REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 36 OF 2018

BAKARI MOHAMED BILALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*Being an appeal from the original conviction and sentence in the Principal Magistrate Court**

at Garsen Criminal Case No. 236 of 2012 by Hon. J.M. Kituku (Ag PM)

dated 18th October 2013)

JUDGMENT

1. The Appellant was charged with two counts of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the first count were that on 10th September, 2012 at [particular withheld] Village, Kipini location, in Tana Delta within Tana River County, the Appellant together with others not before the court, intentionally and unlawfully gang raped PB by inserting their penises to penetrate the vagina of PB.

2. The particulars of the second count were that on 10th September, 2012 at [particulars withheld] Village, Kipini location, in Tana Delta within Tana River County, the Appellant together with others not before the court, intentionally and unlawfully gang raped JDC by inserting their penises into the vagina of JDC a girl of 17 years.

3. The accused pleaded not guilty and at the conclusion of the trial, he was acquitted on the first count but was convicted on the second count and sentenced to life imprisonment.

4. The Appellant being aggrieved by the conviction and sentence lodged his amended petition of appeal on two grounds reproduced verbatim being:-

> i. "That the learned trial magistrate erred in both law and fact by failing to consider the prevailing circumstances at the scene of crime were not conducive for accurate and positive visual identification by recognition of the Appellant making the mode of arrest not free from the possibility of error, resulting to mistaken identity of the Appellant. Sic!
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> ii. That the learned trial magistrate erred in both law and facts by failing to consider no birth certificate or age assessment was prepared, processed and produced as an exhibit in court to prove the actual age of the complainant (PW2) for purposes of sentencing and that the sentence imposed on the Appellant was manifestly harsh and excessive. Sic!

5. The Appellant filed his written submissions on the 13th March 2019 in support of his appeal. His submissions were to the effect that he was not positively identified. That the conditions for identification were not suitable as it was 10pm at night and there was no source of light except the torch in the possession of one of the assailants. He faulted the court for failing to carefully test the evidence of identification. He relied on the cases of **Abdalla Bin Wendo v Rep (1953) EACA 166; R v Turbull (1976) ALLER 540; Wamunga v Rep (1989) eKLR 42** and **Maitanyi v Rep (1986) eKLR.**

6. In addition, the Appellant submitted that the procedures for conducting the identification parade were not adhered as was noted by the trial magistrate and therefore he was not properly identified. He further submitted that circumstantial evidence was insufficient as PW2 did not inform the court how long the ordeal lasted and therefore the mere fact that PW6 saw Balasho's herds boys emerging from the direction of the screams two to three hours after the screaming did not show their involvement.

7. The Appellant further submitted that the prosecution failed to ascertain the age of the second complainant (PW2) which is an ingredient of the defilement. He relied on the case of **Muiruri Njoroge v Rep No. 15 of 1982, Kaingu Elias Kasomo vs Rep Cr. App 504 of 2016** and **Isaiah Mwenda vs Rep [2014] eKLR.**

8. Finally, the Appellant submitted that the sentence was harsh and excessive as the term 'is liable upon conviction to imprisonment for a term not less than…but may be enhanced to…" did not connote a mandatory sentence but rather a minimum and maximum. That he was a first offender and ought to have benefited from the least severe punishment. He relied on the case of **Daniel Kyalo Muema v R (220) eKLR; Openya v Uganda (1967) EACA 752** and; **Mohammed Wekesa Musumba v Rep Cr. App No. 299 of 2009.**

9. Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety and through oral submissions. He submitted that all the elements of gang rape; being lack of consent, penetration, and that the offence was committed with others had been proved to the required standard during trial. He urged that there were aggravating circumstances and asked the court to uphold the conviction.

10. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions**.** Further, the court has to caution itself that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can only rely on the evidence that is on record. See **Okeno v R (1972) EA 32**; **Eric Onyango Odeng' v R [2014] eKLR.**

11. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination is whether the prosecution proved its case beyond reasonable doubt by proving each of the elements of the offence and the positive identification of the Appellant.

12. Gang rape is provided for under **Section 10** of the Sexual Offences 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."**

13. In the case of **Elly Otieno Alose v Republic Criminal Appeal No. 14 Of 2018 [2019] eKLR** Mrima J, stated that:-

> **Under Section 10 of the Act, the key ingredients of the offence of Gang Rape include:-**
>
> **a) Proof of rape or defilement;**
>
> **b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.**

14. With respect to age; it was the submission of the Appellant that the age of PW2 was not proved. The record however shows that the apparent age of the complainant was proved she (PW2) told the court that she was 17 years old at the time of the offence. This was further supported by the P3 form (Exh. 4) filled by Benson Marangu (PW4), the clinical officer.

15. In **Jackson Mwanzia Musembi v Republic [2017] eKLR,** the Court of Appeal held that:-

> **"Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*. Faced with a similar situation, as in this case, this Court in *Evans Wamalwa Simiyu vs. R* [2016] eKLR, observed that –**
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> **"As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."**

16. However, it is trite that for the offence of gang rape, the age of the complainant is immaterial as gang rape is proved on *inter alia* the commission of either rape or defilement. See **Dominic Ochieng Odoyo & another v Republic [2015] eKLR.**

17. Rape is defined by **section 3** of the S.O.A as:-

> **(1) A person commits the offence termed rape if:**
>
> **(a) he or she intentionally and unlawfully commits an act which cause penetration with his or her 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act."

18. Section 43 of the SOA provides as follows:-

1. Any act is intentional and unlawful if it is committed-

a. in any coercive circumstances;

b. under false pretence or by fraudulent means;

c. in respect of a person who is incapable of appreciating the nature of an act which causes the offence (emphasis mine).

19. The complainant, JDC (PW2), testified that on the 10th September 2012 at around 10:00pm, while sleeping at home with her mother (PW1) and sisters they were woken up by her mother who told them that there were intruders in the home. On looking out, she saw two men near the door where one had a panga and the other had a torch. That they started screaming when one of the assailants started beating them with the panga. Together with her sisters, they hid under the bed where they could hear the assailants having sex with her mother. That the assailants then tried to pull one of her sisters from under the bed. The complainant escaped and ran away but the assailants together with four other men who were outside the house chased her and caught up with her while on their farm. The complainant further testified that two of the assailants choked her while two others held her legs, they then tore her clothes and proceeded to have sex with her in turns. When they finished they covered her with an iron sheet.

20. To prove penetration, the prosecution must show medical evidence to corroborate the victim's evidence **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR.**

21. In the present case, the complainant was initially treated by JW (PW8) was the nurse at Kipini Health Centre. PW8 produced the treatment notes (Exh. 2). She told the court that the complainant's clothes were soiled with blood, she had bruises on her face, she had secretion on her private parts and upon conducting a vaginal examination, she found that the complainant was in a lot of pain and was bleeding. PW8's evidence was corroborated by Benson Marangu (PW4), the clinical officer who prepared the P3 report (Exh. 4) for the complainant. He testified that the complainant had bruises on the neck, blood discharge from her genitalia, the hymen was broken and she had lacerations on the labia and majora.

22. From the foregoing medical evidence, and the evidence of the victim there is no doubt that there was penetration.

23. It is also clear from my consideration of the evidence that the complainant did not consent to sexual intercourse with her assailants. The assailants invaded their and one of the assailants was armed with a panga. When the complainant tried to escape, the assailants chased her and when they caught up with her, they held her by force, choked her and tore her clothes before proceeded to have sexual intercourse with her. The sexual intercourse was obtained by coercion and violence and done against the complainant's will. It is my finding therefore that the offence of rape was committed.

24. The other element of the offence of gang rape is whether the Appellant was in the company of other persons and whether they had a common intent in committing the offence.

25. It was the evidence of PB (PW1), the mother to the JDC (PW2) and EKC (PW3), that on the night of the attack she woke up to find two intruders in the door who approached the bed. This was corroborated by the evidence of EKC (PW3) who told the court that on the said night she was woken by her mother screams that there were intruders in the house when she saw two people standing outside the door.

26. The complainant JDC (PW2) on her part testified that on the fateful night she heard her mother calling her saying that there were intruders in the house. That she saw two men standing near the door. She further told the court that she and her siblings hid under the bed from where they could hear the attackers having sex with their mother (PW1) and that when they finished they said they wanted the children. That PW2 ran away but she was chased and was caught while still in their farm and by that time they were six in number; and the attackers proceeded to sexually assault her.

27. From the evidence above, it is clear that the Appellant was in the company of other people and that they had a common intent and proceeded to rape the complainant in turns. There was evidence that one of the members of the gang was armed with a panga. They stripped her and held her down, had forced sexual intercourse with her and when they finished, covered her with an iron sheet. I find that gang rape was established.

28. On identification of the Appellant, PW1 told the court that she had seen the accused since August 2012 grazing animals in his farm. That on the fateful day at around 5:00pm, the Appellant had informed her that he had been insulted by one of her daughters and that he would teach her a lesson. She further gave a description of the man who attempted to rape her to the police during their investigations and she was able to pick out the Appellant in an identification parade.

29. The complainant (PW2) on her part testified that she knew the Appellant as she used to see him grazing in their farms and the environs since the beginning of the year. However, during cross-examination she said that she had told the police that she did not know the culprits

and was unable to identify the Appellant during the identification parade. Similarly, EKC (PW3) told the court that she had seen the accused for over a year as he used to graze animals near their home but during cross-examination, she told the court that she did not recognize the attackers as it was at night and they had hidden under the bed. Further, she was unable to identify the Appellant during the identification parade.

30. From the above evidence, it is clear that the only reliable evidence is that of PB (PW1) who knew the Appellant and identified him. It was a case of recognition which, has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- Republic [2014] eKLR** and **Wamunga –vs-R, [1989] KLR 424**.

31. It is trite that the court has to warn itself on the dangers of relying on visual identification. This caution was sounded by the Court of Appeal in **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** where it held 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. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".**

32. In R-V-Turnbull,(1976) 3 All ER 551, it was held that:-

> **"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... "**

33. Being guided by the above precedents, I have examined the conditions of identification. The incident took place at 10:00pm at night. It was the evidence of PW1 that she saw a torch light inside the house and she was shocked, as she had put out the lamp. She further informed the court that it was the Appellant who had the torch and panga while the other man was unarmed. This was corroborated by PW2 and PW3 who told the court that the assailants had a torch, which they shone.

34. The evidence adduced raises questions as to how PW1 was able to tell that the Appellant was one of the attackers. There was no light in the house as they had put off the lamp save for the torch in the possession of the Appellants. Additionally, according to PW1 the Appellant was the one holding the torch and was at the same time hitting her and her children with the panga. This begs the question how was she able to identify the Appellant; did the Appellant shine the torch on his face accidentally? And how did she manage to see the Appellant while she was struggling with the other attacker while being struck with the panga? How long did the ordeal take?

35. I find that the conditions for visual identification were not favourable and therefore the need for further corroborative evidence.

36. On the issue of the identification parade, PW1 stated that she went for an I.D parade on two consecutive days. That one the first day she was unable to identify anyone but on the second day, she managed to pick out the Appellant. PW2 and PW3 on their part were unable to identify the Appellant during both ID. parades.

38. PC Wilson Langat (PW5) told the court that the accused was arrested with the help of the headman on 15th September 2012, and on the 16th September 2012, an I.D parade was conducted where PW1 identified the Appellant by holding his hand. Sergeant Johnson Kibe (PW7) on his part told the court that on the 16th September 2012, he was requested to conduct an I.D parade by the Investigating Officer. That on the same day he went to [particulars withheld] village and took eight people of similar complexion for purposes of the parade. That the accused called his uncle to represent him in the parade. When the parade was conducted, PW1 identified the accused by tapping him on the shoulder but PW2 and PW3 were unable to identify him.

38. While PW1 was able to pick out the Appellant from the I.D. parade, the sanctity of the said I.D. parade is in question. The witnesses PW1, PW2 and PW3 all told the court that they attended two identification parades yet PW7 claims to have conducted only one I.D. parade. Furthermore, PW7 claims he was informed on the 16th September 2012 at 3:00pm that the Appellant had been arrested yet from the Investigation diary (Exh 5) it clearly shows that the Appellant was arrested on 15th September 2012 at 9:00am. If PW1 knew the identity of the Appellant and the Appellant had been arrested on the 15th September 2012, why was PW1 unable to pick out the Appellant in the first parade? What was the purpose of the second parade?

39. The trial magistrate also found that the evidence of the I.D. parade was suspicious and in her judgment she stated that:-

> **"I found PW5 and PW7 not candid on this issue when they insisted only one parade was conducted, accused was clear in cross-examination and unsworn defence that there were two parades."**

40. It is my finding that the identification parade was suspect and therefore the evidence therefore cannot be reliable.

41. Having found that the Appellant was not properly identified, the only evidence linking him to the offence is that of Daudi Hassan Jalah (PW6) the headsman. It was his evidence that on the night of the assault he heard screams and all the neighbours came out except three men, who were Balasho's. The Appellant was one of the three men and they lived about 10 meters from where the rest of the neighbours

congregated. That the three herdsmen emerged about 2 to 3 hours later from the direction of the screams and when asked where they were they stated that they were out strolling. PW6 informed them that if he heard of any problems they would be the culprits as a 6pm. to 6am curfew had been imposed in the area as a result of tribal clashes.

42. On the issue of circumstantial evidence the Court of Appeal **SAWE v REPUBLIC [2003] eKLR** stated that:-

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."**

43. In **Abanga Alias Onyango V. Rep Cr. A No.32 Of 1990(Ur)** the Court of Appeal pronounced itself thus:-

> **"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

44. Applying the test in the case above, the evidence of the PW6 that the Appellant together with his fellow herds boys were not in their manyatta at night despite there being a curfew from 6pm to 6am and that the they emerged from the direction of the screams 2 to 3 hours later, leads to the conclusion that they may have been at the complainant's home where they gang raped the complainant. This conclusion however does not rule out any other reasonable hypothesis on their whereabouts at the material time. The circumstantial evidence in this regard therefore fails the test in **Sawe V Republic *(Supra)*.**

45. My appreciation of the totality of the evidence in this case creates a deep suspicion in the mind of the court that the Appellant was one of the persons who committed the heinous crime. There was evidence that they had earlier told the mother of the complainant (PW1) that they would teach her daughters a lesson, there was evidence that he was identified in an identification parade by PW1, though as I have stated earlier the identification parade was compromised, and there was evidence that he was not within the manyatta at the material time. This evidence however does not meet the legal threshold of proof beyond reasonable doubt. This position was well articulated by the court of appeal in **Joan Chebichii Sawe v Republic 2003 eKLR** in the following terms:-

> **"The prosecution must prove the case the case against the accused beyond reasonable doubt……suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.'**

46. In the end, I find that there was insufficient evidence to positively identify the Appellant and prove the case beyond reasonable doubt. I resolve the doubt in favour of the Appellant.

47. Consequently the appeal succeeds. I substitute the judgment of the trial court convicting the Appellant with one of acquittal.

48. The Appellant is set at liberty forthwith unless otherwise lawfully held.

49. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 17th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

T. Maro Court Assistant

The Appellant in person

Mr. Mwangi for the Respondent