



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL 272, 273 & 277 OF 2006

DANIEL OTWORI MARIERA 1ST APPELLANT

WILFRED ABUGA NYANGENA 2ND APPELLANT

VINCENT MATUNDURA OTWORI 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From original conviction and sentence in the Senior Resident Magistrate's Court at Nyamira,
Criminal Case No.200 of 2005 by L. Komingoi, SRM)**

JUDGMENT

The appellants were charged with rape contrary to **section 140** of the **Penal code**. The particulars of the offence were that on 26th February 2005 at Nyamira District within Nyanza Province, each one of them had unlawful carnal knowledge of **RO** without her consent. The appellants also faced an alternative charge of indecent assault to the said Ruth Omwenga contrary to **section 144(1)** of **Penal Code**.

They all pleaded not guilty to the said charges. After a full trial the appellants were convicted and sentenced accordingly. The 2nd Appellant was convicted of the alternative charge and sentenced to 7 years' imprisonment while the 1st and the 3rd appellants were convicted of the offence of rape and sentenced to 15 years' imprisonment.

The appellants were aggrieved by the conviction and sentence and filed their respective appeals to this court. During the hearing of the appeals, they were consolidated and heard as one.

The appellants raised more or less the same grounds of appeal. They stated that there was no sufficient evidence upon which they were convicted of the said offences. They further alleged that their defences were not taken into consideration by the trial court. Lastly, they stated that the sentences that were handed down by the trial court were harsh and excessive.

The brief facts of this case were as follows:

On the material day, **PW1, R O**, was on her way to her grandmother's home to pick her younger brother, having left their local church. On her way she met the appellants herein, one Duke Oyugi Kenyatta who was also charged together with the appellants and one other person who was not before the court. The second appellant asked PW1 where she was coming from. She told him that she was coming from church. He ordered her to sit down and the third appellant hit her with a stick on the right leg. She was then tripped and fell down. She was ordered by the 2nd appellant to remove her clothes. She refused to do so but the appellants stripped her naked. The 1st and the 3rd appellants as well as Duke Oyugi Kenyatta proceeded to rape her in turns. While they did so the 2nd appellant kept on touching her breasts.

When two of the appellants were raping her, they had covered her face with her clothes. After the ordeal they uncovered her face. The complainant knew the 2nd appellant by his name. She did not know the 1st and the 3rd appellants but she was able to see them clearly since she was with them for more than one hour. The incident occurred at about 4.00 p.m.

Thereafter PW1 walked slowly to her grandmother's home and told **PW2, J K** what had been done to her. PW2 reported the matter to the village elder. Shortly thereafter the appellants were arrested by villagers and taken to Nyamira Police station. PW1 was able to identify all of them. PW1 was then taken to Nyamira District Hospital where she was treated.

The evidence of PW1 was corroborated in all material aspects by PW2 who added that when she examined the complainant's private parts she realized that she was bleeding. **PW3, Christopher Masese**, the village elder, also corroborated the evidence of PW1. Medical evidence was also produced to confirm that the complainant had been sexually assaulted .

In their defence, each of the appellants denied having committed the offences which they were charged with. They merely stated that they were arrested for no apparent reason after an alarm was raised.

The duty of this court as the first appellate court was set out in **Okeno vs Republic** [1972] EA 32 at page 36 where it was held that:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (Pandya vs

Republic [1957] EA 336) ***and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala vs R.*** [1957] EA 570). ***It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, (See Peters vs Sunday Post*** [1958] EA 424)”

In the present appeal, I have carefully re-evaluated the evidence that was adduced by all the witnesses before the trial court. I have also considered the submissions that were made by the learned State Counsel who urged this court to dismiss the appeals as lacking in merit. The issue for determination is whether the prosecution established to the required standard of proof that the appellants were guilty of the offences which they were charged with.

It was observed by the trial magistrate as follows:

“I had the opportunity of seeing the complainant testify. I have no doubt that she told the truth. She said she saw her assailants during the day. I have warned myself strongly on how to treat her evidence. She was alone but I believe her. She was with the assailants for a long time. She was able to identify them.”

In my view, the above observation by the learned trial magistrate was quite valid. The evidence of PW1

was well corroborated by the evidence of several material witnesses. PW1 named some of her assailants. She was also able to identify the others immediately thereafter. Evidence of recognition is more satisfactory and more assuring than that of identification of a stranger, see **ANJONONI & OTHERS VS R.** [1980] KLR 54._

I am satisfied that PW1 recognized the 2nd appellant and identified the 1st and 3rd appellants properly. The appellants' conviction was well founded.

The sentences that were passed against each of the appellants cannot be said to be harsh or excessive considering the gravity of the offences committed.

In the circumstances, I dismiss the appeals and confirm the convictions and sentences that were passed by the trial court.

DATED, SIGNED AND DELIVERED at KISII this 4TH DAY OF MARCH 2008

D. MUSINGA

JUDGE

Judgment delivered in open court.

Before – Mr. Kemo for the Republic.

Appellants – present

D. MUSINGA

JUDGE