



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.118 OF 2014

ERICK MAINGI KOOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 146 of 2011 of the Chief Magistrate's Court at Meru by Hon. D.O Onyango – Ag. Senior Principal Magistrate)

JUDGMENT

The appellant, **ERICK MAINGI KOOME**, was 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 were that on 10th February 2011 at [particulars withheld] in Imenti North District of Meru County in association with Wilson Muchai Mutwiri intentionally and unlawfully caused his penis to penetrate the vagina of F K without her consent.

The appellant was found guilty of the offence and sentenced to serve fifteen years imprisonment. He now appeals against both conviction and sentence.

The appellant's petition of appeal and the grounds thereof were filed by the firm of m/s Ndubi Ondubi & Associates advocates. The appeal was argued by Mr.Mutegi holding brief for M/s Thibaru for the appellant. The grounds of appeal can be summarized as follows:

1. That the learned trial magistrate erred in law and in facts in failing to appreciate that the ingredients of gang rape were not established.
2. That the learned trial magistrate erred in law and in facts by shifting the burden of proof after placing the appellant on his defence.
3. That the learned trial magistrate erred in law and in facts by convicting the appellant against the weight of evidence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

At about 8 P.M the appellant and another went to the home of the complainant where she was with her mother and child. The duo offered to buy some sugar for the complainant's mother and asked the

complainant to accompany them which she did. Once they were at a safe distance from her home, they beat her and dragged her towards a nearby stream where they raped her in turns. She became unconscious until at about 2 A.M when she regained consciousness. she went home and was assisted to go to hospital by her mother and some neighbours.

In his defence the appellant contended that he visited the complainant who was his lover at her home. When the two were going to buy some sugar, they met with Wilson Muchai who attacked the complainant. He intervened and the complainant left in a huff. He denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

Section 10 of the Sexual Offences Act 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.

The ingredients of gang rape are provided for under section 3 (1) of the Sexual Offences Act as follows:

- (a) When one intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) Without the consent to the penetration by that other person; or
- (c) Where the consent is obtained by force or by means of threats or intimidation of any kind.

Gang rape is rape where more than one person is involved in raping another person in association or in company of another or other persons. In the instant case I will endeavour to establish if these ingredients were satisfied or not.

F K (PW1) testified that the appellant went to her home in company of Wilson Mutwiri and they looked very excited. The two offered to buy some sugar for her mother and asked her (PW1) to accompany them to a nearby kiosk to buy the sugar. She agreed to go with them . When they were about 60 meters from the house, Mutwiri gave her a head butt. She started to scream. The duo used a scarf to block her mouth and carried her towards a nearby stream. This is where they raped her in turns.

The complainant's mother M N (PW2) in her evidence confirmed that the appellant and Mutwiri went to her home and after a short stay asked the complainant to accompany them to buy some sugar. The complainant returned at about 2 A.M while bleeding.

After a careful evaluation of the evidence on record, I find that the learned trial magistrate had basis for rejecting the defence of the appellant which was not convincing at all in view of the overwhelming evidence adduced by the prosecution. The learned trial magistrate did not at any stage shift the burden of proof to the appellant.

The medical evidence adduced by Dr.Koome Guantai (PW3) did not only corroborate the complainant's claim of rape but also confirmed the violence she said was meted on her by the appellant and his accomplice.

I therefore find that the conviction of the appellant was based on overwhelming evidence. His appeal is therefore dismissed.

DATED at Meru this 19th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE