REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 57 OF 2018

CALVIN JOHN ONYANGO

alias **ANDREA OYUGI..APPELLANT**

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 592 of 2016 delivered on 15/10/2018)

JUDGMENT

1. **Calvin John Onyango,** the Appellant herein, was jointly charged with another not before court with the offence of **Gang Rape** contrary to **Section 10** of the **Sexual Offences Act** No. 3 of 2006. He faced a second count of **Committing Gang Rape in view of a Child** contrary to **Section 7** of the **Sexual Offences Act.**

2. The particulars of the offences of Gang Rape were as follows: -

> ***On 11th day of September 2016 at [particulars withheld] jointly within another not before court intentionally and unlawfully caused his penis to penetrate the vagina of SN without her consent.***

> ***On 11th day of September 2016 at [particulars withheld] intentionally caused your penis to penetrate the vagina of SN without her consent within the view of VA, a child aged 8 years.***

3. The Appellant denied the charges and a trial was held. Five witnesses testified in support of the charges. The complainant in the first count one **SN** testified as **PW1.** The complainant in the second count one **VA.** testified as **PW2. PW3** was a Clinical Officer from Awendo Sub-County Hospital. **No. 63085 Corp. Stephen Mulumba** attached at Awendo Police Station was the investigating officer who testified as **PW4** and **PW5** was a Clinical Officer from Migori County Referral Hospital. The Appellant was represented by **Mr. Odondi Awino** during the trial. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for PW1 whom I will refer to as '**the Mother'** and PW2 whom I will refer to as '**the Daughter'** respectively.

4. At the close of the prosecution's case the Appellant was placed on his defense and opted to give an unsworn statement and called no witness. The Appellant was then found guilty of the two charges and was convicted. He was sentenced to 15 years' imprisonment on each count which sentences were to run consecutively.

5. Being aggrieved by the said convictions and sentences, the Appellant preferred an appeal through his Counsel **Messrs. Odondi Awino & Company Advocates** where he raised the following four grounds: -

> ***1. That the learned trial magistrate erred in law and facts by not considering that medical evidence adduced by PW3 did not support the complainant's evidence.***

> ***2. That the learned trial magistrate failed to appreciate that the age of the child in count II was not established.***

> ***3. That the learned trial magistrate failed in law and fact to appreciate that the offence alleged happened in one transaction, went ahead and meted out sentences of 20 and 15 years to run consecutively.***

> ***4. That the learned trial magistrate misdirected himself in his understanding that there was corroboration in the circumstances.***

6. Directions were given and the appeal was disposed of by way of oral submissions. Counsel addressed the Court on two main grounds, that of lack of medical evidence and the severity of the sentence and prayed that the appeal be allowed whereas the Learned Senior Principal Prosecution Counsel **Mr. Kimanthi** submitted in opposition to the appeal.

7. This being the Appellants' first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the counts of gang rape and those of committing gang rape in view of a Child were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions and I must say that both the prosecution and defence evidence was well captured in the judgment under appeal and I hereby incorporate that part herein by reference.

9. The offence of gang rape is provided for under **Section 10** of the **Sexual Offences Act** (hereinafter referred to as '**the Act**'). The said section states as follows: -

> ***10. 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 fifteen years but which may be enhanced to imprisonment for life.***

10. 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.

Was the offence of rape committed?

11. **Section 3** of **the Act** defines '**rape'** as follows:

> ***(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."***

12. **Section 2** of **the Act** defines '**penetration**' as:

> ***the partial or complete insertion of the genital organs of a person into the genital organ of another person.***

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

> ***…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….*** (emphasis mine).

13. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

14. In demonstrating this particular ingredient of the offence, the Mother narrated how her husband kicked her out of their house at night of 10/09/2016. That, she packed her belongings and left with her two children; the Daughter and a young child aged around 8 months old one **LO**. That, reaching the main road the Mother met a friend of her husband whom he knew so well and who is the Appellant herein. The Appellant used to visit the home of the Mother's husband and the Mother had even served the Appellant once with food on his such visit. On asking what had happened, the Mother narrated the preceding events and the Appellant offered to assist them find a place to put up for the night before they left for Kitale the following morning. With such a background, the Mother agreed. The Appellant took them to a friend's house and after talking to the friend the Mother and her two children were given a room to spend in as the Appellant and the other two men went to sleep in the Appellant's house.

15. It appears that the night was bedeviled with tragedies on the part of the Mother. The Mother narrated the events that followed as under: -

> ***…I locked the door with the chapi and slept. I did not switch off the light. I was awoken when someone was on top of me and holding a panga to my neck. It was the accused herein [the Appellant]. He told me that I would have to have sex with him. I told him it was not possible. He started removing my trouser. I had on trousers. The commotion awakened my daughter N…. When she saw it was him, she told him 'Oyugi please forgive my mother'***
>
> ***At the time the door opened and one of the other young men entered. He was holding a knife. He went to her and put the knife on her neck………..***
>
> ***He undid the zip to my jeans. He started pulling them off. I had a T-shirt. He told me to remove my panty. I removed it. He removed his trousers. He did not remove it wholly. It went to his knees. He then removed his penis. He put it in my vagina and had intercourse with me. He did not use protection.***
>
> ***My daughter was at the time standing. The other young man was holding a knife to her neck and making her watch. …….When Oyugi was done he called the young man who was guarding V…He went to guard V…He instructed the young man that he had to have intercourse with me. The young man put a condom. He then inserted his penis inside my vagina and had intercourse with me. He was at it a short time and then Oyugi pulled him off. I put on my clothes. Oyugi still had a panga. He told me it was time to leave. He told me he would see me off to safety but using a different route. We left………***

16. The daughter corroborated the evidence of the Mother and even stated that when the Appellant had a scuffle with her Mother she told the Appellant to forgive her mother and she was threatened. She then saw one of the young men who had left with the Appellant walk into the room and held a panga next to her neck. That, she got off the bed and stood next to it. The daughter narrated the entire sex ordeal between her mother, the Appellant and the young man who held a panga to her neck. She however did not know what they were doing although they were naked.

17. The Clinical Officer (PW3) confirmed that on examination of the Mother's genitalia after 58 hours she found some bruises and scratch marks on the upper part of her both thighs as well as dry white discharge. He also testified that there was no presence of spermatozoa revealed in urinalysis as spermatozoa remain alive for 5 days. He however stated that sexual contact is possible without the presence of spermatozoa.

18. The Mother was a married woman who was with her two children on the alleged date and time. The Mother definitely knew what sex was all about and described the events with certainty and clarity. Therefore, on consideration of the evidence on this issue in totality, I find that indeed there was penetration of the Mother's vagina by a male organ.

19. **On the age of the Mother**, I wish to observe that under **Section 10** of the Act it seems that the age of the victim is immaterial since the offence of gang rape is proved on *inter alia* the commission of either rape or defilement. However, the age is material on sentencing. PW3 accessed the apparent age of the mother as 27 years old. The trial court was as well satisfied that the Mother was an adult. The police who issued the P3 Form also indicated the age of the Mother as an Adult. I hence find that the Mother was an adult of around 27 years old at the commission of the offence.

20. On the aspect of the **consent, Sections 42, 43, 44** and **45** of the Act deals with that aspect at length. **Section 42** states as follows:

> ***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***

Sections 43, 44 and **45** of the Act goes into great detail in describing instances where one's consent cannot be said to have been obtained.

21. From the above statutory description of the consent and going by the testimony of the Mother and the Daughter it can be clearly seen that the Mother never consented to the sexual activity with the assailants. The attackers were armed with a panga and threatened the Mother and the Daughter with death on raising alarm or resisting any command given. The Mother and daughter testified that pangas were put next to their necks and were really frightened and had to oblige to any command they were given. Further, it is clear that the assailants took advantage of the desperate situation the Mother was in that night. The commotion, the use of threats and the holding of the pangas close to the necks of the Mother and the daughter were indicators that the Mother was opposed to the act. I therefore find that the Mother did not consent to the sexual acts and that the sexual activities happened against her will.

22. This Court therefore comes to the finding that the offence of rape was committed on the Mother.

23. Since the offence the Appellant is facing is gang rape, I will now consider the other limb as to whether there were joint assailants and if so if they had a common intention in the commission of the offence.

24. The offence was committed during the night inside the house of one of the friends to the Appellant. The Mother and daughter narrated how the Appellant and the other young man had sex with the Mother in turns. Subject to identification, the Appellant committed the offence in association with another person. The two had common intention.

25. On **identification**, the Mother and Daughter readily recognized the Appellant when they met him at the main road. It was the Appellant who took them to the house of the Appellant. The Mother and the Daughter knew the Appellant so well as they interacted regularly as neighbours in the village and the Appellant was also a friend to the Mother's husband and even visited their home and the Mother had even served him with food. The Mother told the police that it was the Appellant who was in the company of another man whom she described who

were the assailants. Both the Mother and the Daughter testified that the house was lit with a lamp which was not put off. Further, the Appellant and the two young men walked with the Mother and her two children for about 2 hours and the Appellant kept on talking to the Mother and threatened her of death in the event she reported him. The Mother assured him that he would not do so. It was also the Appellant who organized for two motor cycles to ferry the Mother and her two children with their luggage to the bus stage for Kitale. Both the Mother and Daughter contended that they had ample time with the assailants and saw them so well that their identification was not in error.

26. The evidence on identification by the Mother and the Daughter must be carefully tested. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> ***... 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? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

27. The Court of Appeal has also discussed this issue at length. (See **Wamunga vs Republic (1989) KLR 426, Nzaro vs Republic (1991) KAR 212, Kiarie vs Republic (1984) KLR 739** among others).

28. The Appellant denied the offences and stated that he was framed following domestic differences with his relatives. The evidence of the Mother was duly corroborated by the Daughter who also narrated the events as they unfolded until they reached the place where they boarded the two motor cycles. By placing the prosecution's evidence and the defence side by side and on the guidance of the binding case law I find that the Mother and the Daughter had ample opportunity to see the assailants right from the road they met as they had been thrown out of their home, at the home they spent in and even on the road in the morning of the following day and as such the defense is outweighed by the prosecution's evidence. The identification of the Appellant herein as the one who was in the company of a young man when they jointly and in turns had sex with the Mother is hence without any error.

29. The upshot is therefore that the offence of gang rape was proved in law and the appeal on conviction is hereby dismissed.

30. As to whether the offence of Committing Gang Rape in view of a Child was proved, the starting point is whether the Daughter was a child in law. An Age Assessment Report was produced as an exhibit which stated that the age of the Daughter was 10 years old. That evidence was not controverted and settled the issue. The Daughter was a Child of tender age when the offence of Gang Rape was committed.

31. On whether the Daughter was within the view when the Mother was gang raped, the evidence of the Mother and that of the Daughter come to play. They both testified that the Daughter stood next to the bed where the assailants had sex with the Mother. The Daughter saw the assailants climbing on top of the Mother in turns as the assailants held the panga near her neck in turns so as to threaten and silence her. The evidence of the Daughter was so clear that she saw the assailants having sex with her Mother.

32. I also find that the offence of Committing Gang Rape in view of a Child was proved and the Appellant rightly found guilty and convicted. The appeal on conviction is hence dismissed as well.

33. The Appellant also vehemently challenged the sentences rendered. The offence of gang rape attracts a minimum sentence of 15 years' imprisonment and a maximum of life imprisonment on conviction. The offence of committing gang rape in view of the child carries a minimum sentence of 10 years' imprisonment on conviction. The Appellant was sentenced to 20 years' imprisonment on the first court and to 15 years' imprisonment on the second count. The sentences were ordered to run consecutively.

34. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

35. The sentences rendered were lawful and there was no demonstration that the sentencing court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case the sentence is harsh and excessive.

36. As to whether the sentences were to instead run concurrently, I must acknowledge the general policy that sentences for offences committed in the same transaction ought to run concurrently. However, that is a general position and each case must be decided on its own merit.

37. In this case I am in agreement with the sentencing court for the reason that the Daughter was a child of tender age and memories of how her mother was gang raped in her presence would definitely have a long term effect on her life. That was a factor which negated the general policy on concurrent sentences. I hence find that the sentences were proper and that they should run consecutively as ordered. The appeal on sentences equally fails and is hereby dismissed.

38. I therefore affirm the decision of the Learned Magistrate and the appeal be and is hereby dismissed.

DATED, SIGNED and DELIVERED at MIGORI this 14th day of May 2019

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Odondi Awino, Counsel for the Appellant.

Mr. Kimanthi Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant