

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 230 OF 2011

GIDEON JOHNSON LIBOYWA..... APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal from the original Criminal Case No.1303 of 2007 in the Senior Resident Magistrate's Court Vihiga [L.O. ONYINA, SRM] decision delivered on 19.10.2011)

J U D G M E N T

The appellant was charged with one count of robbery with violence contrary to **section 296(2)** of the **Penal Code** and a count of gang rape contrary to **section 10** of the Sexual Offences Act No. 3 of 2006. He was acquitted of the count of robbery with violence but convicted on the count of gang rape. The particulars of the offence for which he was convicted were that the appellant *on the night of 31.8.2007 and 1.9.2007 in Vihiga district within Western Province jointly with others not before court unlawfully and intentionally gang raped a girl child namely J O aged 15 years. The appellant was sentenced to serve 20 years imprisonment.*

The grounds of appeal are that the circumstances prevailing at the time of the offence were not conducive for positive identification, the first report did not give the description of the appellant, he was not subjected to medical examination, the case was not proved beyond reasonable doubt, the defence was not properly considered and the sentence is harsh. The appellant filed written submissions and contends that the complainant PW5 testified that she was able to identify the appellant as the cap he was putting on fell on the ground. The cap was not produced in court. The complainant was checked by a doctor and it was found that she was on her monthly period and therefore the complainant was not raped but was on her monthly period. The complainant did not give the names of the rapist to the doctor. The investigating officer did not properly investigate the case and only testified that he was told by the complainant that the thugs had raped her. He was arrested in his house.

Mr. Oroni, State Counsel, opposed the appeal and relied on the record. Counsel supports the conviction.

The record of the trial court shows that nine witnesses testified. Most of the evidence relates to the count of robbery with violence. The appellant was charged with five other people who were all acquitted of the two counts. **PW1 O J N** was the complainant in the robbery with violence count. His evidence was that on the 31.8.2007 at about midnight he was sleeping in his house when they were attacked by robbers and robbed of several items including KShs.70,000/=. He was also injured during the attack. PW2 is the wife of PW1 and her evidence is similar to that of PW1. She further testified that the robbers took PW5 and raped her. PW2 did not identify any of the robbers but PW1 identified the appellant who is his neighbor. **PW3 M A I** testified that she was in her house when she heard her mother in-law (PW2) screaming. She heard the robbers shouting and telling PW2 to keep quiet. The thugs left and PW5 informed her that she had been raped.

PW4 H O O is a grandchild of PW1 and a brother to PW5. He was sleeping in the same house when the robbers invaded them. He went to the bedroom of PW1 who resisted the robbers but was assaulted. The robbers took PW5 to the bathroom and raped her. He was not able to identify any of the robbers as they were flashing torches on his face. **PW5 J O** testified that she was a student at [particulars withheld] Girls High School. On the 31.8.2007 at about midnight she was sleeping in her grandparents'

house when the robbers invaded the house. She was in a separate room and went out to check. She saw about ten people who had torches and she could not initially identify them. Some of the robbers were wearing black jackets, boots and marvins. They also had pangas and rungs. One of the robbers pulled her and she struggled with him. She concentrated on his face and the torch light was flashing on him as he pulled her. As they were struggling the cap fell down and she recognized the person as the appellant. She knew the appellant since he had inherited a woman from the neighbourhood whose husband had died. The appellant pulled her to the bathroom and others followed him. The appellant tore her underpants and a biker and placed her against the wall. He then turned off the torch. She was raped by the robbers for about one hour. She could not identify the other rapists as she had been overpowered. She was later taken to hospital for treatment. It is her evidence that she knew the appellant very well and she was raped by four people.

PW6 D O testified that he was notified about the robbery incident by PW7. He called the police at Luanda police station as well as Luanda AP camp. They went to the scene and the victims mentioned the name of the appellant. They went to the appellant's house that night and they arrested him. The appellant was taken to Luanda police station. **PW7 P O A** is a neighbor to PW1. He heard the screams from his neighbor and went out. His evidence is that by that time the robbers were coming out and they took cover in the bush. He identified some of the robbers but not the appellant.

PW8 CI ALBERT TAWAWA was based at the Vihiga Division as the Deputy DCIO. On the 1.9.2007 at about 2.00 a.m. he received information about the robbery incident. Together with other officers they went to the scene and interrogated the victims. PW5 informed him that she had been gang raped. He took PW5 to Maseno Hospital where she was treated. PW5 informed him that she knew one of the rapists as his cap fell off as they were struggling. The appellant was later charged with the offence. **PW9 JOHN SHIGALI** was a clinical officer at the Vihiga District Hospital. He produced the P3 form for PW5 and he testified that PW5 had cuts in her genitals and when she was checked she was on her monthly period. The complainant was raped and was put on medication.

The appellant was put on his defence and he gave sworn evidence. He testified that on the 31.8.2007 he was in his house sleeping when people went to knock on his door saying that they were police officers. He opened and saw the area sub-chief. He normally sells busaa and the sub-chief ordered that the busaa be taken. He was arrested and taken to Luanda police station and later charged with the offence.

The appellant and his co-accused were acquitted of the main charge of robbery with violence. The trial magistrate held that the appellant gang raped the complainant PW5 in the count of gang rape. The magistrate evaluated the evidence and the exhibits that were produced in relation to the evidence that was adduced in gang rape. The trial court acquitted the appellant's co-accused on the 2nd count for lack of credible evidence. The appellant was convicted on the basis of the evidence of the complainant PW5. My analysis of the evidence on gang rape is that the medical evidence did prove that the complainant was raped. The fact that when she was examined it was found that she had her monthly period cannot be the basis to discount the allegations that she was raped. The medical officer concluded that there was rape. The main issue is whether it is the appellant who was one of the rapists.

It is the evidence of PW5 that she knew the appellant since he inherited a widow in the neighbourhood. It is her evidence that it was the appellant who pulled her and as they struggled the cap the appellant was wearing fell down. The appellant contends that the cap was not produced in court. That cannot be the reason to disbelief the complainant's evidence as it could be possible that the robbers picked the cap. PW5 recognized the appellant and she knew him by name. She told the court that it is the appellant who pulled her to the bathroom and placed her against the wall. PW5 managed to identify the appellant through the torch light. The evidence shows that other than being raped PW5 was not physically beaten and I find that she was in a position to identify her rapists. She further testified that the appellant switched off the torch when he placed her against the wall and she could therefore not identify the other rapists. Given the evidence on record I do find that PW5 positively identified the appellant as one of the rapists. The defence evidence only relates to the manner in which the appellant was arrested. It is true that the appellant was arrested the same night but that cannot disprove that the appellant was at

the scene and raped the complainant before going back to his house. It is the evidence of PW5 that the incident took almost one hour and she had been overpowered. The evidence of PW5 is corroborated by the medical evidence produced by PW9. Further the court can convict a person charged with a sexual offence if it is convinced that the evidence of the complainant is believable. I do find that PW5 was indeed raped and she was able to identify the appellant as one of the rapists. There is no evidence that PW5 had any grudge with the appellant. She was a young girl aged 15 years old at the time the incident occurred and knew the appellant. The circumstances of the incident cannot be held to be that identification was not possible. There was light from torches and it is the evidence of PW5 that the appellant was having a torch and she was able to identify him before he switched off the torch.

The minimum sentence for the offence of gang rape is 15 years imprisonment and it can be extended to life imprisonment. I do find that the prosecution proved its case beyond reasonable doubt. There is no need to disturb the sentence. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 28th of May 2014

SAID J. CHITEMBWE

J U D G E