



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CORAM R.E. OUGO J
CRIMINAL APPEAL NO.50 OF 2018

BETWEEN

DAVID ONGENDI ONGORI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **David Ongendi Ongori** was convicted of the offence of gang rape contrary to section 10 of the **Sexual Offences Act No. 3 of 2006** (the Act) and Assault causing actual bodily harm contrary to Section 251 of the Penal Code. He was sentenced to 20 years imprisonment for count 1 and 3 years for Count No. 2. The particulars of the 1st count are that on the 21st day of November 2017 in Nyamache Sub County within Kisii County, in association with another not before the Court intentionally and unlawfully caused his penis to penetrate the Vagina of FNO without her consent. The particulars of the 2nd count are that on the 21st day of November 2017 in Nyamache Sub County within Kisii County he assaulted FNO thereby occasioning her actual bodily harm. He also faced an alternative charge of, committing an indecent act with an adult contrary to section 11A of the Sexual Offence Act No. 3 of 2006. The particulars of the offence are that on the 21st day of November 2017 in Nyamache Sub county within Kisii County he intentionally touched the vagina of FNO with his penis against her will.

2. He now appeals against the conviction and sentence. In his petition he raises the following grounds; his rights under Article 50 (1) (2) (j) of the Constitution were infringed as he was not given valuable documents, there was no age assessment report produced by the prosecution, no medical examination was done on him, the essential witness was not called and that the prosecution did not prove their case beyond reasonable doubt.

3. He filed written submission, he challenges his conviction on these grounds that the prosecution did not prove their case beyond reasonable doubt and that some witnesses were not called, there were irregularities in the evidence. In response the State opposed the appeal arguing that the appellant committed the offence with the assistance of another person. The complainant was with the appellant for some time and was able to identify the appellant. Medical evidence confirmed she has injuries consistent with assault and rape. The State urged the court to confirm the conviction and sentence and to dismiss the appeal.

4. The duty of the first appellant Court is to consider the evidence and to come up with an independent finding bearing in mind that it neither saw nor heard the witnesses testify (see **Okeno vs. Republic**

[1972]E.A 32).

5. The prosecution called 3 witnesses to prove its case. FNO PW1 the complainant testified that on the 21.11.17 she finished work at 10pm. She works as a waiter at [particulars withheld]. She asked Kebungo to take her to Kiamokama. Kebungo came with the appellant on a motor bike. He asked her why she had brought the appellant and Kebungo's response was that since it was at night it was safe to have her for purposes of his safety on coming back. Whilst on the way they took a turn she did not know, they told her it was a short cut to her destination. She asked them to drop her or return her to the place they got her. The appellant who was the motor rider hiked speed. Kebungo held her back as she tried to wriggle out and she fell from the motor bike. They assaulted her, the appellant did blows and kicks and strangled her, as Kebungo also beat her. She screamed and people came. The appellant explained to them that she had refused to pay him. The people left. The appellant took his motor bike and went with her to his house. It was a grass thatched house with a wooden bed with no mattress. The appellant ordered her to lie on the bed when she delayed he slapped her. Onyiendi ordered her to take a puff of bhang she denied. The appellant thereafter tore her pant and pushed her on the bed. She requested him to use a condom and he refused saying he was going to gang rape her and call others. They were assaulting her as they raped her. She used her antics and played into his wishes by lying to him that she would accept him as her boyfriend. The other man did not rape her. The appellant raped her by having his penis inserted into her vagina. He did it three times. He forced her he did not have her consent. They slept. At 5.00am he told her to leave but it was dark. The appellant told her that he wanted another round and she complied. He dropped her at Nyacheki around 6-7am. She informed her manager and he was arrested by other motor biker operators. She went to Nyacheki sub-district hospital and was treated. She reported the matter at Nyacheki AP Post, she was issued with a P3 form at Nyangusu police station, and she was also issued with a post rape form. Kebungo disappeared. He participated by holding her feet apart and hitting her knees when she did not comply.

6. PW2 CPL Olivia Ledona testified that she was on duty at Nyangusu police station when she received PW1's report. She interrogated PW1 and noted her report. The appellant was taken to their police station. She issued PW1 with the PRC form. She received the clothes PW1 had on the material day, a black trouser a pink pant which was torn at the centre. They are still looking for Kebungo who ran away. She rearrested the appellant.

7. PW3 a clinical officer Cornelius Mariera produced PW1's P3 form, post rape care form on behalf of his colleague Fredrick Orangi Otuke. The P3 form was filled on the 23.11.2017. PW1 had swellings on the face and eyes. The left eye was red. She complained of neck pains and a headache. HVS (High vaginal swap) Urine analysis and VDRL (Viral diagnostic laboratory) was done. The pregnancy test done was positive. The other tests were negative. On examination of her abdomen a mass was felt. She had normal external genitalia, no bruise, hymen not intact.

8. The appellant in his defence gave an unsworn statement. He stated that he lives in Nyacheki. He is a motor bike rider. On the 21.11.2017 he was arrested by police officers from Nyangusu police station when he was at Stage Bar playing lotto. He saw them pushing his motor bike towards the police station. He followed them and asked them why they were taking his motor bike, then they arrested him saying he had committed an offence. He was arraigned in court without knowing the offence. They have a feud at home and the complainant is targeting him unlawfully as she is interested in his piece of land as he is an orphan. He did not know the charges. He remembers Omwoyo was the first one to allege that he raped the complainant.

9. Section 10 of the Act provides that 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. Under section 3 of the Sexual Offences Act rape is committed if one intentionally and unlawfully commits an act which causes penetration with their genital organs, where the other person does no

consent or the consent is obtained by force.

11. From the evidence I have outlined it is clear that the appellant had sexual intercourse with PW1. The testimony of PW1 was that after the appellant took her to his house he had sex with her, her words that, “*the accused raped me by having his penis and inserting his penis in my vagina. He did it three times. He forced me I did not have my consent.*” PW1 evidence was corroborated by the medical notes from Nyacheki sub-district hospital which indicates that the urinalysis revealed epithelial cells. This evidence proved that sexual intercourse took place. I find that penetration was proved.

12. Section 42 and 43 of the Sexual Offences Act 2006 provides as follows;

42. Consent

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43. Intentional and unlawful acts

(1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

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

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or

(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

(3) False pretences or fraudulent means, referred to in subsection (1)(b),

include circumstances where a person—

(a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;

(b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or

(c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life threatening sexually transmittable disease.

(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act—

(a) asleep;

(b) unconscious;

(c) in an altered stated of consciousness;

(d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;

(e) mentally impaired; or

(f) a child.

(5) This section shall not apply in respect of persons who are lawfully married to each other. [Emphasis mine]

13. From the evidence adduced there was lack of consent, there was force assault and even threats, PW1 testified as follows;

'He ordered me to the bed but when I delayed he slapped me. When I delayed to remove my pants he tore it into pieces. He pushed me to the bed and on my request to use condoms he refused, said he was going to gang rape me and call others. They were assaulting me as they raped me. ... He did it three times. He forced me. He did not have my consent.'

14. The next issue was whether it was a gang rape. Section 10 of the Sexual Offences Act, reproduced above, defines gang rape as rape done "**in association with other**". Association with others can mean acting jointly, having common purpose or interest. PW1 evidence was that Kebungo was with her in the same motor bike with the appellant. Kebungo was with her in the house the appellant took her to. He gave her bhang to puff she refused. That the two assaulted her. That Kebungo participated by holding her feet apart and hitting her knees when she did not comply. PW1 described in detail what happened to her on the material night. The appellant was not alone he was with Kebungo who held her feet as the appellant raped her.

15. The trial court considered the appellant's defence. His defence was that he saw the police take away his motor bike and on following them he was arrested and that PW1 and him had a land dispute. His defence does not cast any doubt on the strong prosecution case. In my view his defence that they had a land dispute is an afterthought.

16. I find no irregularities in the evidence. The prosecution do not have to call each and every witness. Section 143 of the Evidence Act provides that no particular number of witnesses shall in the absence of any provisions of law to the contrary be required for the proof of any fact. Further Section 124 of the Evidence Act (the proviso thereto) clearly stipulates that the Court can convict the accused person in a prosecution involving a Sexual Offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief: **(See George Kioyi V R Cr. Appl 270/2012 (Nyeri) and Jacob Odhiambo Omumbo V R. Cr. Appl 80/2008 (KSM).**

18. On the whole the prosecution proved its case as per the required standard and the trial court rightly convicted the appellant of the offence of gang rape.

19. On sentence Section 10 provides for sentence of not less than 15 years and which can be enhanced to life. The appellant was sentenced to 20 years. Under the circumstances the sentence meted was appropriate and not excessive.

20. In the end the appeal against conviction and sentence is dismissed. The trial court's conviction is upheld and the sentence is confirmed.

Dated signed and delivered at Kisii on the 8th April 2019

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr.Otieno Senior Prosecution Counsel Office of the DPP

Omwoyo Court clerk