



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.127 OF 2016**

**KELVIN OTIENO ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal arising out of the conviction and sentence of Hon. H. M. Nyaga CM*

*delivered on 17<sup>th</sup> June 2016 in Makadara CM Cr. Case No. 1311 of 2010)*

**JUDGMENT**

The Appellant, Kelvin Otieno Odhiambo was charged in the second count, with the offence of gang rape contrary to Section 10 of the Sexual Offences Act. The particulars of the offence were that on 6<sup>th</sup> February 2010 at Kayole Estate within Nairobi County, the Appellant, jointly in association with two others, unlawfully and intentionally caused his penis to penetrate the vagina of WSN, a child aged eleven (11) years without her consent. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 6<sup>th</sup> February 2010 at Kayole Estate within Nairobi County, the Appellant, jointly in association with two others, unlawfully and intentionally committed an indecent act with WSN (the complainant), a child aged eleven (11) years by touching her private parts namely vagina.

The Appellant was charged in the third count with the offence of committing unnatural offence contrary to Section 162(a) of the Penal Code. The particulars of the offence were that on 6<sup>th</sup> February 2010 at Kayole Estate within Nairobi County, the Appellant had carnal knowledge of WSN against the order of nature. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge in the second count. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed a separate appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court failed to acknowledge that the age of the complainant was not established by the prosecution. He faulted the trial magistrate for convicting him yet the evidence of identification was not proved to the required standard of proof beyond any reasonable doubt. He was of the view that the prosecution's evidence was inconsistent and full of contradictions. He took issue with his conviction stating that the trial court contravened the provisions of Section 214 of the Criminal Procedure Code. He faulted the trial court for failing to abide by the provisions of Section 213 and Section 310 of the Criminal Procedure Code, stating that he was not accorded a chance to make his final oral submission. He was further aggrieved that the trial court failed to consider his defence in arriving at its decision.

During the hearing of the Appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the Appellant's conviction was safe. She stated that the evidence by the prosecution established all the ingredients of the offence of gang rape. She averred that the complainant was lured to the Appellant's house by her friend, one Kamum. The Appellant sexually assaulted the complainant with the help of his accomplice and the said Kamum. He held the complainant hostage for two days. The medical evidence adduced established that the complainant was sexually assaulted. Learned State Counsel asserted that the prosecution's evidence was consistent and reliable. In the premises, she urged the court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows: On the material day of 6<sup>th</sup> February 2010, the complainant and PW3 Mary Kavete went to town. They used to beg money from members of the public on the city streets. They were in the company of a lady by the name Kamum. Kamum asked the complainant to accompany her to her house in Kayole. When they arrived there, they found two men in the house. She stated that the Appellant was one of the men. Kamum asked her to undress before going to sleep. She undressed and went to bed. She slept on the same bed as Kamum. Suddenly, Kamum started strangling her. The second man held her legs apart. The Appellant inserted his penis in her anus. He then inserted it into her vagina. He sexually assaulted her. She felt pain. She bled. The Appellant and his accomplices held the complainant hostage at the house for two days. On the second day, she requested to go outside to the toilet. She met a

lady who was the Appellant's neighbour. The lady helped her escape. When she got home, she narrated to PW2 MNK, her grandmother what had happened transpired.

PW2 testified that she saw that the complainant was walking with ungainly gait. She took her to Nairobi Women hospital where she was admitted for a month. PW6 Dr. David Thuo produced a medical report prepared by Dr. Muhombe who had since died at the time of the hearing of the case. According to the medical report, the complainant was taken to hospital on 8<sup>th</sup> February 2010. On examination, it was discovered that she had a torn hymen. She had a 4<sup>th</sup> degree tear from her vagina to the anus. The tear extended to the anus and to the vaginal mid-third. Her anal sphincter was torn. She was operated and the tears repaired. A colostomy was removed to enable the anal sphincter to heal. The doctor testified that the injuries were caused by sexual assault. The injuries that the complainant suffered was confirmed by PW8 Dr. Zephania Kamau based at the Police Surgery. He observed that the complainant had sustained a 4<sup>th</sup> degree perianal tear which involved the vagina and the anus. It was one of severest tears he had seen. He confirmed that the complainant was treated at Nairobi Women hospital.

PW2, upon the release of the complainant from hospital, made a report to Kayole Police Station. The complainant's testimony in regard to how Kamum took the complainant to her house at Kayole was corroborated by PW3 Mary Kavete. PW3 is the complainant's sister. She testified that on the material day of 5<sup>th</sup> February 2010, she came to town with the complainant. They came to beg. When they reached town, they split. Later, she was informed that the complainant had gone together with Kamum to her home. Kamum was at the material time living with the Appellant. PW3 testified that the Appellant did not return home until two days later when she realized that she was wearing bloodstain clothes. She narrated to her how the Appellant raped her after Kamum had lured her into their bedroom. PW3 knew the Appellant to be Kamum's boyfriend. They were living together at the time.

PW4, FN is the complainant's mother. She testified that upon learning that the complainant had been sexually assaulted, she went to Nairobi Women hospital and assisted in taking care of the complainant during her hospitalization. She saw the injuries that the complainant had suffered. She explained that the Appellant was admitted at the Nairobi Women Hospital for a period of a month before she was transferred to another hospital at Eastleigh where she was admitted for another month. She told the court that the complainant had told her that she had been sexually assaulted by the Appellant.

The case was investigated by PW10 Sgt Mary Nderitu. After conclusion of investigations, she formed the opinion that a case had been made to enable her charge the Appellant with the offences that resulted in his conviction. She also produced into evidence the clothes that the complainant wore on the material day of the sexual assault.

When the Appellant was put on his defence, he denied committing the offence. Other than narrating the circumstances of his arrest, he did not adduce any evidence to challenge the evidence that was adduced against him by the prosecution witnesses.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence which established the Appellant's guilt on the charges preferred against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. Gang rape is committed when a person commits rape or defilement 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. In a case of defilement, the onus is on the prosecution to establish that there was penetration; that the victim of the sexual assault was a child and finally, the identity of the perpetrator or perpetrators.

In the present appeal, proof of penetration was established by medical evidence and the testimony of the complainant. The complainant stated that the Appellant penetrated her anus and her vagina. She was examined at Nairobi Women's Hospital on 8<sup>th</sup> February 2010. She had earlier received treatment at Medecins Sans Frontieres Clinic on the same day. The medical report from Nairobi Women's Hospital indicated that the complainant's hymen was torn. Her vagina had a deep septic tear with fecal contamination. It had a 4<sup>th</sup> degree tear. Her anal sphincter was torn. The complainant had to undergo a surgical procedure known as colostomy as well as a perineal repair procedure. The complainant was admitted in hospital for a period of two months as she recovered from the injuries that she had sustained. PW8 examined the complainant on 30<sup>th</sup> March 2011. He stated that the complainant had a left sided colostomy. She had a 4<sup>th</sup> degree perineal tear which involved the vagina and the anus. He stated that it was the severest tear he had ever seen. The medical evidence corroborated the element of penetration as narrated by the complainant. The prosecution therefore did establish that the complainant was penetrated.

The second issue for determination is whether the prosecution established that the victim was a minor. The Appellant submitted that the prosecution failed to establish the age of the complainant as there was contradictory testimony on the same. The complainant stated that she was ten (10) years old at the time of giving evidence. She however stated that she did not know her date of birth. Her mother PW4 stated that she was twelve (12) years old at the time of the sexual assault. PW8 stated that the complainant was aged eleven (11) years when he examined her. He produced in evidence a P3 form which indicated that the complainant was eleven (11) years. The investigating officer (PW10) produced in evidence the complainant's clinic card which indicated that she was born on 4<sup>th</sup> January 1999 and was therefore eleven (11) years at the time of the sexual assault. In the face of the evidence laid before the trial court, the complainant was below eighteen (18) years old at the material time of the offence. The Appellant did not adduce any evidence to the contrary. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the Children Act. The complainant was therefore defiled in accordance with the provisions of Section 8 of the Sexual Offences Act.

The third issue is the identity of the perpetrator. The Appellant submitted that the complainant testified that she did not know him prior to the material day. He asserted that an identification parade ought to have been conducted after he was arrested. It was therefore his contention that the evidence of identification was not proved by the prosecution to the required standard of proof beyond any reasonable doubt. The prosecution on the other hand averred that the Appellant's identification was by recognition. Hence, there was no need for an identification

parade to be conducted.

This court has re-evaluated the evidence of identification as presented by the prosecution. The complainant indicated that she was asleep. She slept on the same bed as her friend Kamum. Suddenly Kamum started strangling her. A man by the name Jose held her legs apart. The Appellant proceeded to sexually assault her. The Appellant sexual times assaulted her several times throughout the night. The complainant testified that the Appellant first inserted his penis into her anus before inserting it into her vagina. She testified that despite bleeding a lot, the Appellant was not willing to let her go. She was detained in the house for two days before the complainant feigned that she was going to an outside toilet and made good her escape.

The issue for determination by this court is whether in the circumstances that the sexual assault took place, the complainant was able to identify her assailant. From the evidence adduced by the complainant and PW3, it was clear that the complainant and PW3 were known to the Appellant prior to the sexual assault. They were particularly close to the Appellant's girlfriend by the name Kamum. The complainant narrated how on the material evening, Kamum persuaded her to go to their home for the night. During the night, Kamum slept with the complainant. However, sometime during the night, Kamum left the room and in came the Appellant. The Appellant then sexually assaulted the complainant with the assistance of Kamum and others who were not before court. This court holds that the complainant properly identified the Appellant as her assailant. Her testimony was cogent and consistent on all material respects. Her testimony was that of recognition rather than the identification of a total stranger.

The Court of Appeal in Anjononi –Vs- Republic [1980] KLR 54 at P.60 held thus:

***“Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other.”***

In the present appeal, it was evident that the complainant had interacted with the Appellant the entire evening and the night before they retired to bed. The Appellant's behaviour in detaining the complainant in his house for a period of two days was consistent with the behaviour of someone who had sexually assaulted the complainant. He had no reason to detain the complainant if he had not come to the realization that he had injured the complainant in the course of sexually assaulting her. In that regard, the Appellant's defence and grounds of appeal did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

In the premises therefore, the Appellant's appeal lacks merit and is hereby dismissed. The sentence that was imposed upon the Appellant was legal. The appeal against sentence is similarly dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY 2019**

**L. KIMARU**

**JUDGE**