



**REPUBLIC OF KENYA**

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

**HCCR APPEAL NO. 63 & 66 OF 2013**

1. MEE  
2. PE ::::::::::::::::::::::::::::::::::::::: APPELLANTS

**VERSUS**

**REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

*[Being an appeal from original conviction and sentence of Hon. E. K. MWAITA, PM at Lodwar on the 3rd May, 2012 in Criminal Case No. 99 of 2011]*

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

Appellant one, MEE, was jointly charged with appellant two, P E, with gang rape contrary to section 10 of the Sexual Offences Act, in that on the 30th January, 2011, at 10.30 p.m. in Turkana County, they sexually assaulted E K without her consent.

Appellant two was separately charged with an additional offence of deliberate transmission of H.I.V, contrary to section 26 (1) (a) of the Sexual Offences Act. After a full trial before the learned Principal Magistrate at Lodwar, the appellants were convicted and sentenced to life imprisonment on both counts.

The sentences respecting appellant two were to run concurrently.

Being dissatisfied with the conviction and sentence, the appellants filed separate appeals on the basis of more or less similar grounds contained in their respective petitions of appeal dated 8th May, 2013.

The appeals were considered and heard together. The appellants were at the hearing of the appeals represented by the learned Counsel, Mr Nyamu, while the learned prosecution counsel, M/S Limo, represented the State/Respondent.

In his submissions, the appellants Learned Counsel stated that there were glaring inconsistencies in the evidence of all the prosecution witnesses. That, the offence allegedly occurred on 30th January, 2011, but the investigations officer (PW5) indicated that the offences were committed prior to the said date. That, the report was made to him (PW5) on 2nd January, 2011, whereas the charge sheet refers to 30th January, 2011. That, PW1 stated that she could not recall the date of the offence.

Learned Counsel further submitted that, PW1 stated in cross – examination that she was raped on 13th February, 2010. That, the trial court did not warn itself and proceeded to convict the appellants on the basis of the glaring inconsistencies in the prosecution evidence. That, the proceedings showed that charges was preferred against the appellants yet there was no sufficient evidence.

Learned Counsel observed that the H.I.V status report requested by the prosecution was never tendered in

court yet the second appellant was convicted on the second charge which was not at all proved. That, there was no clear evidence on the issue of identification of both appellants during the offence which occurred in the night, according to PW1, when the second appellant was not even present. That, it was alleged that the second appellant arrived at the scene later while holding a torch used allegedly in identifying the complainant's private parts yet a person cannot direct the torch at himself. That, it was not clear at what point the torch was directed at appellant two for him to be positively identified. That, apart from the appellants presence nothing was said about any other person's presence at the scene. That, the trial magistrate failed to warn himself of the dangers of convicting on circumstances aforementioned.

Learned Counsel, submitted that penetration was crucial and that although PW4 said that the complainant was diagnosed with a venereal disease such as syphilis, it was not indicated whether the second appellant suffered from a similar disease. That, PW1 and PW2 were warned such that medical evidence would show that they engaged in sexual intercourse. That, the judgment of the trial court did not comply with section 169 CPC as no reasons for the decision were given nor were the elements of the offence analyzed.

On sentence, learned counsel submitted that the appellants were first offenders yet the trial court handed them maximum sentences of life imprisonment whereas the minimum sentence was fifteen (15) years. That, the sentence was harsh and excessive calling for interference by this court.

For all the foregoing reasons, learned counsel urged this court to allow the appeal by quashing the convictions and setting aside the sentences.

In opposing the appeal, the learned prosecution counsel submitted that the glaring inconsistencies referred to by the appellants were non-existent and if they existed they were insignificant and could not prejudice the appellants. That under section 26 of the Sexual Offences Act, it was proper for the second appellant to be subjected to a medical test.

On identification, the learned prosecution counsel submitted that the first appellant is a sister of the second appellant. She called on the second appellant who came out with a torch.

Learned prosecution counsel, submitted further that the court must have been given the record of the medical test carried out in respect of the second appellant and that PW4 (doctor) noted evidence of sexual assault among other injuries. That, PW4 confirmed the complainant's evidence that she was strangled by the first appellant and then raped by the second appellant.

Learned prosecution counsel contended that the sentence was lawful although a minimum of fifteen (15) years is provided for. That, the second sentence for the second appellant should have been held in abeyance in view of the first sentence.

Learned prosecution counsel called for the dismissal of the appeal.

This court has considered the rival submissions in the light of the grounds of appeal and the evidence adduced at the trial court which this court was bound to re-visit and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

With regard to the first count of gang-rape facing both appellants, it is apparent to this court that the act was established through evidence led by the complainant, **EK (PW1)**, who confirmed that the act occurred on 30th January, 2011, at 10.00 p.m. while she was at the first appellant's home where she was to spend the night after digging trenches together with the first appellant and others. It was while she was asleep and after the first appellant had gone out of the house when she was awakened by a person holding her thighs and pulling up her dress. The intruder tore her inner shorts after which the first appellant strangled her on the neck and pinned her down on the ground thereby allowing the intruder to have sexual intercourse with her. The first appellant thereafter remained in the house while the intruder left.

The complainant reported the matter to her husband **K L (PW2)**, on the following morning when she returned to her home.

They then reported the incident to the area chief who referred them to Kainuk police station. The complainant's son, **L K (PW3)**, confirmed that her mother had left home in the company of the first appellant and did not return until the following morning.

The clinical officer, Hosea Kiplangat Kiringi (PW4), produced a medical examination report. (P3 form) which was filled and signed by a colleague who had been transferred to Garissa and had examined the complainant after she had given a history of having been raped.

The report indicated that the complainant has been assaulted and raped and coupled with the complainant's evidence, the act of rape was duly proved and because it was executed by one person assisted by another both were criminally culpable, hence the term gang rape. In fact, there was no dispute or substantial dispute that the complainant was indeed raped.

With regard to the identification of the offenders, it was clear from the complainant's evidence that she was deliberately exposed to first appellant who took her to the scene and invited her to sleep over only to leave the house in the middle of the night and return in time to assist the intruder to engage in forceful and unconsented sexual intercourse with the complainant. It could not have been a coincidence that the intruder was alerted into the house when the complainant was sleeping therein alone after her host (first appellant) left. It was also not a coincidence that the first appellant returned to the house when the intruder had commenced his unlawful activity and went ahead to assist him contain the complainant so as to hit his target.

The first appellant was a person very well known to the complainant such that the possibility that she was wrongly identified was remote considering that light from a torch in the possession of the intruder illuminated the place.

It was further not a coincidence that the intruder was no other than the first appellant's brother i.e the second appellant, who was also very well known to the complainant. Clearly, the defence raised by both appellants to the effect that they did not commit the offence was unsustainable and was thus correctly disregarded by the learned trial magistrate who found that it was not meritable in the face of the evidence adduced against them by the prosecution.

Consequently, both appellant's conviction by the learned trial magistrate on count one was safe and proper and is hereby upheld.

However, on count two respecting the second appellant, the evidence by the clinical officer (PW4) revealed that the complainant was infected with the venereal disease syphilis. There was no specific mention of H.I.V thereby implying that the complainant was not suffering from that condition.

Further, in accordance with section 26 (2) of the Sexual Offences Act, the court ordered that the second appellant be subjected to medical test for H.I.V but it was not clear whether this was done as no formal report was tendered in evidence by the prosecution which was therefore unable to establish beyond reasonable doubt that the second appellant deliberately transmitted H.I.V to the complainant.

Contrary to what the learned trial magistrate found, the medical evidence did not show that the complainant was infected with H.I.V.

The second appellant's conviction on the second count was therefore erroneous and is hereby quashed and the sentence in respect thereof set aside.

The sentence on count one respecting both appellant was lawful but rather on a higher side for first offenders. The same is therefore reduced to fifteen (15) years imprisonment.

Otherwise, the appeal on conviction on count one is dismissed for want of merit. The variance in dates and the inconsistencies in the prosecution evidence pointed out by the appellants were insignificant as they did not substantially affect the credibility of the evidence and in particular that of the complainant, neither

did they go to the root of the prosecution case against the appellants.

Ordered accordingly.

**J. R. KARANJA**

**JUDGE**

**22/10/2014**

**[Delivered & signed this 22nd day of October, 2014]**