REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 110 OF 2012

Jeremiah Mwangi Ngatia…..……...…….Appellant

Versus

Republic……..…….……Respondent

(Appeal against Judgement, sentence and conviction in Criminal case number 2 of 2012, Republic vs Jeremiah Mwangi Ngatia at Karatina, delivered L. Mutai, SPM, on 29.6.2012).

JUDGEMENT

This is an appeal against both conviction and sentence passed against the appellant by the Senior Principal Magistrate in criminal case number **2 of 2012, Republic vs Jeremiah Mwangi Ngatia, at Karatina**, delivered on 29.6.2012 where the appellant was convicted of the offence of gang rape contrary to Section **10** of the Sexual Offences Act.[1] The particulars of the offence were that on the 25th day of February 2012 at [particulars withheld] Village in Mathira West District within Nyeri County, in association with another not before court intentionally and unlawfully caused his penis to penetrate the anus of **J G M** a male person with mental disability.

This being a first appeal, this court will scrutinize, re-evaluate and analyse the evidence submitted in the lower and arrive at its own conclusions making allowance for the fact that it did not have the benefit of seeing the witnesses testify[2] in line with the decision in the case of **Okeno v. R**[3]whereby it was held that *"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination*[4] *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*[5]

PW1, J G M testified that he was walking together with the appellant in a tea farm, that the appellant was joined by another person and they asked him to remove his trousers and sexually assaulted him through the anus and that the two did that at different times. He went home and reported to his mother, he was taken to the police and the hospital and was issued with a P3 form. He also recorded his statement with the police.

PW2 V W testified *inter alia* the complainant is her son aged 20 years, that on 25.2.2012 at around 9.00pm the complainant came home and was experiencing pain in a sitting position and she asked him what the problem was and he replied that Mwangi and Geoffrey had asked him to remove his trouser and sodomised him, that the complainant told him the said Mwangi was Ngatia's son. The alleged assailants are his neighbours and he knows them. She alerted W, her son and the two went for Mwangi and Godfrey but the two denied the allegation. On 26.2.2012 she went to the police together with the complainant, they

were issued with a P3 form and a note to go to the hospital.

PW3 No. 65377 Cpl Silvester Wambua from Kiamariga Police Station confirmed that on 27.2.12 at around 11.30am while at the station the complainant escorted by her mother reported that he was sodomized, that the complainant appeared to have mental challenges, that the alleged assailants were known to the complainant.He recorded the incident in the O.B and issued them with a P3 form and recorded their statements and arrested the appellant. The second suspect remained at large

PW4 Lenard Ngari a clinical officer at Karatina District Hospital examined the complainant on 27.2.12. On examination, he was mentally retarded, aged 20 years, he noted a crack around anal opening, and concluded that he had been sodomized. No swap was done due to time lapse.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established, complied with Section 211 of the Criminal Procedure Code[6] and put the accused on his defence. The accused elected to give sworn defence and in a brief statement he denied committing the offence. On cross-examination he confirmed he knows the complainant and that the complainant also knows him and that they come from the same village. He also confirmed that he knows the other suspect in this case.

The learned magistrate analysed the prosecution and defence evidence and concluded that the appellant was guilty as charged and convicted him and sentenced him to 15 years imprisonment.

Aggrieved by the above verdict, the appellant appealed to this court citing **4** grounds which in my view can be reduced into two, namely **(a)** whether the evidence tendered sufficiently provedthe offence beyond reasonable doubt and **(b)** whether the defence tendered was considered.

Counsel for the appellant**Mr.Muchiri** wa **Gathoni** argued that there was no positive identification, that the evidence tendered had glaring inconsistencies, that there was no sufficient evidence to prove the charge, that the person named by the complainant was not produced.

The learned State Counsel **Miss Kitoto** urged the court to uphold the conviction and sentence and submitted that there was overwhelming evidence to support both the conviction and sentence, that there was proper identification by recognition, that the appellants *alibi*was considered and found to be wanting, that the medical evidence collaborated **PW1's** evidence and urged the court to dismiss the appeal.

I have carefully considered the submissions by both counsels. I have also reviewed the evidence on record and the relevant law. Section **10** of the Sexual Offences Act[7] provides that:-

> *Any person who commits the offence of rape orDefilement under this Act in association with another or others, or any other 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,*

My understanding of this section is that in an offence of gang rape, there must be more than one assailant who acts in association with a common intention even though not all of them carry out the actual rape or defilement. In the present case the complainant testified *"that the appellant was joined by another person and they asked him to remove his trousers and sexually assaulted him through the anus and that the two did that in turns."*The act defines gang as follows:- *'gang' means two or more persons"*

Section 2 of the act defines *"genital organs" to include the whole or part of male or female genital organs and for purposes of this act includes the anus."*

The complainant gave an account of what transpired on the material day. On the contrary, the defence offered is brief, a mere denial and that the same does not in my view rebut the complainants evidence. The complainant testified that he knew the appellant and the other person. Indeed, the appellant in cross-

examination confirmed that he knew the complainant and that the complainant knows him and that they come from the same village. To me this shows that identification was positive and free from error.

A person is said to commit rape under any of the following circumstances, namely, against the will of the victim, without the victims consent, or with consent if the consent was obtained through threats or coercion, or if the person giving the consent is of unsound mind or intoxicated or is not able to understand the nature of the act or if the person is a minor. Penetration is sufficient to constitute the offence of rape.

The *actus reus* of rape is having unlawful sexual intercourse with a woman or a man who at the time of the intercourse does not consent to it. While the *mens rea* is an intention to have sexual intercourse with another person knowing that he or she does not consent to the act. Consent is important to sexual matters because it can transform coitus from being among the most heinous of criminal offences into sex that is of no concern at all to criminal law. Consent is a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest and verbal agreement. Consent cannot be coerced; never implied and cannot be assumed, even in the context of a relationship. The law clearly states certain circumstances in which consent cannot be said to have been obtained and these include when a person is physically or mentally disabled. The complainant is said to be somehow mentally retarded. He cannot be said to have consented to the act nor can it be said he appreciated the nature of the act. In the case of **Republic vs Oyier**,[8] the court of appeal held that:-

> *"the lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not."*

Section **43 (1)** of the Sexual Offences Act provides as follows:-

1. *Any act is intentional and unlawful if it is committed-*

a. *in any coercive circumstances;*
b. *under false pretence or by fraudulent means;*
c. *in respect of a person who is incapable of appreciating the nature of an act which causes the offence*

Section **43 (4)** provides as here below:-

> *The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act-*

a. asleep;
b. unconscious;
c. in an altered state of consciousness;
d. under the influence of medicine, drug, alcohol, or other substance to the extent that the person's consciousness or judgement is adversely affected;
e. mentally impaired; or
f. a child

The victim in this case is a man aged 20 years at the time of the offence and who was mentally retarded hence incapable of appreciating the nature of the act in question. He could not comprehend or understand what the appellant was up to nor could he give consent. Thus the act in question is both *intentional* and *unlawful* within the meaning of section **43(1)** referred to above.

It is extremely important that we bear in mind the category of persons defined in Section **2** of the act as **'vulnerable person'** which *means a child, a person with mental disabilities or an elderly person and 'vulnerable witness'* shall be construed accordingly. I find no difficulty in concluding that the complainant in this case was a vulnerable person.

The medical evidence also confirmed cracks on the anal opening, colloborating the complaints evidence while the complainants' mother confirming noting the complainants had difficulties while sitting and upon asking him, he stated that he had been defiled by the appellant and another person.

The appellants counsel insisted that failure by the prosecution to avail the other person left a dent in the prosecution case. I do not agree because the said person was an accomplice and not a witness. Had he been arrested, he could have been in the dock and his absence does not in any manner injure or prejudice the prosecution case. In my view this did not weaken the available evidence and no adverse inference can be drawn from the said omission.

Also to my mind even the evidence of a single witness is adequate to prove an offence of this nature. The proviso to Section 124 of the Evidence Act provides that:-

> *"provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

I find that there was sufficient evidence to sustain the conviction and that the offence was proved to the required standard. On the sentence, Section **10** of the Sexual Offences Act[9] provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than fifteen years but which may be enhanced to imprisonment for life. The learned magistrate sentenced the appellant to the lowest sentence prescribed by the law. To me the offence is serious and the sentence passed is not only the lowest provided by the law but is in my view lenient considering the gravity of the offence and the pain and stigma the complainant was subjected to.

Considering the evidence, the nature of the offence and all the circumstances, I hold the view that the sentence imposed was within the law and I hereby uphold the conviction and sentence and dismiss the appeal.

Dated at Nyeri this **27th** day of **November** 2015

John M. Mativo

Judge