



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 71 of 2010**

**TOM JOASH LIPURE .....1<sup>ST</sup> APPELLANT**

**JAPHETH MUTEREMA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(An Appeal against both conviction and sentence of the Vihiga Senior Resident Magistrate's court in Criminal Case No. 502 of 2009 [L. O. ONYINA, SRM] dated 19<sup>th</sup> March, 2010)*

**JUDGMENT**

The 1<sup>st</sup> appellant, **TOM JOASH LIPURE** and the 2<sup>nd</sup> appellant **JAPHETH MUTEREMA** were charged as follows:-

**GANG RAPE CONTRARY TO SECTION 10 OF SEXUAL OFFENCES ACT NO. 3 OF 2006**

***The particulars of the offence were that on the night of 10<sup>th</sup> day of April 2009 at [particulars withheld] Western Province willfully and unlawfully jointly and in turns gang raped a girl child namely MO by causing your genital organs namely penis into her genital organ namely vagina, a girl aged 13 years.***

In the alternative, both the 1<sup>st</sup> and 2<sup>nd</sup> appellants were charged with the offence of indecent act contrary to Section 11, 11 of the Sexual Offences Act No. 3 of 2006.

***The particulars of the offence were that on the night of 10<sup>th</sup> day of April 2009 at {particulars withheld} within Western Province intentionally and unlawfully jointly caused your genital organs to make contact with the genital organ of a girl child namely MO aged 13 years by touching her vagina.***

The appellants pleaded not guilty before the lower court. After a full trial, the appellants were convicted in the main count of gang rape and sentenced to twenty years imprisonment each.

Aggrieved by the conviction and sentence, the appellants appealed to this court. Although the appellants filed separate appeals, the same were consolidated and heard as one. This judgment is therefore in respect of each of the appeals.

Both appellants raised more or less similar grounds of appeal which can be summarized as follows:-

- Their Constitutional rights were violated in that there was delay in effecting the arrest.

- There was no pre-trial disclosure of the evidence of prosecution witnesses.
- The trial magistrate erred in relying on insufficient and uncorroborated evidence.
- The trial magistrate failed to properly analyze the medical evidence which evidence was fabricated and speculative.
- No DNA test or any forensic tests were carried out to ascertain who committed the offence.

At the hearing of the appeal, each of the appellants relied on their grounds of appeal. The written submissions handed in essentially expounded on the grounds of appeal.

Mr. Orinda, the State Counsel supported the conviction. He submitted that the victim knew the appellants and therefore the issue of mistaken identity did not arise.

The case for the Prosecution was that on 10.4.09 at about 4.00 a.m., the complainant, PW1 **MO** was at home in {particulars withheld} sleeping. At about 4.00 a.m. her uncle, the 1<sup>st</sup> appellant woke her up. The complainant opened the door. The uncle (1<sup>st</sup> appellant) told her to put off the lights and follow him. The complainant went outside where she found the 1<sup>st</sup> appellant who was with Muterema, the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant then asked the complainant to follow him to his house. The complainant obliged. The 1<sup>st</sup> appellant then told the complainant that he wanted her to be a wife to the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant further explained that the 2<sup>nd</sup> appellant would give out Kshs.100/= before sleeping with her. The 2<sup>nd</sup> produced a Kshs.100/= currency note and gave the same to the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant “slept” with the complainant. While in the process the 1<sup>st</sup> appellant demanded a further Kshs.100/= from the 2<sup>nd</sup> appellant or else the 2<sup>nd</sup> appellant was to get up and leave. The 2<sup>nd</sup> appellant paid a further Kshs.100/= and “made love” again to the complainant.

The 1<sup>st</sup> appellant then told the 2<sup>nd</sup> appellant to get up and leave. The 1<sup>st</sup> appellant told the complainant to carry the lamp and follow him to where he sleeps. The 1<sup>st</sup> appellant then “slept” with the complainant after threatening to cut her with a jembe. The 1<sup>st</sup> appellant “slept” with the complainant until 9.00 a.m. when he told her to leave.

The complainant returned to her home where she lived with her grandfather. The matter was reported to the village elder, the grandfather, the Provincial Administration then to the Police Station. The complainant was escorted to Vihiga District Hospital where she was treated and a P3 form filled in. After investigations, the appellants were arrested and charged with the offences herein.

The 1<sup>st</sup> appellant in his statement of defence stated that he was arrested and escorted to the police station and placed in the cells. He was then brought to court where he denied the charges read out to him.

The 2<sup>nd</sup> appellant stated in his defence that he was at home with his wife and children when he was arrested, handcuffed and escorted to the Police Station without being told what offence he had committed. He denied the same.

This being the first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate’s court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see **Okeno v Republic [1972] EA 32***).

The complainant (PW1) narrated to the court how on the material date the 2<sup>nd</sup> appellant “made love” to her after the 1<sup>st</sup> appellant who is her uncle asked her “to be a wife” to the 2<sup>nd</sup> appellant. According to the

evidence of the complainant, the 2<sup>nd</sup> appellant “made love” to her twice after paying Kshs.100/= to the 1<sup>st</sup> appellant for each session. The complainant further testified that after the 2<sup>nd</sup> appellant left the 1<sup>st</sup> appellant “slept” with her until morning at around 9.00 a.m. when he told her to leave.

During cross-examination of the complainant by the 2<sup>nd</sup> appellant, it came out quite clearly that the complainant knew what she was talking about when she talked of “slept with me” and “made love”. The complainant stated as follows:- “Yes, you were the first person to sleep with me. When you inserted your penis in me I felt pain.”

The complainant knew the people she was dealing with. She described the 1<sup>st</sup> appellant as her uncle Tom and referred to the 2<sup>nd</sup> appellant by his name i.e Omuterema. The complainant’s evidence mentions some lights which she stated that the 1<sup>st</sup> appellant told her to put off and also mentions the presence of a lamp where she slept with the 2<sup>nd</sup> appellant and which lamp she carried with her to where she slept with the 1<sup>st</sup> appellant. By the time the complainant left the house of the 1<sup>st</sup> appellant, it was already 9.00 a.m. in broad daylight. The complainant therefore had sufficient time to see her molesters who were known to her.

The grandfather to the complainant, PW2, **JAL** also testified. According to the grandfather, he did not find the complainant when he arrived home from a safari at about 8.00 a.m. on 11.4.2009. Later in the course of the day he learnt about the defilement and with the involvement of the village elder, the Assistant Chief and the police, the appellants were arrested. The events as narrated by the complainant to the grandfather are consistent with the evidence of the complainant in court. PW2 (grandfather) has given unchallenged evidence that the 1<sup>st</sup> appellant is his sixth born son.

The evidence of PW3, **IBRAHIM OBWATINYA NAHUNYA**, the village elder and that of the Assistant Chief, PW4 **PAUL OPIAYO** have testified on their having received the report of defilement and arrested the appellants.

The evidence of the Assistant Chief shows the complainant gave him the same details about the defilement including pointing out the appellants as the culprits. According to the Assistant Chief, the complainant could not even walk properly as she was walking with her legs apart and they had to hire a motor cycle to take her to the Police Station and also restrained the villagers from administering mob justice on the appellants.

The complainant described herself as a Std. 7 student at the material time. The evidence of the Clinical Officer, PW5 **CHARLES LEPAL MURICHO** gave the complainant’s age as 13 years at the material time. The Clinical Officer gave evidence that confirmed that the complainant had been defiled. He produced the P3 form and the treatment notes as exhibits. The P3 form in section “C” reflects the complainant’s estimated age as 13 years and describes the complainant’s genitalia as having a “swollen labia minora” and also reflected possibility of the complainant having been infected with a sexually transmitted disease.

During cross-examination, the Clinical Officer explained that he did not examine the culprits but stated the complainant was placed on ARVs to prevent HIV transmission.

The evidence of PW6, **PC DAVID KIPKEMBOI HAYAGAN** and PW7, **PC SIMON BIRIR** confirms that a report of the defilement was made at Vihiga Police Station and investigations carried out and the arrests made.

On the other hand, each of the appellants denied having committed the offence. Each of the appellants talked about the arrest. None of the appellants has given any reason why any of the witnesses would frame them up with the case herein.

The court carried out a *voire dire* on the complainant who gave her age as 13 years. The court found the complainant possessing sufficient intelligence to testify and understood the duty of telling the truth

although she did not understand the implications of taking Oath. The complainant gave unsworn evidence and was duly cross-examined. The complainant's evidence is corroborated by the medical evidence on the question of defilement. The complainant gave account of what transpired to the grandfather, the village elder, the Assistant Chief and the Police Officers and the reports remained consistent throughout. The trial magistrate had good basis to believe the complainant's evidence. The Proviso to Section 124 of the evidence Act states as follows:-

***“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

The complainant's evidence on identification of the culprits cannot be faulted and need no corroboration once the court was satisfied the complainant was telling the truth and positively pointed out her molesters without making any errors.

Although the grounds of Appeal stated that there was no pre-trial disclosure of the evidence of the prosecution witnesses, an order was made on 16.4.09 by the trial magistrate for the appellants to be supplied with statements. The court record does not reflect any further request for the statements by the appellants. The appellants were therefore ready to proceed and indeed proceeded with the case and cross-examined by witnesses.

A delay in the effecting of the arrests would not have violated any Constitutional rights of the appellants. The appellants were arrested within three days of the offence.

The Prosecution case was proved beyond any reasonable doubts. The conviction is based on sound evidence and the same is upheld together with the sentence which is within the law. The appeal has no merits and is dismissed.

***Delivered, dated and signed at Kakamega this 21<sup>st</sup> day of November, 2012***

**B. THURANIRA JADEN  
JUDGE**