REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 144 & 145 OF 2011

1. KILUNGI KITHEKA

2. KINYUTU MBITHUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutumo Resident Magistrate's Court Criminal case No. 116 of 2011 by Hon. S.K . Mutai, R.M. on 29/6/2011)

JUDGMENT

The two appellants, **Kilungi Kitheka** and **Kinyutu Mbithuka** were jointly charged before the Resident Magistrate's court at Mutomo with gang rape contrary to section 10 of the Sexual Offences Act. Particulars of the offence were that on the 26th April, 2011 at around 7.00p.m inIkutha District within Kitui County, the appellants jointly gang raped **S.S** in turns.

In the alternative charge, the appellants were charged with Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act. Particulars being that on the same day, place and time the appellants jointly committed an Act of indecency with **S. S**, a child aged 12 years by touching her private parts namely vagina and breast. The appellants denied the charges and were soon thereafter tried.

The prosecution called four witnesses in support of its case. They were the complainant **S.S**, **K.S**, **John Amollo** and **Corporal Phillip Lenarpasipia.** They all testified as PW1, PW2, PW3 and PW4 respectively.

The complainant (PW1) recalled that on 26th April 2011 at 7.00p.m she was at home studying when the appellants came calling and gave her chapati. The 2nd appellant then asked her to escort him. On the way the 1st appellant got hold of her by the neck and then removed her clothes while the second appellant defiled her first followed by the first appellant. She told her mother, **K.S** (PW2) what had happened to her and the appellants were arrested. She was taken to Mutomo Hospitalthe following day. Following the incident her clothes were stained with blood. She positively identified the appellants. As all this was happening PW2 had infact gone to the house of the 1st appellant to commensurate with his sick wife. On coming back home, she did not find the complainant. Her son told her that the 1st appellant had passed -by. She went back to 1st appellant's house but did not find him. On her way back she met the 1st appellant and the complainant. The 1st appellant informed her that the complainant had escorted her. She then went home with the complainant. She lit a lamp and saw blood flowing from the complainant's legs. The complainant told her that the appellants had defiled her in turns. She sent for youths who arrested the appellants. In the meantime, she took the complainant to Mutomo Hospital after reporting the matter to police. She was issued with a P3 form and post-rape care form.

Dr Hellen Solomon filled the P3 form of the complainant on 28 April 2011. The complainant had blood stained pants and the hymen was broken and presence of foul smelly whitish vaginal discharge was noted. Her conclusion was that rape had taken place. She produced the

post-rape care form and P3 form as exhibits.

PW4, Corporal Phillip Lenarpasipia on 27 April 2011 at 1.00p.m received AP Officers from Kamutei AP Camp with the complainant in company of her mother. The complainant reported that she was gang raped by the appellants in turns. He booked the report and issued her with a P3 form. The appellants were arrested and he subsequently preferred charges against them.

In their defence the appellants gave unsworn statements and called no witness. The first appellant denied committing the offences he was charged with. He said that he was framed up.

The 2nd appellant too denied committing the offences he was charged with. He also said that he was framed up in the case.

The learned Magistrate having carefully considered the evidence on record was persuaded that the prosecution had proved its case against the appellants. He proceeded to convict them and though the learned Magistrate did not specifically state on which count, it is pretty obvious, that the conviction was on the main count. If there is any doubt as to the charge upon which the appellants were convicted, that disquiet can be put to rest by considering the sentence imposed. Gang rape attracts a minimum sentence of 15 years imprisonment but which may be enhanced to imprisonment for life, whereas indecent act attracts a sentence of not less than 10 years. The appellants herein were upon conviction sentenced to the minimum sentence of 15 years imprisonment; hence the conviction must have been on the charge of gang rape.

Aggrieved by the conviction and sentence, the appellants separately and individually lodged appeals to this court stating that their convictions were wrong on account of the prosecution failing to prove any of the charges preferred and therefore their conviction was unjustified and manifestly unsafe. The prosecutions' failure to produce the complainant's blood stained clothes was fatal to their case and created reasonable doubts which ought to have been resolved in their favor and finally that the charge sheet talked of the appellants " jointly defiled **S. S**. However, no sexual act can be committed jointly.

When the appeal came before me on 25th June, 2012 for hearing **Mr.Mukofu,** learned State Counsel applied for the 2 appeals to be consolidated. The appellants not objecting, the prayer was granted.

The appellants opted to canvass the appeals by way of written submission. I have carefully read and considered them alongside cited authorities.

Mr.Mukofu opposed the appeal. He submitted orally that circumstances obtaining at the scene of crime favored positive identification. The complainant was able to recognize the appellants. She gave a detailed account of the role played by each appellant in the episode. She was with the appellants for a very long time. The evidence of the complainant was collaborated in material particulars by the evidence of PW3. The appellants' conviction was therefore safe and ought not to be disturbed.

As a first appellate court, it is my duty to subject the evidence tendered during the trial to a fresh and exhaustive re-evaluation so as to reach my own independent decision as to the guilt or otherwise of the appellants.

The appellants' first complaint is that the charge sheet was defective in that it alleged in its particulars that on 26th day of April, 2011at around 7.00pm the appellants jointly gang raped **S. S** in turns. It is their contention and I agree with them, that there is no way that two people can jointly rape a girl. How can two male organs be jointly inserted in the female genital organ, that is, the vagina of the victim at the same time. Although the prosecution added the words- "*in turns*" the presence of the word "jointly" still rendered the charge defective. Those words made no difference to the defect. In the case of **Paul Mwangi Murunga** vs **Republic,Cr App. No 35** of **2006 [UR],** the Court of Appeal observed:-

"…this court has repeatedly said that two or three men or whatever they may be their number cannot jointly at the same time rape one woman. Each one of them commits the act of rape individually and he is followed by the next man. We are unable to appreciate how two or three men can at the same time "jointly" enter or try to enter her genital organs. The act is committed by each one of them alone and if there be two, or three or four of them each must be charged on a separate count of rape…"

The appellants too have complained and rightly so in my view that the prosecution case was not proved beyond reasonable doubt. There was a claim that the complainants underpants were blood stained. The complainant herself testified that ***"my clothes were stained with blood…"*** her mother also testified thus ***" S's clothes were soaked in blood"*** whereas **Dr.John Amollo** who testified on behalf of **Dr.Hellen Solomon** stated ***"she was examined and her underpants had blood stains…"*** Although **CPL Phillip Lenarpasipia** did not make any reference to having received or seen the alleged complainant's blood stained pants, the same were nonetheless not produced in evidence. No explanation was offered by the prosecution for the failure. Secondly, although upon examination, the complainant's hymen was torn, there was presence of foul smelly whitish vaginal discharge, there was no prove as to the origin of the discharge given that the appellants were not subjected to medical examination.

The omission to examine the appellants plus the non- production of the blood stained pants of the complainant rendered the claims by the complainant and her mother to be mere assertions without prove. In the case **Muiruri Njoroge V Republic, Cr.App.NO.115** of **2002 [UR**] the Court of Appeal opined:- ***"…A court of law does not act on assertions unless proved by evidence before the court…"***

In criminal cases the charge must be proved beyond reasonable doubt. Many great judges have said that in proportion as the crime is enormous so ought the prove to be clear. Sexual Offences require careful handling by the trial courts. It is unsafe to act on the evidence of the complainant alone without adequate safeguards with regard to prove and collaboration. The failure by the trial court to warn itself of the dangers of convicting on the complainants' sole evidence without adequate prove, rendered the appellants' conviction unsound. The trial court did not even revert to the provisions of section 124 of the Evidence Act.

On the whole, I am satisfied that there was reasonable doubt created by the evidence brought forth by the prosecution. Accordingly, the prosecution case was not proved thereby entitling the appellants to an acquittal. The appeal is allowed, conviction quashed and the sentences imposed set aside. The appellants should be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** dayof **OCTOBER, 2012.**

ASIKE-MAKHANDIA
JUDGE