



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 84 OF 2014

DOMINIC OCHIENG ODOYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 83 OF 2014

MARICUS AJIANDO JALANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction:

1. The afternoon of the 10th October, 2013 did not turn out to be a normal one for one **N. A. O. (the complainant herein)** as she had began her day so well and went about her daily chores normally.
2. As she was on her way back to her home in Nyamunda village from Masara Trading Centre where she carried on the business of selling *omena* (a certain type of small fish), she met two young men. Although the complainant did not know them by their names, they were so familiar to her as she used to see them as she went about her daily duties. This was at a place known as Pop Bomba.
3. The said young men accompanied the Complainant and they generally chatted as they walked in the direction towards the complainant's home. As they reached at a deserted place, the two young men pounced on the complainant and forceful had sexual intercourse with her in turns. On raising alarm, the complainant was rescued by the neighbours who managed to get in touch with the complainant's people.
4. That led to the arrest and subsequent arraignment before the then Senior Principal Magistrate's Court at Migori of one **DOMINIC OCHIENG ODOYO** (the first Appellant herein who was the second Accused person) and **MARICUS AJIANDO JALANGO** (the second Appellant who was the first Accused person) facing the charge of Gang Rape with an alternative charge. The record reveals that they were charged on separate charge sheets but in the same file.

5. The said similar charges were framed as follows:-

“GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

.....: On the 10th day of October, 2013 within Migori County in the Republic of Kenya, with a common intention and in association with another before court caused his penis to penetrate the vagina of N. A. O. without her consent.

The Alternative Charge was as follows:

COMMITTING AN INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11 (A) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.

.....: On the 10th day of October, 2013 within Migori County in the Republic of Kenya, intentionally and unlawfully caused a contact with your penis to the vagina of N. A. O. against her will.

6. The Appellant denied the charges and on a full hearing of the case, they were both found guilty and accordingly convicted. Each of them was eventually sentenced to a term of 15 years imprisonment.

The Appeal:

7. Being aggrieved by the said conviction and sentence, the Appellants herein preferred their separate appeals which were eventually consolidated with Appeal number 84 of 2014 being the lead appeal.

8. From the Petitions of Appeal, the grounds appear to be more or less similar as they both dealt with mainly the issues that the Appellants were not given adequate time to prepare for their cases, that the offence of gang rape was not proved and that their conviction remains *null and void* in law. They both prayed that the appeals be allowed and they be set at liberty.

9. At the hearing of the appeals, the Appellants appeared in persons and wholly relied on their respective written and filed submissions whereas the Learned State Counsel Ms. Owenga tendered oral submissions in opposition to the appeals.

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 gang 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 offence of gang rape is provided for under **Section 10** of the Sexual Offences Act (hereinafter referred to as '**the Act**'). The said section states as follows:-

“10. 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. This Court will first deal with the ingredients of the offence of gang rape and unless the said offence is not established, there will be no need to venture into the arena of the alternative charge.

14. The key ingredients of the offence of Gang Rape include the following:

a. Proof of rape or defilement;

b. Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

Was the offence of rape committed?

15. Section 3 of the Act defines ‘rape’ as follows:

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

(a) he or she intentionally and unlawfully commits an act which cause 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.”

16. Section 2 of the Sexual Offences Act defines penetration as:

‘the partial or complete insertion of the genital organs of a person into the genital organ of another person.’

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** 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. 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....’ (emphasis mine).

17. 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.

18. In demonstrating this particular ingredient of the offence, the complainant had the following to say:-

“...I was walking from Masara to home when I got to a place called Pup Bomba I met the accused. I used to see the accused around but didn’t know their names.....the 1st accused held my leg/foot that I fell down and the 2nd accused climbed on top of me started to do (maovu) injustice to me. Ajiando the 1st Accused removed my inner clothes. I had a biker. I didn’t have a panty. Ochieng climbed and slept with me. He had sex with me once 2nd accused started then when he was through Ajiando also came on top of me after the 2nd accused had had sex with me. I screamed after both had had sex with me. At that time they wanted to do again the second

time I screamed and a lady....heard me.....she came and asked what a bad manners we were doing on the road. Ochieng 2nd accused told her don't report me. They then ran away...my brother-in-law came and took me to a hospital called Arombe Dispensary. At the hospital I was treated and given medication. I was given a letter to go to police station.”

19. PW2 who is the one who answered the call of help by the complainant had the following to say:

“...I heard a woman scream...I ran to the place...I saw Ochieng. I at about 50 metres away and Achiando (Ajiando) having sex with the complainant. I moved near to around two metres away. The 1st accused Achiando (Ajiando) had removed his trousers. The trouser was down. The girls cloth was torn.....I called the 1st accused and told him that's bad. He said no one will stop me because this girl had taken a lot of my money.....”

20. On being cross-examined PW2 clearly stated that he saw the first Accused (second appellant) nude naked having sex with the complainant and raised alarm that made her neighbour one Ang'wen to come to the scene. The second appellant then ran away. She also witnessed the first appellant standing there canning the complainant and as the second appellant had sex with her.

21. The Clinical Officer (PW 6) confirmed that on examination he found the presence of pus cells in the urine a day after the sexual assault and that the complainant had first been seen at a dispensary on the day of the attack.

22. On consideration of the evidence on this issue in totality, I find that indeed there was penetration of the complainant's vagina by a male organ.

23. On the age of the complainant, I wish to observe that under **Section 10** of the Act it seems that the age of the victim is immaterial since the offence of gang rape is proved on *inter alia* the commission of either rape or defilement.

24. However the record is very clear on this aspect. All the medical documents produced indicated the complainant's age as 18 years old. Indeed in the P3 Form the age was assessed on examination. I therefore find that the complainant was aged 18 years old at the commission of the offence on her.

25. On the aspect of the **consent**, **Sections 42, 43, 44** and **45** of the Act deals with that aspect 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.

26. From the above statutory description of the consent and going by the testimony of the complainant coupled with that of the other witnesses, it can be clearly seen that the complainant never consented to the sexual activity with the assailants. The issues of the complainant raising alarm, her torn clothes, being forcefully pulled down are some indicators that indeed the assailants used force on her as opposed to a consensual act. I therefore find that the complainant did not consent to the sexual act and that it was so done as against her will.

27. This Court therefore comes to the finding that the offence of rape was committed on the complainant.

28. Since the offence the Appellants are facing is gang rape, we will consider the other limb on whether they were indeed the joint assailants and if so if they had a common intention in the commission of the offence.

29. The offence was committed during the day as the complainant was on her way home from the

market. She testified that she usually used the route to the market where she carried out some business and used to see the Appellants each day at a place called Pup Bomba. She however did not know them by their names. She clearly described how the Appellants chatted with her on the way before pouncing on her. She therefore had an opportunity of seeing them at a very close range.

30. The complainant went ahead to describe how each one of the Appellants raped her in turns until when she raised alarm.

31. Her evidence was properly and squarely corroborated by PW2, a woman who hailed from the same village with the Appellants and knew and even called the Appellants by their names. She witnessed the sexual act between the second Appellant and the complainant at a short distance of about two metres and even talked to the Appellants. By that time the first Appellant was busy canning the complainant on the ground as the ordeal went on. PW2 scolded the two and even raised alarm which made one Ang'wen come to the scene before the Appellants ran away.

32. Without belabouring the issue, I firmly find that the Appellants were properly identified by the complainant and recognized by PW2 as the assailants. The respective identification and recognition was free from any error whatsoever.

33. From the way the events unfolded and as captured on the record, which proceedings were not challenged as not reflecting what the witnesses said before the trial Court, it remains a fact that the Appellants had sexual intercourse with the complainant in turns. If anything PW2 witnessed the sexual act between the complainant and the second Appellant as the first Appellant was beating the complainant.

34. By any measure, it can be safely held, as I do hereby hold, that the Appellants had a common intention and indeed went ahead and jointly raped the complainant.

35. The Appellants also raised the issue of the sentence that it was excessive. The penalty for gang rape is prescribed under **Section 10** of the Act. It provides for a minimum of fifteen years which can be enhanced to life imprisonment. The trial Court prior to sentencing called for a Probation Officer's reports for both Appellants and took their mitigations into account and ended up giving the minimum sentence in law. That ground therefore fails.

36. On the ground that the Appellants were not given ample time to understand the charges, this Court has gone through the record and fails to see how their rights were trampled upon. There was appropriate interpretation in *Dholuo* language whenever the matter came up in Court. The Appellants were supplied with all the witness statements and remained on bond throughout the trial. They equally and actively participated in the proceedings by examining all the witnesses and voluntarily closed their cases. None of them raised any complaint before the trial Court on how the trial was being conducted. I can presume that ground to be an afterthought and is hereby rejected.

37. I have equally gone through the judgment of the trial Court where the Court dealt with all the issues relevant to the charges before it and appropriately considered the Appellants' defences which it rightly disregarded.

38. The upshot is that the evidence reveals the commission of the offence of gang rape by the Appellants herein and none of the grounds of appeal appear to persuade me otherwise. I therefore affirm the decision of the Learned Magistrate and the appeal is hereby dismissed.

DATED, SIGNED and DELIVERED at MIGORI this 21st day of OCTOBER, 2015

A. C. MRIMA

JUDGE