REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 67 OF 2011

(CONSOLIDATED WITH APPEAL NO. 68 OF 2011)

KIOKO MUTISYA.....…… 1ST APPELLANT

MWANZIA MUSEMBI..... 2ND APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. S.K. Mutai Resident Magistrate delivered on 16/3/2011 in Mutomo Resident Magistrate Criminal Case No. 4 of 2010)

****

(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The 1st Appellant, **Kioko Mutisya and the 2nd Appellant Mwanzia Musembi**, were charged with the offence of gang rape contrary to section 10 of the sexual offences Act No. 3 of 2006.

   The particulars of the charge were that "on the 29th December 2010 at about 5.30 p.m at **[particulars withheld] Kitui** County gang raped **M K**".

2. In the alternative, the two Appellants were charged with the offence of indecent act with an adult contrary to section 11A of the sexual offences Act No. 3 of 2006.

   The particulars of the charge were that "on the 29th December 2010 at about 5.30 p.m at **[particulars withheld] Kitui** County jointly committed an act of indecency with **M K** an adult aged 20 years by touching her private parts namely vagina and breast".

3. When the Appellants were arraigned before the trial court, they pleaded not guilty. The case proceeded to a full trial.
4. The case for the prosecution was that on the material day at about 5.00 p.m, the Complainant, Pw1 **M K** a twenty (20) year old female adult had just arrived home from the fields where she had been grazing livestock. The Appellants then proceeded to where the complainant was. The 1st Appellant then chased her, held her and then fell her down. The 2nd Appellant then held the complainant's legs and the 1st Appellant proceeded to rape her. The 2nd Appellant then had his turn and also

raped the complainant. The Appellants then left.

5. The Complainant reported the matter to her mother, Pw4 **N K**. The mother informed the village elders of the matter. Three elders accompanied the Complainant to the scene. The elders who included Pw3 **Mwikya Kamau** noted some disturbances at the scene.
6. A report was made to the police. The complainant was referred to hospital for examination and treatment. The Appellants were arrested and subsequently charged with the offences herein.
7. In his defence, the first Appellant, **Kioko Mutisya** gave sworn evidence. No witness was called. The 1st Appellant denied the offence and termed the same as a frame up due to a grudge with the Complainant's mother over some money. He stated that at the material time he was at Ikutha Market.
8. The 2nd Appellant, **Mwanzia Musembi** gave sworn evidence. No witnesses were called. The 2nd Appellant stated that on the material day he had gone to Mutitu area for the new year celebrations. He denied having committed the offence.
9. The trial magistrate found the prosecution case proved beyond any reasonable doubts. The Appellants were convicted and sentenced to fifteen (15) years imprisonment each.
10. The Appellants were aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:

a. ***That the charge sheet was defective.***
b. ***That the plea was taken in a language that the Appellants did not understand.***
c. ***That the Appellants fundamental rights were violated due to over stay in police custody.***
d. ***That the prosecution case was not proved beyond reasonable doubts.***
e. ***That the prosecution case was riddled with contradictions and lacked corroboration.***
f. ***That the medical evidence was unrealiable.***
g. ***That no exhibits like torn pants or soiled clothes were produced as evidence.***
h. ***That the arresting officer did not testify.***
i. ***That the case was investigated by unqualified police officer.***
j. ***That the burden of proof was shifted to the defence.***
k. ***That the defence case was not given adequate consideration.***
l. ***That the sentence meted out was manifestingly excessiv***e.

11. During the hearing of the appeal, the appeals filed by each of the Appellants were consolidated and heard as one. The Appellants relied on their written submissions which I have duly considered.
12. The appeal was opposed by the State. The learned counsel for the State submitted on the sufficiency of the prosecution evidence.
13. This being the first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.
14. The Complainant's evidence is that she was chased, held and felled down by the Appellants who proceeded to hold her and have sex with her in turns. The Complainant thereafter reported the matter to the elders who made a report to the police. The Complainant also went to the hospital. These events as narrated by the complainant do not reflect consensual sex. The Complainant's evidence is that she was forced to have sex. It is noted that the offence took place in broad daylight. This is a case of recognition as the complainant knew the Appellants. There is therefore no possibility of mistaken identity.
15. The Complainant's mother (pw4) gave evidence that shows consistency between the Complainant's evidence in court and what she informed the mother soon after the incident. The Complainant's mother testified that the Complainant was crying when she made the report to her. This evidence shows that the Complainant was distressed. The mother denied any suggestions by the Appellants that they were framed up with the case.
16. The village elder (pw4) testified that the Complainant lead them to the scene. He observed that the scene was disturbed and noted some signs of struggle. This adds further credence to the Complainant's case.
17. The Clinical Officer, Pw2 **Nicasious Ngereki** gave evidence that he noted no tears on the complainant's genetalia but noted a foul smell and presence of an infection. The Clinical Officer

concluded that rape had occurred as there was presence of seminal fluid. The Appellants have submitted that these findings are not unusual for an adult female and that the same failed to link them to the perpetration of the offence. I agree with their submissions but also note that the medical evidence proves that the Complainant engaged in sexual intercourse at the material time. As stated by the **Court of Appeal in Kassim Ali –vs- Republic CR.A No. 84 of 2005 (Mbs)**

> ***"….(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence".***

18. The evidence of Pw5, **PC Dickson Kikenyi** confirms that a report was made at Mutomo Police Station and investigations carried out and the Appellants arrested. Although the arresting officer was not called to testify, this was not fatal to the prosecution case. As stated by the court of appeal in **Julius Kalewa – vs- Republic CA 31 of 2005:**

> ***"The second ground of appeal relates to the failure by the prosecution to call the arresting officer to testify. It is evident, indeed conceded, that the person who arrested the Appellant was not called to testify. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".***

19. There is no requirement of the law that the investigating office be an officer of the rank not below that of an assistant inspector. **Section 85 (2)** of the **CPC** which the Appellants referred to refers to prosecutors and not investigating officers. ***Section 5 (2) CPC*** was amended by **Legal Notice No. 7 of 2007** which removed the provision relating to an assistant inspector.
20. Both the 1st and 2nd Appellant raised the defence of *alibi* and stated that they were away in Ikutha and Mutitu respectively at the material time. The defence of *alibi* was however dislodged by the strong prosecution evidence. Although the 1st Appellant stated in his defence that this case was a frame up by the complainant's mother, there are no reasons that emerge from the record why the complainant would frame up the Appellants. The village elder (pw3) who testified that he saw some signs of disturbance at the scene had no reasons to give false evidence. The medical evidence reflects that sexual intercourse took place.
21. One of the grounds of appeal is that the charge sheet was defective. Section 10 of the Sexual offences Act defines the offence of gang rape contrary to section 10 as follows:

> ***"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".***

22. ***Section 3 (1)*** of the ***Sexual offences Act*** defines rape as follows: ***"he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; the other person does not consent to the penetration or the consent is obtained by force or by means of threats or intimidation of any kind.***
23. The prosecution evidence as analysed above reflects that there was lack of consent by the Complainant. The sexual act was committed intentionally and unlawfully as there was use of force against the complainant who was chased, held, felled down and legs held. There was no consent. It therefore matters not whether the complainant's clothes were not torn or soiled in the process.
24. On whether the plea was taken in a language not understood by the Appellants, it is noted that the plea was taken on 10/1/2011. There was a court clerk by the name **Wambua** on record. The language used by the court is reflected as English/kikamba. There is therefore no merit on this ground of appeal.
25. As stated by the court of appeal in **Said Hassan Nuno v Republic (2010) eKLR**:-

> **"We take judicial notice that one of the core duties of a court clerk is to offer**

interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case."

26. On the question of overstay in police custody and the alleged violation of the Appellant's fundamental rights, that topic is now moot. The Appellant's remedy lies in a civil action (*See* for example **Julius Kamau Mbugua –vs- Republic - Criminal Appeal Nrb. 50 of 2008)**.
27. I now turn to whether the sentence is harsh and excessive. I observe that the trial magistrate purported to convict the Appellants in both the main count and the alternative. The trial magistrate having convicted the Appellants in the main count should not have gone on the convict in the alternative count but should have left it out altogether. The sentence for the offence of gang rape is imprisonment for a term of not less than fifteen (15) years but which may be enhanced to imprisonment for life. The sentence meted out is therefore within the law.
28. The names of the Appellants are as reflected in the charge sheet. The 2nd Appellant complained that his committal warrant reflected the wrong name. He stated that the committal warrant reflected his name as **Mwanzia Musembi** instead of **Mwanzia Mutisya**. I direct the Deputy Registrar to issue a fresh committal warrant reflecting the correct name of the 2nd Appellant.
29. With the foregoing, I find no merit in the appeal and dismiss the same.

B. THURANIRA JADEN

JUDGE

Dated and **delivered** at **Kitui** this **23rd** day of **April 20**15.

B. THURANIRA JADEN

JUDGE