1 knew the two men physically

and did tell PW3 so and assisted in their arrest. In view of the above I find the identification and recognition evidence safe to warrant the appellant's conviction. I do find the evidence overwhelming.

26. The Appellant raised several grounds in his written submissions which do not form part of his grounds of appeal and to which the State Counsel did not respond to. I shall therefore not consider the grounds raised on the written submissions which do not form part of the grounds of appeal.

27. I think the judgment won't be complete if I do not make final comments as to whether it is proper for a trial court to convict the accused person on both the main charge and the alternative charge. In the instant case the trial court found the appellant guilty on the main count and the alternative charge. The court addressed itself thus:-

> ***"I find him to be guilty on the offence in count I and the alternative charge. However, I shall only convict him on the offence in the main charge."***

The position should be that once an accused is charged with main count and at the same time faces an alternative charge, as is the case, however, once convicted on the main count the accused cannot be convicted on the alternative charge once the main charge is proved as one cannot be convicted on both of them at the same time, it is either the main count or the alternative charge or none of them but not both of them. That it was therefore wrong to convict the appellant on both the main count and alternative charge. The main charge was proved beyond any reasonable doubt and the trial court properly convicted the Appellant with an offence of gang rape.

28. **The upshot is that the appeal is dismissed, conviction upheld and sentence confirmed**

The Deputy Registrar of this court to furnish the trial magistrate with copy of this judgment for record purpose and information.

DATED AND SIGNED AT SIAYA THIS 29TH DAY OF SEPTEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER, 2016

IN THE PRESENCE OF:

Mr. Ombati for State.

Appellant in person – present.

C.C. Kevin Odhiambo.

Leonida Atika.

J. A. MAKAU

JUDGE