



**REPUBLIC OF KENYA**

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

**CORAM. D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 30 OF 2018**

**CONSOLIDATED WITH**

**CRIMINAL APPEALS NOS. 31 AND 32 OF 2018**

**BETWEEN**

**KELVIN MAINA.....1<sup>ST</sup> APPELLANT**

**DERRICK JIBET CHINUSU..... 2<sup>ND</sup> APPELLANT**

**JOHN MURIITHI MURIITHI.....3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against the original conviction and sentence dated 26<sup>th</sup> April 2018 in Criminal Case No. 4187 of 2016 at the Thika Magistrates Court before Hon C.A. Otieno-Omondi, PM)***

**JUDGMENT**

1. The appellants, **KELVIN MAINA, DERRICK JIBET KINUSU** and **JOHN MURIITHI** together with another co-accused were charged with the offence of gang rape contrary to **section 10** of the **Sexual Offences Act** (“the Act”). The particulars of offence were that on 28<sup>th</sup> May 2016 at Kiandutu Slum in Thika within Kiambu County each of them in association with one another and others not before the court, did intentionally and unlawfully cause his penis to penetrate the vagina of MKM without her consent.

2. The complainant, MKM (PW 2), recalled that on the night of 28<sup>th</sup> May 2016, she was at home when a lady, PW 6, came looking for her daughter. Before she could respond, a gang of men broke into her house. They started ransacking the house. They dragged her into the next house, tore off her clothes and began to rape her one by one. She testified that she was not able to identify any of the assailants. After the ordeal, the men took off. She was able to call her father, PW 3, who took her to hospital. The doctor, PW 1, who examined her produced the P3 medical form and Post Rape Care (PRC) form. He noted that she had a laceration on the left ring finger and lacerations on the genitalia. He testified that when she was treated initially, the vaginal swab revealed spermatozoa. He opined that PW 2 had been raped.

3. PW 3 was called at about 11.10pm and informed of the incident. He came and took PW 2 to hospital for examination and treatment. He told the court that when he came to pick PW 2, he saw the 1<sup>st</sup> appellant outside the plot using his torch light. He told the court that he knew the appellants as he used to see them in the locality.

4. PW 6 testified that on the material day, her daughter, SA, had taken Kshs. 10,000/- from her place and left with her possession. She went to look for her assisted by her friend, PW 7. They looked for her and managed to find out that she had rented a room in Kiandutu. When they reached there that night, they found a group of about 20 men armed with knives and pangas standing outside that plot. PW 6 told the court that when she entered SA’s room, the men followed her, started beating SA while others started ransacking the room. PW 6 testified that she was able to recognise the 1<sup>st</sup> appellant as he was from the locality. The men left the room and went to the next room where PW 2 was staying. They broke the door, dragged PW 2 to SA’s room and started raping her. PW 6 tried to intervene but the 1<sup>st</sup> appellant injured her on the hand when he tried to stab her with a knife. As the men continued to rape PW 2, PW 6 remained outside guarded by the other men. She could only hear PW 2 crying. After a while the men ordered PW 2 out, threatened PW 6 and PW 7 and left.

5. PW 7 confirmed that she assisted PW 6 to look for her daughter, SA. When they arrived at the plot that night, they found a gang of 20

armed men. She saw them break into SA's house. She recalled that SA lit a chimney lamp whereupon she recognised the 1<sup>st</sup> appellant. She told the court she did not know the other assailants. Some of the men started carrying away household items from SA's room. She saw the 1<sup>st</sup> appellant go into PW 2's room and drag her to SA's room and while PW 6 tried to intervene, the 1<sup>st</sup> appellant stabbed her on the hand. PW 7 testified that the 1<sup>st</sup> appellant led PW 2 to the bed and started raping her. After he finished, the other men also continued in turns. After the incident the men left.

6. Administration Police officers from Kiganjo Police Post, PW 4 and PW 5, testified that on 29<sup>th</sup> May 2016, PW 2 accompanied by PW 3 came and reported the incident of gang rape. They advised PW 3 to take PW 2 to Thika Level 5 Hospital. On 29<sup>th</sup> May 2016, together with other officers, they looked for one of the suspects whom they found and who led them to arrest the other appellants. The Investigating officer, PW 8, confirmed that the incident of gang rape was reported at the Thika Police Station and he was asked to investigate the same on 29<sup>th</sup> May 2016. He recorded witness statements and was informed that the suspects had been arrested by AP officers. He was told to organize an identification parade where the appellants were arrested.

7. All the appellants elected to make unsworn statements. They all denied the offence and told the court how they were arrested in their respective houses while asleep.

8. Based on the aforesaid evidence, the trial magistrate was satisfied that the prosecution had proved its case and more so that the appellants had been identified as the assailants. The appellants have now appealed against conviction and sentence and the main issue they have raised is that the prosecution failed to prove that they were identified as part of the gang that raped PW 2.

9. Gang rape is provided for under **section 10** of the **Act** which states;

*Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.*

10. The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the **Act**;

*A person commits the offence termed rape if –*

*(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.*

*(b) The other person does not consent to the penetration; or*

*(c) The consent is obtained by force or by means of threats or intimidation of any kind.*

11. From the evidence I have outlined, I find that the prosecution proved the essential elements of the offence of gang rape. The collective testimony of PW 2, PW 6 and PW 7 was that on the material night there was a gang of 20 armed men. They broke into PW 2's room where one of the assailants dragged her out and took her to another room where he proceeded to subject her to acts of penetration without her consent, by force and threats violence. PW 2's testimony that she was forcefully subjected to acts of penetration without her consent by several men, was corroborated by PW 6 and PW 7 who saw what was happening. As I stated, the main issue in this appeal is whether the appellants were identified as the perpetrators.

12. The prosecution's case was based on the direct testimony of witnesses in difficult circumstances which, as our courts have held, may lead to miscarriage of justice and have urged caution in accepting evidence of a single witness in such cases. The Court of Appeal in **Kiilu and Another v Republic [2005] 1 KLR 174** as follows:

*Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the 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 as free from the probability of error.*

13. Before acting on such evidence, the trial court ought to inquire about the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused amongst other facts so as to be able to identify him (see **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**). It is also accepted that evidence of recognition is stronger than that of identification because recognition of someone known to the witness is more reliable than identification of a stranger (see **Anjononi & Others v Republic [1980] KLR 59**). But in **Wanjohi & 2 Others v Republic [1989] KLR 415**, the Court of Appeal held that, "recognition is stronger than identification but an honest recognition may yet be mistaken."

14. Since PW 1 did not identify any of her assailants, the issue of identification turned on the testimony of PW 6 and PW 7. PW 6 told the court that she only recognised the 1<sup>st</sup> appellant. She was able to see because the lamp in her daughter's room was on briefly before it was switched off. Moreover, she saw him go into PW 2's room and drag her out and when she tried to intervene, he stabbed her on her hand. She was able to observe the entire incident of rape. Even though there was little light, the proximity and time of interaction between the 1<sup>st</sup> appellant and PW 6 was sufficient for positive identification. When cross-examined, PW 6 stated that she knew him as they were neighbours and since the 1<sup>st</sup> appellant was not a stranger to her, this was a case of recognition.

15. PW 7 recognised the 1<sup>st</sup> appellant whom she knew when SA switched on the chimney lamp before she switched it off when the gang took over. She recalled that the 1<sup>st</sup> appellant was the one who went to get PW 2 from the opposite room. She saw him stab PW 6 on the hand and was able to watch the entire ordeal PW 2 underwent. I also find in this case, PW 7 recognised the 1<sup>st</sup> appellant given the proximity and time the incident took. PW 6 knew the 1<sup>st</sup> appellant as they grew up together.

16. The 1<sup>st</sup> appellant's defence was a mere denial of the offence. He was known to PW 6 and PW 7 who recognised him as he came from the same locality. The testimony of PW 6 and PW 7 was consistent and to the effect that he was the ring leader of the gang as he appeared to have played a prominent role. Although the 1<sup>st</sup> appellant complained that he was not mentioned in the first report to the police, this aspect does not undermine the quality of the evidence as both PW 6 and PW 7 told the court that they feared for their lives as they were subjected to threats before they testified. In addition to the testimonies of PW 6 and PW 7, PW 3 placed the 1<sup>st</sup> appellant at the scene of the incident when he came to collect PW 2. Taking all the circumstances into account, I find and hold that the 1<sup>st</sup> appellant is one of the people who raped PW 2 in association with others. I affirm the conviction.

17. PW 5 and PW 6 did not mention the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as part of the gang. They were implicated by one of the suspects and identified by PW 6's daughter, SA, at an identification parade. Neither SA nor the officer who conducted the identification parade were called as witnesses. Since they were not implicated by any admissible evidence, their appeal succeeds.

18. The 1<sup>st</sup> appellant was sentenced to 20 years' imprisonment under **section 10** of the **Act**. This was the mandatory minimum sentence provided. Although such sentences were declared unconstitutional, I find that the sentence of 20 years' imprisonment is appropriate in the circumstances. The evidence reveals that the 1<sup>st</sup> appellant was the ring leader of the gang of about 20 people who went to rape PW 2 allegedly on the ground that she had rebuffed his advances. He does not deserve sympathy or leniency. I affirm the sentence.

19. The appeal by the 1<sup>st</sup> appellant is dismissed. I allow the appeal by the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, quash their respective convictions and sentence. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants are set free unless otherwise lawfully held.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 16<sup>th</sup> day of JANUARY 2020.**

**R. N. SITATI**

**JUDGE**

Appellants in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.