



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL APPEAL NO. 77 OF 2009 CONSOLIDATED WITH CR.A. NO. 78 OF 2009.**

L.N. )

L.L. ).....APPELLANTS.

VERSUS

REPUBLIC.....RESPONDENT.

*(An appeal from the original conviction and sentence of Hon. T. Nzyoki – SRM in Criminal Case No. 500 of 2007*

*delivered on 25<sup>th</sup> November, 2008 at Lodwar.)*

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

1. The above appeals were consolidated and heard together. The 1<sup>st</sup> and 2<sup>nd</sup> appellants were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence stated that on the 2<sup>nd</sup> day of August, 2008 at L[...] trading centre in Turkana South District within Rift Valley province jointly or in association, unlawfully and intentionally caused penetration of genital organs of C.E., a girl aged 16 years. The appellants were also charged with another offence of being in possession of ammunition without a firearm certificate contrary to section 4 (2) (a) as read with section 4 (3) (a) of the firearm Act 114 Laws of Kenya. The particulars are that on the 23<sup>rd</sup> August, 2008 at L[...] trading centre in Turkana South district within Rift Valley province was found in possession of three rounds of 7.62 x39 mm special ammunitions without a firearm certificate. The appellants pleaded not guilty to both charges and after trial they were convicted and sentenced to 30 years imprisonment each in respect of the first count.
2. Being aggrieved by the conviction and sentences, each of the appellant appealed and challenged the quantity and quality of the evidence before the trial court. The appellants contended that there were contradictions in the prosecution's evidence especially PW1 and PW2. Moreover there was no identification parade that was conducted to test the veracity of the complainant's evidence. The trial court was also faulted for failure to consider the defence evidence which according to the appellant, was plausible. The sentence of thirty years was harsh and unlawful. Both appellants filed written submissions in support of their case.
3. This appeal was opposed by the state; **M/s. Bartoo** the learned State Counsel supported the conviction which she argued was supported by the evidence on record. According to the State, the complainant was attacked and defiled at 6.00 p.m. It was during the day. The complainant was able to identify the 1<sup>st</sup> and 2<sup>nd</sup> appellant who defiled her in turns. Secondly, while the 1<sup>st</sup> and 2<sup>nd</sup> appellants ran away from the scene after savagely violating the complainant, the 1<sup>st</sup> appellant dropped his hospital card and TB medicines which had his name.

4. Although PW2 a child of tender years, she clearly gave a chronology of how they were walking from school with PW1 when they were accosted by the 1<sup>st</sup> and 2<sup>nd</sup> appellant. The two men held PW2 threatened her with death unless they gave in to their sexual advances. They hit PW1 with a butt of the gun. PW2 ran and narrated to her auntie and PW3 what had happened and that PW1 was being attacked by two men. PW3 mobilized some help and responded to a screams by PW1. PW3 with the other men ran to the scene they found PW1 was badly injured, she was bleeding and they followed the footmarks from the scene, they found the 1<sup>st</sup> and 2<sup>nd</sup> appellant lying outside *a manyatta*. Upon seeing PW3, the two assailants escaped but as they escaped one of them dropped a treatment card and TB tablets. The complainant was taken to hospital and the injuries she sustained were confirmed by the clinical officer. The state urged the court to sustain the conviction.

5. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19**. I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellants. Briefly summarized, the evidence that led to the conviction of the appellants was given by C.E., **PW1**, a girl aged about 17 years testified that on the 2<sup>nd</sup> August 2008, she was walking home from school in the company of a younger sister **E.E.**, PW2 a young girl in class one. The learned trial magistrate conducted a *voire dire examination* of PW2 and found her competent to give sworn evidence.

6. On their way home, it was about 6.00p.m, PW1 and PW2 met with two assailants. The 2<sup>nd</sup> appellant was carrying a firearm while the 1<sup>st</sup> appellant was carrying a walking stick. The two appellants accosted PW1 and PW2, and asked them to choose between being killed and giving themselves for sex. PW2 started crying and managed to run away when the 1<sup>st</sup> appellant held PW1 and pinned her down. PW2. The 2<sup>nd</sup> appellant hit the complainant on the head. They tore her under pants and raped her in turns as one held her legs and they took turns to defile her. The complainant was rescued by members of public who responded to the screams by PW1 and also PW2 during the ordeal was crying.

7. PW1 was escorted to the chief who referred her to a health centre. She was treated and referred to Lodwar District Hospital on 3<sup>rd</sup> August, 2008. She went to Lodwar District Hospital. The complainant was examined by Abraham Kimtai, the clinical officer based at Lodwar District Hospital. Upon examination of the complainant's genitalia, he found bruises on the labia minora and inflamed vulva. The cervix was open and the hymen broken. They conducted a vagina swap which disclosed spermatozoa. The urine analysis did not disclose any infection. He concluded that there was defilement or excessive force used in the sexual act.

8. Further evidence in this case was given by **PW3** who corroborated the evidence of PW1 of how they were accosted by the 1<sup>st</sup> and 2<sup>nd</sup> appellant. The two assailants had beaten and raped PW2 while PW1 managed to escape while crying. She alerted people from the village and accompanied them to the scene where PW2 was being raped. Among the people who went to rescue PW2 was Vishion Ekai, PW3.

He testified how he mobilized people to rescue PW2. When the assailants saw them, they started running away. PW3 sought reinforcement with men armed with firearms and they pursued the assailants with the help of a big torch they followed the footprints from the scene where PW2 was attacked and there was bloodstains upto Namochu Drift where he found the two appellants sleeping on the ground. They shot in the air and the two appellants ran away.

9. One of them dropped a treatment card and TB tablets which bore the name of 1<sup>st</sup> appellant. The matter was reported to L[...] AP camp. The appellants were arrested and brought to Lodwar Police station where they were re-arrested by PC Alfred Mwarambu, PW4, on 23<sup>rd</sup> August, 2008. PW4 is the one who received the initial report of the gang rape by the complainant. He issued her with a P3 form and referred her to Lodwar District Hospital where she was treated and P3 form was completed. He also recovered a medical card and TB tablets from the KPR officers who had pursued the appellants and produced them as exhibits. PW4 also recorded the statements from PW1 and PW2 who were able to identify the appellants. PW4 charged the appellants with the present offences. Put on their defence, the 1<sup>st</sup> and 2<sup>nd</sup> appellants gave sworn statements of defence and denied the offence.

10. The 1<sup>st</sup> appellant testified that on 2<sup>nd</sup> August, 2008, he was hospitalized at Nakwamoro Dispensary upto 22<sup>nd</sup> August, 2008. On the 23<sup>rd</sup> August, 2008, he said he was going about his normal businesses when police struck at K[...] centre where he was doing his business. Other people ran away but since he was unwell he was arrested. The police who arrested him stalked near his home and collected his TB medicine. He was placed in the police cells for 3 days without his medicine but when he complained to the OCS, he was escorted to Lodwar District Hospital and was given some more TB medicine. He challenged

the evidence before the court especially because the offence took place at night and it was not possible for PW3 to follow foot prints at night.

11. On the part of the 2<sup>nd</sup> appellant, also gave a sworn statement of defence and denied having committed the offence. He claimed that at the material time he had gone to Lokichar to visit his sick sister who died and while he was mourning he was arrested by the police on 23<sup>rd</sup> August, 2008. He also challenged the veracity of the evidence of the complainant. Upon evaluation of the above evidence, the learned trial magistrate was satisfied that the prosecution proved its case to the required standards. In particular, he was satisfied that the evidence of PW1 and PW2 who are the complainants was cogent even though there was no identification parade PW1 and PW2 were able to identify the attackers at the scene where PW1 was raped.

The learned trial magistrate also found the evidence of PW3 reliable because they pursued the appellants upto N[...] Drift where they recovered a treatment card and TB tablets which belonged to the 1<sup>st</sup> appellant. The learned trial magistrate found the defence of the 1<sup>st</sup> and 2<sup>nd</sup> appellant a mere afterthought and proceeded to convict them with the 1<sup>st</sup> count.

12. The issue of identification of the appellant is critical because the assailants were not known to the complainant prior to the incident. The attack took place at 6.00 p.m. and PW1 and PW2 told PW4, the investigating officer that they could identify the assailants. There is no explanation why an identification parade was not carried out especially after the appellants were arrested 20 days after the incident. However, in cases of sexual, the Evidence Act section 124 especially the proviso thereto, it is provided that;

***“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.”***

13. Have no difficulties to accept the holding by the learned trial magistrate that PW1 was a truthful witness. The assailants were pursued by PW3 and when they were accosted at N[...] Drift, they escaped. That is when the 1<sup>st</sup> appellant dropped a treatment card bearing his name and also TB medicine. The 1<sup>st</sup> appellant confirmed that he was on TB treatment when he was arrested by the police who impounded his medicine and used it as exhibit. Like the trial court I find this defence too far fetched. This evidence of TB medicine was given by PW3. I see no justifiable reasons why the police would go out of their way to get medicine and treatment card of the 1<sup>st</sup> appellant in order to implicate him with the offence of gang rape and in order to corroborate the evidence of PW3. I find the identification of the 1<sup>st</sup> appellant by PW1 and PW2 was corroborated by the TB treatment card which the appellant dropped as he freed from the scene.

14. As regards the identification of the 2<sup>nd</sup> appellant, although he was identified by the PW1 & PW2 during the attack, the prosecution ought to have tested the accuracy of that identification by conducting an identification parade. PW2 is a child of tender age, while PW1 was the victim of the assault. When they were accosted, PW2 managed to escape, in essence this was a splint identification of two assailants, under a tense moment, and no description of these assailants was not given to the investigating officer. This therefore leaves the evidence of PW1 who was subjected to the orgy of rape by the 1<sup>st</sup> and 2<sup>nd</sup> appellant as the only credible evidence of identification.

15. The Court of Appeal has emphasized that while dealing with evidence of a sole identifying witness, the court has to consider other circumstances which points to the guilt of the accused person. (See the case of **Maitany vs. Republic [1986] KAR** it was held that:-

***“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted from the possession of error.”***

16. As regards the identification of the 1<sup>st</sup> appellant, there were other circumstances which were taken into account such as the treatment card which had his name and the TB tablets, the 1<sup>st</sup> appellant confirmed even in his defence that he was suffering

from TB. These were many coincidences and taking all the circumstances into account , I am satisfied the conviction of the 1<sup>st</sup> appellant is safe and it is hereby upheld. However on the sentence, the learned trial magistrate imposed 30 years imprisonment. The act provides for a minimum of 20 years but the court can impose upto life sentence. The 1<sup>st</sup> appellant gave compelling mitigating factors and in the judgment, the learned trial magistrate did not give the aggravating factors which led to the imposition of 30 years sentence. For that reason I will interfere with the sentence and reduce it to 20 years. The 1<sup>st</sup> appellant will serve 20 years imprisonment.

17. As regards the conviction of the 2<sup>nd</sup> appellant there is doubt regarding his identification which is compounded by the gap in evidence on what led to his arrest. For the 1<sup>st</sup> appellant his name was found from the treatment card. There was no evidence on how the people who arrested the 2<sup>nd</sup> appellant were able to identify him. The conviction and sentence imposed on the 2<sup>nd</sup> appellant is hereby quashed and set aside accordingly. The 2<sup>nd</sup> appellant is to be set at liberty forthwith unless otherwise lawfully held.

Judgment read and signed this 26<sup>th</sup> day of May, 2011.

**MARTHA KOOME.**

**JUDGE.**