



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NUMBER 111 OF 2019.**

**OLIVER SIMIYU NABANJENJE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from the conviction and sentence in original Kimilili SPM'S COURT case number 66/2017 delivered on 5.7.2009 by Hon G.A. OLLIMO)***

**JUDGMENT**

The appellant Oliver Simiyu Nabanjenje hereinafter face charge of Gang defilement contrary to section 10 of the Sexual Offences Act No.3 of 2006. *Particulars of offence being that; On the 21st day of October 2017(particulars withheld) within Bungoma County in association with others not before court unlawfully and intentionally caused his penis to penetrate the vagina of LNS without her consent.*

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. *The particulars of the offence were that on the 21st day of October 2017, at 0200hrs in Kimilili sub-county within Bungoma County touched the vagina of RNS (Name withheld) with his penis against her will.*

The prosecution called a total of five witnesses in support of its case. Briefly, the prosecution case is as follows:

**PW1 LWN, [Name Withheld]** told the court that she is a student at [Particulars Withheld] training institute and that she resides in the rental rooms outside the institution's compound. On 21st October, 2017 they had entertainment at the institution wherein the students and outsiders participated. At around 02.00am she left school to her room in the company of nine other students including PW2.

As they approached [Particulars Withheld] Primary school, they noticed a flashlight being shown towards their direction and on reaching the source of light, they met two men. One of the men who had a 'Panga' demanded to know where they were coming from and all of a sudden, other men emerged carrying 'Pangas' and 'Rungus'. It was her testimony that there was security light at [Particulars Withheld] primary school gate and moonlight that facilitated visibility. She testified that the men started pursuing them prompting the group of students to flee. She was overwhelmed and two men caught up with her and one of them hit her with a 'Rungu' and the other one threatened to cut her with a 'Panga' as she screamed. She testified that the two men forcefully dragged her to maize farm where they undressed her and they began raping her in turns. It was her testimony that she was raped by 7 men. She told court that PW2 was also forcefully dragged to the maize farm and that she was also raped by the gang and that she heard her scream.

PW1 testified that the appellant was among the gang members and that she identified him positively firstly, because she observed him sharpen his 'Panga' on the tarmac and identification was facilitated by security light from [Particulars Withheld] primary school gate and moonlight. She further testified that it was appellant who demanded to know where they were coming from before they started pursuing them. Second, the accused was among the men who forcefully took her to the maize farm. Thirdly, that the accused was in white shorts.

PW1 returned to school in the company of PW2 after the incident. They both went to Kimilili police station where they recorded their statements. They thereafter went to Dreamland hospital for treatment. She was issued with a P3 Form (pext.2) which was dully filled.

During cross-examination, she stated that the appellant was in white shorts and a red shirt and that she also observed the accused in the school premises during entertainment as outsiders were also allowed in school .

PW1 further stated in re-examination that she saw the appellant in the entertainment hall when he was forcing female students to dance with him and that the accused even pulled her to dance with her but she declined.

PW2. RNS testified to the court that she is a second year student at [Particulars Withheld] institute. She recalled that on 21st of October, 2017 at about 02.00 am she had just left the institution after an entertainment night in the company of PW1 and eight others, heading to their residential rooms which were in close proximity to the institution. On reaching [Particulars Withheld] primary school, she noticed someone

sharpening a 'Panga' against the tarmac road. It was her further testimony that the man sharpening the 'Panga' was wearing white shorts and a red shirt and that identification was facilitated by security lights at [Particulars Withheld] primary school gate.

PW2 testified that she was walking ahead with PW1 and upon sighting the man with the 'Panga', other men merged, they held her while some of them held PW1. They forcefully escorted them to a maize farm and started raping them in turns.

As the men raped them, she saw some light from a distance, the men ordered her to dress hurriedly. Some of them fled while others apologized to them and showed them their way back to the institution.

It was her further testimony that the man she had earlier sighted in a white short and red shirt was part of the gang who raped her and that the said man (accused) even asked her whether she was married and had children as he raped her and that he also had a 'Panga' and he threatened her with death if she dared scream.

PW2 testified that after they were shown their way back to school, they met police officers who escorted them to Kimilili police station where she was issued with a P3 form (pext.4) that was filled at Kimilili District Hospital. During cross-examination, she stated that she was able to identify the accused because he was in a red T-shirt.

**PW3 JOSEPH WAMBOKA LUSWETI** the village elder Mikhonge village told court that he resides in [Particulars Withheld] R.C within Kimilili. On 21st October, 2017 at around 04.00 am, students from [Particulars Withheld] institute stormed into his homestead whereupon they informed him that there had been a rape incident at the school. He further testified that the students mentioned the names of some of the suspects, namely **LINUS WAMBOKA** (A son to PW3). He accompanied the students to the homes of the suspects implicated by the students but he found none. He therefore proceeded to the police station with the students. It was his further testimony that he learnt that Nabajenje (Accused) was arrested in connection to the offence and that Nabajenje is a son to his Cousin. He added that he refers to Nabajenje as "Nassan" in the village.

**PW4 KIPSANG MASAI** clinical officer Kimilili sub-county hospital filled P3 Form for both PW1 and PW2. With respect to PW2's P3 form examination of genitalia revealed laceration on labia minora, missing hymen and presence of blood. He arrived at the conclusion that the patient was raped. He classified the degree of injury as harm. With respect to the P3 Form of PW1, examination of genitalia revealed lacerations on labia minora and labia majora, bloodspots and missing hymen. He classified the degree of injury as harm and made a finding that the patient had been raped.

**PW5 NO.60587 CPL Richard Ombati** attached to Kimilili Police station and the investigating officer told court that on 21st October, 2017 at around 02.00 am while at the station, he received information that students of [Particulars Withheld] technical had been attacked and some raped. He proceeded to the school, met the two complainants who recounted their ordeal. He escorted them to Dreamland hospital for treatment. He later issued them with P3 forms that were duly filled. On 23rd October, 2017, the accused was arrested by students from the said institution who escorted him to the station. He thereafter preferred the present charges against him. He told court that he was not able to locate the other perpetrators.

After close of the prosecution case the accused/appellant was placed to his defense opted to give sworn statement. He did not call witness. The appellant in his defence told court that on 23rd October, 2017 while at the market, a friend approached him and asked him if he knew any suspect in connection to the incident at [Particulars Withheld] Technical and he stated he had none. Just before he left for home, members of the public arrested him and escorted him to the police station. He denied any connection to the offences and wondered why he was charged with the aforementioned offences.

It is upon the above evidence that appellant was found guilty, convicted and sentenced 15 years imprisonment on each main count. The appellant being aggrieved by conviction and sentence filed this appeal on the following amended grounds of appeal;

*i. That, he pleaded not guilty to said charge.*

*ii. That the trial magistrate erred in both law and facts by convicting and sentencing the appellant without putting in to consideration that prosecution evidence was very contradictory.*

*iii. That, the trial magistrate erred in law and facts hence he was generally biased as the case was not well investigated.*

*iv. That, the trial magistrate erred in law by sentencing the appellant without putting into consideration his defence*

*v. That the trial magistrate erred in law and fact by sentencing the appellant to serve 15 years imprisonment which sentence itself was extremely harsh and excess as per the circumstance of the case.*

*vi. That the trial court failed to observe that my constitutional rights were violated.*

*vii. That the trial court failed to observe he provisions Law during trial and judgment.*

*viii. That the learned court failed to observe that the prosecution case was full of contradictions.*

*ix That the trial court failed to give my defense due consideration whereas the same was cogent to secure me an acquittal.*

The appellant filed written submission. He submitted that the particulars of the charge sheet do not disclose the age of the victim to support

the offence of rape. He submitted that the charge was duplex and the court should have invoked **Section 135(3) CPC**. Appellant relied on case law in **OMBOGA-V-R** where the court observed that when the charge is duplex and the accused is taken to trial, the fairness of the process is fundamentally compromised since it will not be clear to which charge he/she faces hence unable to prepare for his defense.

Appellant submitted that, the evidence indicates that he was arrested on 23.10.2017 and arraigned in court on 27.10.2017. The delay of 3 days was not explained by the prosecution hence his right under Article 49(1) of the Constitution was violated relying on case of **ALBANUS MWASIA MUTUA –V- CR NO. 120 OF 2004**.

Appellant submitted that the court did not invoke Section 164 of the evidence Act by considering the demeanor of the witnesses and the Complainants.

Mr Thuo for the state opposed the appeal and submitted that contrary to the Appellant's submissions, the charge –sheet was not defective for want of description of age. There is no provision for indicating the age in a charge of gang –rape offence as argued by the appellant since there is a presumption of law that the offence caters for adult victims. The statement of the offence and ingredients of the offence were also correctly set out in the charge sheet contrary to the assertion by the appellant. Misconstruing the statement and ingredient of the offence on the part of the appellant is not reason enough to nullify the case and proceedings.

He submitted that Contrary to the submissions, the 1st Complainant WNL – was called as lead witness and testified. and also the 2nd Complainant – RNS – was called to testify hence their evidence corroborated each other. He submitted that the medical officer was called to confirm medical examination of the Complainants plus their injuries and produced their medical records. He submitted that the investigations officer was called to sum up the case and give details of the arrest.

He submitted that contrary to the paragraph 5 of the grounds of Appeal the sentence meted to the Appellant of 15 years in prison was lawful. The sexual offence act stipulated the penalty for gang rape under section 10 as imprisonment for life. He submitted that he prosecution discharged the burden and standard of proof to the required standard. The identifying conditions were favorable since torches were used by the assailants-amongst them the Appellant –allowed them to have sufficient recollection. The appellant being a local in the college where the Complainant's reside and school enabled recollection be sufficient enough as to amount the recognition. The prosecution prays that the conviction and sentence be upheld or enhanced.

Having analyzed the appeal and submissions by the appellant and prosecution it clear that this court should determine;

1. Whether the charge sheet was defective?
2. Whether the identification of the appellant was positively done by the prosecution witnesses?
3. Whether the appellant committed the offence of gang rape

This being a first appeal, the court is required to examine all the evidence tendered before the trial court, analyze it and arrive at its own conclusions see ***Kiilu v Republic (2005) KLR 174***. This court will of course bear in mind that it did not see the witnesses in order to assess their demeanor.

On issue number 1 I have carefully analyzed the charge sheet the appellant was charged with two charge sheets that reads;

***On the 21st day of October 2017(particulars withheld) within Bungoma County in association with others not before court unlawfully and intentionally caused his penis to penetrate the vagina of LNS without her consent.***

The second charge sheet reads;

***On the 21st day of October 2017(particulars withheld) within Bungoma County in association with others not before court unlawfully and intentionally caused his penis to penetrate the vagina of RSN without her consent.***

It is clear from evidence on record that the appellant was charged with two counts in which he raped two victims on the same date. The question that arise is whether the charge sheet was defective is charging him of the same offence committed on same date arising from same facts against two complainants in two different counts.

Section 135(1) of the Criminal Procedure Code provides inter alia:-

***“Any offences, whether felonies or misdemeanors may be charged together in the same charge or information, if the offence charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.”***

Looking at the proceedings in the trial court and despite the numerous charges, I cannot detect any embarrassment encountered by the appellant. In other words, the embarrassment of the appellant in his defence is not self-evident.

On the issue whether the appellant was positively identified. Identification was by visual means. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in ***Wamunga v. Republic (1989) KLR 424 at 426*** had this to say:

***“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine***

***such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”***

In ***Nzaro v. Republic (1991) KAR 212***, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. This court is therefore bound to interrogate whether or not the circumstances in this case were favourable for positive identification.

It is the evidence of the PW1 that on 21st October 2017 while enroute to her house the appellant with another man attacked her and raped her in company of pw2 and other students. She testified that there was security light and moonlight that facilitated visibility.

She testified that she identified the appellant because she observed him sharpen his panga and he is the one who forced her to maize farm and he was in white shorts.

On cross examination she stated that she had also earlier seen the accused in the school premises during entertainment. PW2 testified that on the 21st October 2017 they left school entertainment premises at 2.00am and she saw a man sharpening a panga wearing white shorts and red tshirt and that identification was facilitated by security lights.

PW2 testified that while walking with PW1 and upon sighting the man with panga other men emerged and held her while some held PW1 and forcefully escorted them to maize farm and started raping them in turns. She testified that the man she had earlier sighted in a white short and red shirt was part of the gang that raped her and that is the accused.

Positive identification of the old is an offence of defilement or rape is a crucial ingredient of the charge. The complaint must positively identify the aid person as the person who committed the offence.

The court seized of the issue must analyzed the evidence carefully and be satisfied that the identification was positive and free from error. In ***Michael Nganga Kinyanjui –vs- Republic (2014) ECLR.*** The court of appeal on this issue stated:

***“The courts have all along been alive to the fallibility of eye witnesses identification. The justice system has as one of the basic foundations the assumptions that witnesses are capable of accurately describing events that from the basis of a case. It is equally true that witnesses may be deliberately untruthful but there may be many other causes of inaccuracy in witness testimony like imperfect observation, faulty Memory or self interest. It is for these reasons that courts approach the question of identification with caution in situations of disputed identification evidence as demonstrated in Abdulla Bin Wendo –vs- Republic (1953) 20EA 166 and R –vs Thunbull & Others (1976) 3 LLER 549. This court in relying on Thuunbull (supra) said in the case of Cleopas Otieno Wamungo –vs- Republic Criminal Appeal No. 20 of 1982 (UR) that***

***“ Evidence of Visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Wherever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance of the correctness of identification.***

***The way to approach the evidence was succinctly stated by lord Widgeny CJ in the well known case of Republic –vs- Thuonbull 1970 B. ALLER 549.....***

The circumstances of the offence are not disputed. The act occurred at 2 a.m. at night along a road. It involved many people. 8 in group of the complaints and another at least 4 from the group of the assailants. The complaint had not known accused before except having seen them that night. Thought there is evidence that there was moonlight and security light no evidence of intensity of the same was tendered lastly the offence occurred in a maize plantation.

Cumulatively these are circumstances which in my view mitigate against positive identification without possibility of error. I therefore find that the evidence of identification is as tendered, is unsafe to be a basis of a conviction. I therefore allow the appeal. I hereby direct the appellants **OLIVER SIMIYU NABAJENJE** be set at liberty unless otherwise lawfully detained.

**Dated and Delivered at Bungoma this 10<sup>th</sup> day of February, 2021.**

**S.N RIECHI**

**JUDGE**