



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO.53 OF 2012**

**R M .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**[Appeal from Original Conviction and Sentence from MASENO P.M'S Court: J. M. NANGEA – SPM**

**in Criminal Case No.1018 of 2010.]**

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**J U D G M E N T**

**1. The appellant was charged with the following offence:**

**COUNT1: GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO.3 OF 2007:** On the 26th day of August 2010 at [Particulars withheld] area within the county of Vihiga, in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of C T without her consent.

**COUNT 2: ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE.:** On the day of 26th August, 2010 at [Particulars withheld] area within the county of Vihiga unlawfully assaulted C T thereby occasioning her actual bodily harm.

**ALTERNATIVE CHARGE TO COUNT 1: COMMITTING AN INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11(A) OF THE SEXUAL OFFENCES ACT NO.3 OF 2006:** On the 26th day of August 2010 at [Particulars withheld] area within the County of Vihiga intentionally touched the vagina of C T with his penis against her will.

**2. The appellant was convicted and sentenced to 18 years imprisonment hence this appeal. The facts leading to the conviction are that PW1, the complainant had come home from Mombasa. On the material day she decided to go and visit her ailing sister. She took a motorcycle boda boda. On the way the motor cycle rider pushed her down and took off. Immediately she was bounced on by 5 male youths who forcefully carried her to a nearby bush and raped her in turns. She was then left naked and she sought assistance from a nearby home.**

**3. In the process of seeking the above assistance she encountered one of the attackers who then rape her again. She further sought assistance from another homestead where she was provided with some clothing. Thereafter she went to Lwanda police station and later Epali health centre where she received treatment.**

4. The police then began their investigation and then apprehended the appellant in one of the houses where the complainant had sought help. The complainant identified the appellant by his long dreadlocks hair. He was then arrested and charged.

5. **PW2 HAJIRA WABWIRE** produced the P3 form which showed that the complainant had her cheeks and upper lip swollen, bruises on the right knee joint and left ankle joint. There were also bruises on the sides of the vagina which also had whitish foul smelling discharge. She concluded that the complainant had been sexually assaulted.

6. **PW3 P.C. DANIEL ODONGO testified on behalf of PC MATILDA WANJIRU who was the investigating officer.** After receiving the complaint the police carried out their investigation which led to the arrest of the appellant. The appellant was identified by the complainant.

7. When put on his defence the appellant gave sworn evidence. He narrated the events of 27.8.2010 when he was arrested while in his house by the police at 10 a.m. for an offence that he did not know. On cross-examination he said that he would not recall the events of 26.7.2010.

8. This court has perused the petition of appeal by the appellant which basically argues that there were inconsistencies in the evidence by the prosecution witnesses especially PW1. He further argues that no medical tests were carried out to determine whether he was part of the persons that raped the complainant.

9. The state opposed the appeal arguing that the evidence on record was sufficient to have had the appellant convicted. The learned state counsel further said that there was no requirement that medical examination be carried out against the assailant in sexual offences.

10. The court is enjoined to re-evaluate the evidence afresh with a view of arriving at fresh and independent findings. See **OKENO VRS REPUBLIC [1973] E.A. 32.**

11. The sum total of the appellant's appeal was on whether the complainant managed to recognise him. According to the complainant the ordeal took place at around 7 p.m. It seems throughout the night she was in distress till the following morning.

12. Was she able to identify the assailants and in particular the appellant? I think so. First the witness said that in the process of being raped one of the attackers had dreadlocks and he attempted to stab her with a knife., she went on to say:

**“The “Rasta” man wore short sleeved jungle – like clothes. I didn't know him before.”**

Then she went on to say:

**“I went to a homestead for help. I found two youths in the homestead. As we spoke I saw the dreadlocked man coming to the homestead., he pretended to inquire about what was happening. I told the two youths he was one of my attackers. The attacker then hit me with his head on the face while ordering me to leave the homestead.”**

13. The following day she led the police to the same homestead where the appellant was arrested.

14. Clearly, it is beyond doubt that the appellant was clearly identified as correctly found by the trial court. The time taken by the ordeal including the period of seeking help was sufficient enough for the appellant to have been recognised by the complainant. Even on cross-examination the complainant said that there were torches used by the rapist as well as light from the lamp which assisted her recognise the appellant.

15. In the premises I do not think that this appeal is meritorious. The evidence of PW2, the clinical officer was watertight. The complainant went to the hospital hardly 12 hours after the ordeal. Its clear that she was forcefully sexually assaulted. The appellant and his cohorts clearly knew what they were doing.

Unfortunately the complainant was also HIV positive though not as a result of the rape. There is no specific requirement that the appellant ought to have been examined. This is the law as it relates to sexual offences. There was forceful penetration which is an ingredient in sexual offences too. The sentence passed against the appellant was lawful.

16. The appeal is therefore dismissed.

**Dated, signed and delivered this 16th day of December, 2015.**

**H. K. CHEMITEI**

**J U D G E**