



IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 48 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 49 OF 2018

BETWEEN

HILLARY KIPCHUMBA KIMOSOP.....1ST APPELLANT

MATHEW KIMWETICH.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. N.C. Adalo, RM

dated 10th July 2018 at the Magistrates Court in Iten in Criminal Case No. 30 of 2017)

JUDGMENT

1. The appellants, **HILLARY KIPCHUMBA KIMOSOP** and **MATHEW KIMWETICH** were charged, convicted and sentence to 15 years' imprisonment for the offence of gang rape contrary to **section 10** of the *Sexual Offences Act No. 4 of 2006* ("the Act"). The particulars of the offence were that on 8th May 2017 at around 09:00 p.m. at [particulars withheld] Sub-location, in Kuserwo Location within Elgeyo Marakwet County in association with another, one after another, willfully and unlawfully caused their genital organs namely penis to penetrate the genital organ namely vagina of **RJN**.
2. The 1st appellant faced additional counts of rape contrary to **section 3(3)** of the Act and for committing an indecent act contrary to **section 11A** of the Act in respect of another complainant but he was acquitted.
3. The appellants now appeal against conviction and sentence. This being a first appellate court, I am mindful of the duty of this court which is to re-appraise the evidence and reach an independent conclusion as to whether to sustain the conviction. I shall outline and analyze the evidence before the trial court bearing in mind that I neither heard nor saw the witnesses testify.
4. The complainant (PW 2) testified that on 8th May 2017 at about 9:00 pm, as she was working at [particulars withheld] Kimnai Centre, the 1st appellant called her and told her that he wanted to see her. He was in the company of his brother, the 2nd appellant. When she went outside, the 1st appellant hit her on the left arm with a piece of wood. Both appellants pulled her to their mother's home which was about 500 metres from the centre, chased their mother and younger brother from her house, dragged her to a bed where they stripped and raped her. The 1st appellant was the first to rape her and when he was done, the 2nd appellant who had been waiting outside got in, went on beating her and raped her.
5. PW 2 testified that she fainted during the ordeal and regained consciousness when she heard the appellants' elder brother, beating up the 2nd appellant and asking him what they had done. He escorted PW 2 to the center. On the following day she went to Kimnai Dispensary and was transferred to Chebiemit Sub-county hospital where an x-ray revealed that she had suffered a fracture. She reported the incident at Chebiemit Police Station and was issued with a P3 medical report form which was filed at the hospital by PW 5, a clinical officer. When cross examined, PW 2 stated that the 1st appellant had offered to pay her Kshs. 35,000/= and she had agreed because he had threatened to kill her.

6. PW 5 recalled that he had examined PW 2 on 12th May 2017. He noted that she had swollen, bruised and tender left hand, thighs and eyebrows. She had a broken tooth and had sustained a fracture of the left mid ulna. Both thighs also showed signs of beating. On external examination of her genitalia, he noted blood on the examining finger and observed bruises, blood and lacerations on the cervix on speculum examination. He classified the degree of the injuries as grievous harm and concluded that there was evidence of penetration.
7. The investigating officer (PW 7) testified that on 9th May 2017 at about 10.00am, he received a call from a lady reporting that her employee had been raped. He told her to advise the victim to report the matter and visit a hospital. On 12th May 2017, PW 2, made a report and was issued with a P3 form. PW 7 testified that the appellants had gone into hiding before they were arrested. On 18th September 2017, PW 7 received another complaint that the 1st appellant had raped another lady the previous evening. The appellants were arrested at a later date and arraigned in court.
8. The 1st appellant (DW 1) denied the offence in his unsworn testimony. He stated that he had gone to [particulars withheld] club on the evening of 8th May 2017 and while he was there PW 2 started an argument and poured a jar of water on him. He testified that he had slapped her and left for home. He recalled that one of the revelers at the bar had thrown a bottle at the TV screen breaking it. He was summoned by a village elder to discuss the issue and it was agreed that he would pay Kshs. 35,000/= for the damage. He testified that by 22nd August 2017, he had only managed to get Kshs. 15,000/= which he gave to the bar owner which she refused to accept. He stated that on 24th September 2017, as he was relaxing at a club an officer and the watchman assaulted him and took him to the administration police camp whereupon he was charged. He told the court that he had been framed as the only case against him was the assault.
9. The 2nd appellant (DW 2) testified that he got into an argument with his younger brother the morning after he had attended an all-night party on 8th December 2017. He testified that he would have conceded had he been charged with creating disturbance but denied the charge of gang rape.
10. DW 3 testified that on 23rd July 2017 she had been selling groundnuts at [particulars withheld] and had to leave due to a fight involving the 1st appellant and PW 2. About 2 months later, a meeting was convened and it was agreed that the owner of the bar would be paid Kshs. 35,000/= by the 1st appellant. This was put down in an agreement which she was asked to sign. DW 4 recounted that he been requested to attend a meeting by the owner of a bar where the 1st appellant had caused disturbance. They discussed the assault on PW 2 and the damage of items at the bar and it had been agreed that the 1st appellant would pay Kshs. 35,000/=. He testified that PW 2 had only testified that she had been slapped and that there had been no mention of rape.
11. The appellants filed elaborate written submissions expounding the grounds of appeal set out in their duplicate amended petitions of appeal dated 23rd November 2018. They challenged the evidence given by the complainant on the grounds that it was uncorroborated and key witnesses such as the owner of the bar and its patrons that night had not been interviewed by the police or called to testify. They also submitted that the complainant's testimony was inconsistent and had been manufactured due to their failure to honour the agreement between them to compensate the complainant for assault. They argued that the complainant's testimony was further weakened by the fact that her evidence and that of the medical doctor PW 5 were contradictory, as the complainant had testified that she had been escorted by Abraham to the center after the ordeal yet PW 5 testified that she had told him that she found herself naked the next day and had walked herself home. PW 5's evidence which was backed by medical records also showed that the complainant had gone to hospital on 12th May 2017 contrary to the complainant's testimony that she went to the hospital on 10th May 2017.
12. The appellants argued that they had put forward a coherent defence whereas the complainant's testimony had been inconsistent and showed her propensity to deceive. They questioned the constitutionality of the trial court's refusal to grant them bond and complained that the sentence meted out on them by the trial court was excessive.
13. The respondent's position was the prosecution proved each element of the offence. Counsel for the respondent submitted that the appellants were properly recognised as the complaint knew them and they admitted as much in their defence. Counsel contended that the complainant was not part of the alleged agreement and that it did not negate the facts establishing the offence.
14. The appellants were charged with the offence of gang rape contrary to **section 10** of the **Act** which provides;
- 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 than fifteen years but which may be enhanced to imprisonment for life.*
15. The essential element of gang rape is rape committed in association with other persons. The offence of rape which is described under **section 3(1)** of **Act** entails the intentional or unlawful penetration of the genital organs of one person by another without consent.
16. The testimony of PW 2 was clear and consistent on how the appellants coaxed her out of her place of work and had forcefully took her to their mother's home where they both proceeded to have sexual intercourse with her without her consent. The fact that there was no consent is evidenced by the violence they inflicted on her. The complainant testified that she went to Kimnai dispensary the day following her attack and was transferred to Chebiemit sub-county hospital where PW 5 examined her on 12th May 2017. From the proceedings, it is evident that PW 2 was subjected intense cross-examination from the appellants and her testimony remained unshaken.
17. PW 5 testified that the complainant lost consciousness when the appellants attacked her which contradicted the complainant's testimony. However, since PW 5 did not witness this, the history he gave of the offence amounted to hearsay. The relevance of his testimony was only confined to his examination of the complainant which proved that there was penetration and also confirmed that the complainant had been assaulted. He reached this conclusion after observing bleeding and bruises in the complainant's genitalia and the injuries she had on her body

including a fracture she had sustained on her left upper limb where she had said the appellants hit her. All the evidence confirmed that the acts of penetration by the appellants were by force and without consent of PW 2.

18. The appellants argued that crucial witnesses such as Abraham, their mother and younger brother who were present at the scene, were not called to testify in the matter. **Section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* provides that no particular number of witnesses is required for the proof of any fact. When asked by the 2nd appellant about these witnesses in cross-examination, PW 7 stated that they refused to record statement. This is understandable as they were the appellants' relatives.

19. The appellants' argument that the trial court was wrong to convict them on the sole evidence of the complainant is untenable for the reason that her testimony was corroborated by medical evidence. Further the proviso to **section 124** of the *Evidence Act* entitles a court, for reasons to be recorded, to convict an accused based on the evidence of single witness where the witness is a victim of a sexual offence. In this case though, there was sufficient corroborative evidence that appellants subjected PW 2 not only to forceful penetration but also to violence.

20. As to whether the appellants were properly identified, it was established that the conditions prevailing at the time were difficult for positive identification. It had been raining that night and there were no electric lights in the stretch between the bar where the appellants accosted PW 2 and dragged her to the house where they raped her. In such cases, the trial court was enjoined to examine the evidence carefully to eliminate the possibility of an error occurring.

21. The complainant testified that she saw the appellants when they called her from her place of work. She had known them since 2014 hence even in the difficult conditions she recognized them. In *Anjononi & Others v Republic [1980] KLR 59* the court held that recognition of someone known to one is more reliable than identification of a stranger. But in *Wanjohi & 2 Others v Republic [1989] KLR 415*, the Court of Appeal noted that, "*recognition is stronger than identification but an honest recognition may yet be mistaken.*" Since PW 2 knew the appellants, they are the ones who called her and given the nature and duration of the assault which she described in detail are all factors which eliminated the possibility of error.

22. In their respective defences, the appellants' contended that they were framed by PW 2 for failure to pay compensation for assault. This defence was rightly rejected by the trial court in light of the overwhelming prosecution evidence. In any case, when PW 2 was cross-examined by the 1st appellant on this issue she was very clear that the agreement was an attempt to get her to withdraw the complaint and was made under threat. The appellants did not explain why the PW 2 would implicate the 2nd appellant if the quarrel had been between her and the 1st appellant. The fact that the appellants disappeared from the locality and were arrested in September 2017, 5 months after the incident is inconsistent with their innocence. If in fact, the issue had been settled or that the matter involved only a breach of the peace, why would they disappear for 5 months?

23. Having re-evaluated the evidence, I am satisfied that the prosecution proved that both appellants raped the complainant bringing the offence within the provisions of **section 10** of the *Act*.

24. The mandatory minimum sentence for the offence of gang rape is 15 years' imprisonment hence the sentence imposed on the appellants was neither harsh nor excessive and does not warrant interference.

25. Before I conclude the judgment, I wish to deal with the complaint by the 1st appellant that his right to be released on bond or bail under **Article 49 (1) (h)** of the Constitution was violated. From the proceedings, it is apparent that the trial court exercised its discretion in denying and revoking the 1st appellant's bond. That was within its discretion and the 1st appellant had right to seek review of the decision or appeal against it. The violation pre-trial rights is a matter outside the jurisdiction of this court to consider as was held by the Court of Appeal in the case of *Julius Kamau Mbugua v Republic NRB CA Criminal Appeal No. 50 of 2008 [2010] eKLR* and does not affect the guilty or innocence of the 1st appellant.

26. The appeal is dismissed.

SIGNED AT KISII

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2019.

H. OMONDI

JUDGE

Appellants in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.