



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.228 OF 2010

CHARLES MACHARIA MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**[An Appeal from original conviction and sentence in Nyahururu P. M.A.CR.C.NO.2033 of 2009 (K)
by Hon A. B. Mongare, Senior Resident Magistrate dated 13th July, 2010]**

JUDGMENT

The accused person has been aggrieved by both the conviction and the fifteen (15) years imprisonment imposed on him by the learned trial magistrate for the offence of rape. He is contesting the conviction and sentence on the grounds that:

- i) there was no proper identification;
- ii) the learned magistrate introduced her own theories in the judgment;
- iii) the charges were duplex;
- iv) the burden of proof was shifted to him;

v) his constitutional rights under **Section 72(3)** of the former **Constitution** was violated;

vi) the charges were at variance with the evidence and **Section 214** of the **Criminal Procedure Code** was not complied with.

Learned counsel for the respondent opposed the appeal arguing that the appellant was positively identified by the complainant who immediately after the sexual assault gave the name of the appellant to her elder sister, P.W.2 and to the police. That there was electricity light at the trading centre, where the complainant had seen the appellant in a group of other young men.

Being the first appellate court, the evidence on record must be subjected to fresh analysis for this court to arrive at an independent decision, bearing in mind that the witnesses testified not before it but before the trial court.

In brief, the evidence on record may be stated as follows:

The complainant who gave her age as 14 years, in the company of another young girl who did not testify, were sent for paraffin by the former's elder sister (P.W.2) as there was power black-out on the evening in question namely on the 19th August, 2009 at about 9p.m. The two girls found the shop for paraffin already closed. They decided to go to the market to buy candles. They noticed five people, including the appellant seated at the stalls. They followed the girls to the shop where they brought the candles.

As they begun their journey back home, the men began to follow them. They ran as the five pursued them. The complainant recalled that when the men caught up with them, the appellant called her, pushed her to the ground, undressed her while covering her mouth to prevent her from screaming; that the appellant raped her as the other four men held her hands and legs. Her companion, the other young girls meanwhile was throwing stones at them. The police happened to pass by as a result which the men ran away.

The complainant ran towards her home screaming. Her sister, P.W.2 and her husband heard her screams and shortly the complainant arrived and explained that she had been defiled by the appellant. P.W.2 and her husband took the complainant to a nearby health centre, from where they were referred to Ol Kalou District Hospital.

An Administration Police (AP) Constable, **P.W.3 George Mwangi** confirmed hearing screams from a small girl at about 9p.m. with a colleague, Sgt. Njeru, they went to find out what was happening. They met the complainant who explained to them that she had been defiled by the appellant and four men held her.

On 24th August, 2009, some five days after the alleged defilement the complainant reported to APC

George Mwangi (P.W.3) that she had seen the appellant, who was, as a result of the report arrested and taken to Kipipiri Police Station where the charges were preferred. Earlier on 20th August, 2009, the complainant was examined by **P.W.6 Peter Nginyo**, a clinical officer at Ol Kalou District Hospital who observed that although her external genitalia was normal and no spermatozoa noticed, laboratory results of a swab indicated red blood cells and upon physical examination, the clinical officer also found that the complainant's hymen had been broken but it was noted to be old. According to Exhibit 2 (P.3), the appellant was suffering from herpes genitalia on the penile shaft.

In his unsworn defence, the appellant argued that this was a case of extortion; that the complainant had a tendency of extorting money from men and that when he refused to pay her money, she caused the charges to be brought against him.

In her judgment, the learned magistrate found that the evidence summarized above proved beyond any reasonable doubt. No doubt the alleged offence took place at night (9p.m.). It is also common ground that the appellant and the complainant were not strangers to each other. The broad question in the trial and in this appeal is whether the complainant was gang defiled.

The complainant repeatedly maintained that she was defiled. She said:

“As we were leaving, we saw five people sitting in the stalls. They followed us to where we were buying candles. They started running after us. I identified the accused person. He called me. He pushed me onto the ground. He undressed me. He removed my shorts and my pant. He covered my mouth with his hand. I could not scream. He raped me. The other four were holding my hands and legs.”

There is also evidence that the complainant told her sister, P.W.2 and the police immediately after the incident that it was the appellant who had defiled her.

In terms of the provisions of **Section 124** of the **Evidence Act**, the trial magistrate found that the complainant was a truthful witness. In terms of **Section 10** of the **Sexual Offences Act**, the offence of gang rape is committed where a person commits the offence of rape or defilement in association with another or others or with a common intention, a person, in the company of another or others commits the offence of rape or defilement.

The complainant's evidence was that only the appellant raped her but that he was assisted by four others who held her hands and legs. The clinical officer found that the complainant's hymen was broken and it appeared to have been broken earlier, suggesting in my view that the complainant had had sexual intercourse before the date in question.

In view of the complainant's clear account of events and the fact that the trial magistrate who observed her demeanour found her to be truthful coupled with the medical evidence, I find that the prosecution proved the charges against the appellant. His defence did not address the accusation alleged against him. The defence was displaced by the prosecution evidence.

In the result, this appeal fails and is dismissed.

Dated, Signed and Delivered at Nakuru this 27th day of March, 2012.

W OUKO

JUDGE