



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 41 OF 2019

(CONSOLIDATED)

BETWEEN

ANTONY MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 4187 of 2016

in the Chief Magistrate's Court at Thika by Hon. C.A.O.Omondi-Otieno (PM) on 26.04.18)

JUDGMENT

Background

1. **ANTONY MWANGI** (*hereinafter referred to as the Appellant*) and 3 others were charged with three others who were acquitted with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence is alleged to have been committed on 28th May, 2016.

The prosecution's case

2. The prosecution called 8 witnesses in support of the charges. **PW1, Dr. George Maingi** examined the complainant on 02nd June, 2016 and found that she had lacerations in her genitalia, spermatozoa and pus cells. He produced a P3 form **PEXH. 1** in which he concluded that complainant had been raped. PW2, the complainant stated that on 28.5.16 at about 09.00 pm, she was gang raped by about 10 men that she did not identify. **PW3 PETER MWAI MUTURA** escorted complainant to hospital whereas **PW4 APC OLIVER MUSAU** and **PW5 APC ANTONY WANJOHI** arrested the Appellant and 3 others following information received from members of public that they had gang raped the complainant. **PW6 PAMELA WAMUKOYA** testified that complainant was raped by about 20 men and that she did not identify the Appellant among them. **PW7 GRACE WANJIKU NJOKI** similarly testified that complainant was raped by about 20 men who included the Appellant whom he did not know before the material date but saw him with the light of a small lamp in the room where the offence was committed. **PW8 CPL ESTHER KOMBO** the investigating officer arranged for an identification parade of the Appellant and 4 others who were identified by PC James Kiarie and PC Manasse Kirinya as shown on the identification report form **PEXH. 3** prepared by IP Angoya.

3. The Appellant and his 3 co-accused persons gave unsworn evidence in which they denied the offences. The trial court found the offence of gang rape proved against the Appellant and sentenced him to 20 years' imprisonment.

The Appeal

4. Aggrieved by the conviction and sentence, the Appellant lodged the instant appeal on 03rd June, 2019. From the grounds of appeal and written submissions by the appellant, I have deduced the following issues: -

1. That the prosecution case was not proved beyond any reasonable doubt

2. The prosecution did not call one Schola who was a crucial witness

5. When the appeal came up for hearing on 11th September, 2019, the Appellant stated that he was wholly relying on his grounds of appeal and written submissions.
6. Ms. Ndombi, learned State Counsel opposed the appeal and stated that act of gang rape against the complainant was witnessed by PW6 and PW7 and was corroborated by a P3 form and further that the Appellant was correctly identified in an identification parade.

Analysis and Determination

7. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. See **OKENO – VS – REPUBLIC (1972) E.A. 32.**

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant and for the State.

9. The gravamen of this appeal really turns on the issue of identification of the Appellant by PW7. The offence was committed at night and hence, the means by which the Appellant was identified becomes critical. According to the PW7, complainant was raped by about 20 men who included the Appellant whom he did not know before the material date but saw him with the light of a small lamp in the room where the offence was committed

10. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of **Maitanyi vs Republic (1986) KLR 198**, the Court of Appeal held: -

“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

11. In the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, the Court of Appeal held: -

“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

12. The scene has been described as a one roomed house. The complainant was allegedly gang raped in that room by about 20 men who were strangers to her and to PW6 and PW7. The offence was allegedly committed at about 09.00 in the night. Both PW6 and PW7 told court that there was a small lamp in the house with none describing its light's intensity or where Appellant was in relation to the said lamp. With this set of facts, I am unable to fathom how the trial Magistrate concluded that there was adequate light at the scene yet there is no evidence that the court evaluated the strength of the light, its size and its position relative to the Appellant. With due respect, I am persuaded that the trial court might have arrived at a different decision had it properly considered that the circumstances at the scene did not favour positive identification of any of the 20 strangers that gang raped the complainant.

13. Further to the foregoing, the identification parade form prepared by IP Angoya that the trial court greatly and erroneously relied upon to conclude that the Appellant had been identified was of no probative value for two reasons. First, the form was not produced by the maker and amounted to hearsay evidence and ought to have been rejected. Secondly, **PC James Kiarie** and **PC Manasse Kirinya** the witnesses who are alleged to have identified the Appellant as indicated in the identification report form **PEXH. 3** are strangers to this case for the reason that they did not testify and have not been stated to have witnessed the commission of the offence.

14. The absence of inquiries as to the light condition at the scene of crime by the trial Magistrate notwithstanding, this court is under a duty to consider if there is other evidence that points to the Appellant's culpability. Complainant told court that she did not identify her assailants and there is therefore no other evidence pointing to the Appellant's culpability.

15. In light of the above, I have come to the conclusion the Appellant was not positively identified as one of the persons that gang raped the complainant.

16. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that Appellant shall be released and set free forthwith.

DATED, DELIVERED AND SIGNED IN KIAMBU THIS 13th DAY OF September 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Nancy & Morris

Appellant - Present in person

For the State - Mr. Kasyoka