



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 100 OF 2017

(FORMERLY ELDORET HCCRA NO. 164 OF 2014)

VICTOR KORIR KIPLAGAT.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 32 of 2014 delivered on the 22nd day of October, 2014 by Hon. E. Kigen, RM]

JUDGMENT

1. The appellant was on 22/10/2014 convicted and sentenced to imprisonment for 15 years for the offence of gang rape contrary to section 10 of the Sexual Offences Act. The particulars of the offence were that he “on the 14th day of January 2014 at [particulars withheld] Sub-Location in Baringo Central District within Baringo County, in association with another not before the Court did intentionally and unlawfully cause his penis to penetrate the vagina of N.J.S without her consent.”

2. The appellant's grounds of appeal were set out in his Amended Grounds of Appeal as follows:

1. THAT the trial Magistrate erred in both law and facts by delivering a judgment by not analyzing the evidence of the defence and reasons for rejection.

2. THAT the trial Magistrate erred in both law and facts and law is proceeding to write judgment on a matter he was not presiding over and by not giving the appellant a chance to give his opinion whether he agrees for the case proceed for judgment hence occasioning miscarriage of justice.

3. THAT the trial Magistrate erred in both law and facts by delivering judgment without considering my poor communication barrier between me and the complainant's translator.

4. THAT the trial Magistrate erred in both law and facts by delivering judgment and convicting me on a matter that Clinical Officer states upon examination that I was not involved on the issue.

5. THAT the trial Magistrate erred in both law and facts by delivering judgment on a matter that the prosecution did not visit the scene.

The appellant additionally filed another submissions which he relied upon at the hearing.

3. The DPP made oral submissions to which the appellant responded as shown in the record of proceedings before this Court as follows:

Ms. Macharia

I am ready to proceed.

Appellant

I wish to add that Pw4 asked me whether I knew the complainant and I answered in the affirmative.

Exhibits recovered by the Interpreter and taken to police station. I was not involved in the matter.

Ms. Macharia

Appeal is opposed.

Appellant convicted gang rape contrary to section 10 of the Sexual Offences Act and sentenced to 15 years on 22/10/2014.

Complainant is deaf and dumb. She gave her evidence through interpreter one J K, a teacher and sign language interpreter.

She testified that on 14/1/14 at about 7:00 pm she went to [particulars withheld] Hotel at Kabarnet and boarded a Boda Boda rider to take her home. The Boda rider is known to her. There was another passenger when she boarded the motorcycle. She explained about the passenger, and the appellant informed her that he knew the appellant and they were headed the same direction.

On reaching a place known as Ebenezer where the complainant was supposed to alight, she showed the appellant to stop but he refused. The other passenger also told him that to stop.

The complainant stated that they proceeded upto a junction which was near the forest. The other passenger alighted and followed the complainant to towards the forest while the appellant kept vigil. The appellant then jointed the appellant and they blind folded the complainant with a scarf after which she felt dizzy and lost consciousness. When some women came and looked her up. She had been raped.

The evidence of Pw1 was corroborated by Pw2, Pw3 and Pw4. They also stated that the complainant was their neighbor. They testified that on 14/1/14, as they were coming from a funeral around 7:00 pm when they alighted from a matatu at [particulars withheld] junction. It was a bit dark and they saw an object that had a reflector. On close scrutiny and on raising a torch they saw that it was a motor cycle. Two people boarded the motor cycle and drove off. One of them was wearing a red Jacket. A few metres from there, they found the complainant lying naked from the waist. Her nose and eyes were covered with a pink scarf. They looked her up but she was weak. They carried her to the main room where they saw a KPLC vehicle and they stopped it. The occupant of the vehicle assisted the women to take the complainant to hospital while in hospital appellant also came and the KPLC staff enquired from him he was the one they had assisted after he had an accident with his motorcycle and he said yes.

Before the KPLC vehicle reached the point where they assisted the complainant they had met the appellant who had an accident with his motorcycle and they had assisted him. So when they found him in hospital, they recognized him.

When the KPLC was talking to the appellant the complainant recognized the appellant as the person who had carried her on the motorcycle and she grabbed him. The other people knew that the complainant and the appellant knew each other. He was wearing the same red Jacket.

Pw5 testified that both the complainant and the appellant were customers at a time at spirits shop and Singoro Hotel. On 14/1/14 at about 4:00 p.m. both of them had come to this shop. I and the appellant took the complainant as he said he knew her home. He was to take her home. Pw5 stated that they left together.

Pw6 is the doctor who examined the complainant. He found that she had bruises on the labia and numerous pus cells with no discharge. She concluded that there was penetration.

Pw1, Pw3 and Pw4 later identified a scarf which had been used to cover the complainant's mouth and nose. The said scarf was also identified by Pw5 as the one the appellant was wearing on the date when he picked complainant to the hotel.

The scarf had a white substance. Pw7 said he took the scarf to Government Chemist and the substances found to be a tranquilizer daily known as Chlorpromazine. In his defence, the appellant confirmed that he knew the complainant as his customer and he had considered her on that material night p. 30 line 7 – 14. He also confirmed that the red jumper belonged to him, which is the one he was wearing during the incident and the one he was wearing when he went to the hospital when he was arrested.

Evidence is overwhelming. Evidence is consistent and the appellant was placed at the serve. There is no doubt that the appellant with another one was arrested in consideration raped the complainant after changing her and becoming unconsciousness. The appellant was sentence to 15 years which is now minimum sentence.

Appellant in reply

I went to the Wines and Spirits I found the complainant with another person who was not arrested. She had told me that he was her husband when I reached the place I helped her. I only knew of the event at the hospital. I had an accident and the KPLC vehicle helped and told me to go to hospital.

The KPLC came to hospital and found me. If I had been involved, I would not have admitted that I was the one who was assisted by the KPLC

The interpreter received the exhibit and stayed behind and when the complainant reached the police station, the exhibit.

The interpreter could have done something to the scarf. Otherwise, she would have presented it with the complainant at the police station.

The Investigation Officer asked for the interpreter who came with the scarf and other exhibits.”

4. The issues before the Court are whether the offence of gang rape was committed and whether the appellant was shown to have been involved in the offence.

Determination

5. The Court has consistently with its duty as a first appellate Court reevaluated the evidence presented before the trial Court, to reach its own conclusion before considering whether to uphold the decision of the trial Court. (*Okeno v. R* (1972) EA 32).

6. The parameters of the offence of gang rape against which the evidence shall be considered is set out in section 10 of the Sexual Offences Act as follows:

“Gang rape

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.”

7. The offence of gang rape is, therefore, committed in two situations where:

1. A person **commits the offence of rape or defilement in association with another**, or
2. With common intention, is in the company of **another or others who commit the offence of rape or defilement**.

8. Under section 20 of the Penal Code, a person who aids or abets another in committing of an offence is guilty as a principal offence as follows:

“20. Principal Offenders

1. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

- a. every person who actually does the act or makes the omission which constitutes the offence;
 - b. every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - c. every person who aids or abets another person in committing the offence;**
 - d. any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
2. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
3. Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Analysis of Evidence

9. Pw1 being deaf and dumb testified through an interpreter for sign language as follows:

“PW1

I am C. S., I live in [particular withheld], I work at GTI. I know the accused he is a motorbike rider. I recall on 14/1/2014 it was on Tuesday around 7:00 pm after work. I went to Singoro then I hired a boda boda to take me home. There was another passenger on board whom I didn't know and enquiring from the driver he told me that he knew him and we were headed to the same direction.

On reaching near Ebenezer, I asked the driver to stop but he refused when the other passenger told him not to stop.

We went up to a junction that was near forest. The other passenger alighted and pulled me towards the forest where the other person kept vigil.

I surrendered and the accused blind folded me with a scarf. After which I felt dizzy and fell because the scarf was laced with some substance which made me dizzy.

The other person pushed me to the ground and I fell my bag dropped and also my shoes disappeared. I lost consciousness and regained conscious when some women came and woke me up.

Torn blood stained pink dress – MFI (1). Torn black pant – MFI (2). I was still blind folded and my mouth tied up. One Zipporah and another old lady woke me and called me to the road. We boarded a Kenya Power Lighting vehicle which took me to hospital I was feeling very weak.

I met the accused in hospital and he was bleeding. I was able to identify the accused and even asked him to refund my money Ksh.1500/= which he had picked from my bag.

The Kenya Power employee slapped the accused and asked him to refund the money. They later took the accused to the police station in my company.

The next day I went to hospital for treatment. I was examined by the doctor although we had a communication barrier. I was given medication. I was also issued with a P3 form which was dully filled by the doctor in the presence of Jane Kisera.

P 3 form – MFI (3).

Red blood stained jumper (MFI 4).

INTERPRETOR: I later took the complainant to hospital where she was given medication and an emergency pill. I instructed her on how the same were to be swallowed and I followed up to ensure that she took her medication.

I even reported to the area chief. I have sine seen the other suspect in town. I held his hand and told him that he is the one who had raped me but he ran away.

At the stage there were security lights he had a red jumper and black jacket on top. And I knew him before.

That is all.

RE-EXAMINATION BY THE ACCUSED

- a. I boarded the boda boda outside the stage.
- b. It is the other suspect who called you to come and take me home.
- c. I did not drink alcohol.
- d. I did not write in my statement that I had been given alcohol.
- e. I bought my own alcohol using my money.
- f. On being asked if I wanted more I said no.
- g. Nobody bought me alcohol.
- h. It is the other person who called for a boda boda.
- i. I told you not to carry the other passenger but refused and said you knew him he was your friend and he was giving you escort.
- j. The other suspect was from Pemwai and I thought you would drop me and proceed to drop him at Pemwai.
- k. You left the motorcycle on the road and kept vigil.
- l. Both of you pulled me towards the forest and held my left hand and the other person pulled my right hand.”

10. At the outset of the hearing before the trial Court on two occasions 16/3/14 and 24/4/14, the appellant requested the Court to be escorted to the police station to record a statement to who committed the offence, stating that he did not commit the offence. The record of 25/4/14 shows that the appellant had been “*taken to the police station and I had recorded my statement*” but nothing apparently came out of it. On 23/6/2014, the accused protested that “*I am not ready to proceed since whoever committed the offence is still walking scot-free in town,*” and

the prosecutor stated that “I will inform the OCS so that he can personally take over the matter and arrest the accused who is known.” On 3/7/14, despite request by the accused that “I want the other suspect to be arrested first,” the case proceeded to trial with Pw1, C.S., testifying through a sign language interpreter and at the request of Prosecution, the Identification of exhibit by Pw1 deferred, as it was said to be at (Government Chemist), Nairobi.

11. It is clear for the evidence of Pw1 that the appellant’s role in the rape was an aider and abettor in that she only accused the appellant as follows:

“On reaching near Ebenezer [the complainant destination] I asked the driver to stop but he refused when the other passenger told him not to stop.”

“The accused blindfolded me with a scarf. After which I felt dizzy and fell because the scarf was laced with some substance which made me dizzy.”

12. Accordingly to Pw1, it was the other person who pulled her towards the forest and pushed the complainant to the ground and according to medical evidence raped her. Indeed, Pw1 was aware of this as she said “I have since seen the other suspect in town. **I held his hand and told him that he is the one who had raped me but he ran away.** It was the other suspect who called the boda boda for me when I requested him to help me get a boda boda to take me home.”

13. In this case, the appellant was charged with gang rape in the first sense of the rapist in association with another, according to the particulars of the offence set out above. In this case, proof of rape (or defilement) committed by the accused is crucial to the offence, unless the provisions of section 20 of the Penal Code on principal offenders apply.

14. Three women Pw2, Pw3 and Pw4 who were going back home from a funeral arrived at the scene and their evidence as to finding a motorcycle parked besides the road and two men on seeing them driving off fast and almost knocking them down and later finding and rescuing Pw1, is consistent as follows:

“**PW2**

I am Z C from [particulars withheld]. I am a house wife. I know A.C.S she is a neighbor. I recall on 14/1/2014 I was in the forest at around 7:00 pm we were from a safari on reaching the junction to the forest we saw a motor bike packed beside the road. I was with R and K.

On alighting we saw a motorcycle parked besides the road. Two men on seeing us ran and took their motorcycle and drove away very fast they almost knocked us down.

We walked a bit when we saw the complainant whose mouth and eyes was covered with a scarf. Her pant was besides her she had been stripped naked and was lying on the ground. We screamed, and using our torch we shone the torch and discovered it was C. There was a red jumper, MFI (4) pink dress MFI (1) and shoes and a black pant MFI (2) and handbag identified.

We carried her to the main road and luckily a KPLC vehicle came it had 2 people on board. They said that they had met two boys on a motorbike which didn’t have headlights. We boarded the vehicle and took the complainant to the hospital. While in hospital the accused came in and the complainant grabbed the accused and pointed at him that is when we knew it was him.

He asked him where the other person was using sign language. The accused was taken to the police station. On being asked the accused said he was not him but his friend who had said that he wanted him to escort him and his friend. The officer did not accept to accompany us to hospital but he arrested the accused.

We left for home and dropped the complainant at Ebenezer. J later took the complainant to hospital. I did not identify the accused in the forest since it was dark and the headlights had been switched off. That is all.

RE-EXAMINATION BY ACCUSED

i. I did not see you at the forest.

ii. I did not witness the accident.

iii. You said that you knew the complainant because you had carried her severally.

iv. It is the complainant who identified you.

v. You drove off first and almost hit another person.

vi. The scarf was produced at the station and medicine fell.

“**PW3**

I am K C from [particulars withheld]. I am a farmer. I know the complainant she is a neighbor. I know the accused he almost knocked me in the forest. I recall on 14/1/2014 it was around 8:00 pm we were from a funeral in Mogotio. On alighting at Ebenezer as we were heading home, we were with mama G, mama C. We spotted a motorcycle on approaching the motorcycle somebody jumped and drove off very first. It even brushed me on my stomach on looking closely I saw two people. I cursed them we proceeded and found the complainant lying facing upwards, she had been defiled, her pant was a few metres away and **she had been covered on the mouth and eyes.**

I saw a pink dress, red pant and jumper – MFI (1) (2) identified using the torch we were able to identify the complainant. She was unconscious and we identified her as daughter of K. We carried her to the main road. We found a vehicle heading to Kabartonjo and whom we told what happened. They said they had met a motorcycle and did not have headlights.

A KPLC vehicle arrived and we told them what happened. They boarded the vehicle and proceeded home. I did not spot the accused at the scene.

CROSS-EXAMINATION BY THE ACCUSED

I did not identify you as it was dark.

I only saw two people on the motorcycle.

She had a black scarf like the one you are wearing today.”

“PW4

I am R B. I live in [particulars withheld]. I am a farmer. I know the complainant she is a neighbor. I know the accused we met in hospital. I recall on 14/1/2014 we were from a funeral at around 7:40 pm we alighted at the junction Seretunin. We saw an object that had a reflector, we asked one of our colleagues to shine a torch which we identified the motorcycle. That did not have lights there were two people on board. One had a red jumper. A few metres ahead we found the complainant who was lying naked below the waist and handcuffed on the nose and eyes. MFI 1, 2, 4 identified.

She was unconscious we carried her to the main road. We met a motor vehicle and in the process of inquiring if they had seen a motorcycle a KPLC vehicle came and on enquiring they told us that they had found a motorcycle which had been involved in an accident. Suddenly a KPLC vehicle came and we boarded the vehicle to hospital. Some of the KPLC staff asked the accused if he is the one they had assisted after an accident and he said yes. We asked him if he knew the complainant and he said yes he had been hired by her husband to take them to the forest.

Suddenly the complainant grabbed her and pointed him. He went to the police station and later left for home.

The accused had marks on the forehead.

CROSS-EXAMINATION BY THE ACCUSED

i. We saw the reflector of a motorcycle.

ii. You speed off first and almost hit one of us who chased you.

iii. I saw you very well using the light from our torch, you had a mark which is on your face and you had an orange jacket.

iv. You told us that you knew the other person who was your customer.

RE-EXAMINATION

- I shone my torch and saw the accused he had a mark on the forehead and an orange jacket which he was wearing even in hospital when we met him.”

15. From the evidence of the three women, it was clear that the two persons who drove off very fast upon their arrival at the scene were acting in concert because, the motorcycle had been parked besides the road and the two drove off together fast and with head lights switched off obviously to avoid identification. Whatever it was that the two persons had done, it was clear that they acted together, or one had assisted the other do whatever it was that the other did.

16. Pw5, the Wines and Spirits [shop] attendant who knew both the complainant and the appellant as his customers testified as follows:

“PW5

I am M K from [particulars withheld]. I work at Wines and Spirits at Sinkoro as an attendant.

I know the complainant she is my customer. I also know the accused as a customer. I recall on 14/1/2014 at around 4:00 pm when the complainant came and bought alcohol which she kept in her bag. The accused came and bought cigarettes and left his head lamp behind. The complainant sat when the accused came and took the complainant as he knew her home.

They left with the complainant. He left a head lamp in a green paper bag. He came back the next day and picked the lamp at 2:00 pm and returned it again after a few minutes.

Head lamp – MFI (5)

They left at around 7:00 pm. That is all.

CROSS-EXAMINATION BY THE ACCUSED

The complainant bought the alcohol and put in her bag.

You bought a cigarette and went to smoke outside and then came back and picked the complainant.

RE-EXAMINATION

The complainant was tipsy and the accused having a motorbike offered to take her home.”

The bar tender significantly testified on re-examination as follows:

“The complaint was tipsy and the accused having a motorbike offered to take her home.”

17. Pw6, a Clinical Officer testified on the values of nature on the complainant as follows:

“PW6

I am Benjamin Kendagor a Clinical Officer at Kabarnet District Hospital.

On 15/1/2014 I did receive a patient by the name A.C.S 30 years old alleging to have been raped by person known to her on 14/01/2014. She was given ref No. 10041/14 and subsequently treated.

On examination, she had bruises, swelling and darkness on the right cheek had torn black panty. Had bruises on labia minora and no discharge. VDRL – urinalysis normal HIV – no spermatozoa with numerous pus cells on the basis of the numerous pus cells and bruises on the labia and....on history of rape I concluded there was sexual penetration.

MFI (2) identified.

P 3 form Exhibit No. 3.

On 21/1/2014 I filled a P3 for Victor Kipkorir 23 years old he was being accused of having raped a 30 year old lady on 14/1/2014. He was treated and given ref No. 50014/14. Had bruises swelling and tenderness on the upper swelling of the head bruises on the posterior.

Bruises had taken some days and inflicted by a blunt tool. **The private parts had negative findings urinalysis moderate protein and moderate blood.**

Hep – HIC, VDRL, clothes had no stains.

I could not conclude conclusively on the offence. The injury had taken a few days and I concluded the same as harm.

P3 form – exh. No. 6

That is all.

RE-EXAMINATION BY THE ACCUSED

It is difficult to tell in men after 3 days.

The lady had been raped.

RE-EXAMINATION: Nil”

While finding that there was sexual penetration because of the bruises on labia minora and numerous pus cells, the Clinical Officer could not “conclude conclusively on the offence” on examination of the accused.

Defence

18. When put on his defence, the appellant gave an unsworn statement as follows:

“DW1

I am Victor Kipkorir Kiplagat from Kituro. I operate a boda boda. I am not married.

The offence is a lied.

I recall on 14/1/2014 I was at the stage waiting for customers when I saw two customers, a man and a woman. The man requested me to take them to Ngolong. We agreed that they would pay Ksh.200/=. They alighted when they reached their destination and I came back. On my way back I got a puncture, and fell. When the Kenya Power vehicle came and stopped, they inquired if I was hurt and advised to go hospital.

Another motor cycle came and he said person assisted me we took the motorcycle to a neighbor’s house and proceeded to Kabarnet District Hospital. Suddenly the KPLC vehicle came and asked if I am the one they had found earlier on. They asked me if I knew a certain lady and I told them I knew her as my customer and I had carried them earlier on. They slapped me and took me to the police station and I was later arraigned in Court.”

While agreeing that he had been hired by a man and a woman, he alleged that the two had alighted and he had gone back. He also admitted having met with a K.P.L. & C. vehicle which had stopped about them and advising him to go to hospital following his fall after his motor cycle had a tyre burst. We confirmed knowing the complainant before the date of incident.

Determination

19. The bruises on the labia minora supports the Clinical Officer’s conclusion of penetration and corroborates to complainant’s allegation of rape. From the complainant’s own evidence it is the “*other suspect*” who had pulled her to the forest and fell her to the ground while the appellant kept vigil. The evidence of the three women who found the motorcycle, which then rode off taking two persons, belies the unsworn statement of the appellant that he had upon dropping the man and woman at their destination gone back.

20. I have no doubt from the evidence that the appellant, although not shown as having raped the complainant, was an aider and abettor for purposes of section 20 of the Penal Code and he was properly charged as a principal offender, for the offence of gang rape contrary to section 10 of the Sexual Offences Act set out above.

21. For greater clarity of the charge, he should have been charged under the 2nd limb of the offence of gang rape as a person who “*with common intention, is in the company of another or others who commit the offence of rape.*” **However, in view of section 20 of the Penal Code, no prejudice can be shown.**

22. In refusing to stop at the complainant’s bus stage when asked not to do so by the other person, and in helping the other person pull the complainant to the forest and keeping vigil according to Pw1, a fact confirmed by the witnesses Pw2, Pw3 and Pw4 that they found a motorcycle besides the road, the appellant had, if nothing else, aided the other person in committing rape of the complainant which was confirmed by the medical evidence on examination of the complainant, even though the appellant’s own involvement in any sexual assault on the complainant was according to the Clinical Officer not conclusive.

23. Accordingly, I find that the appellant was guilty of the offence of gang rape contrary to section 10 of the Sexual Offences Act. It did not require that “*other suspect be arrested*” before the trial against the appellant for the offence of gang rape could proceed.

24. There is no merit in the submission of a friendly interpreter in sign language because, the interpreter did not herself materially testify as a witness and was only communicating the testimony of the deaf and dumb complainant.

Orders

25. The appellant’s appeal herein has no merit and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent