



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCRA NO. 118 OF 2018

LIVINGSTONE ASIRIKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment dated 1st August,2018 by Hon. M.L. Nabibya, Senior Resident Magistrate at Hamisi SRM's Criminal Case No. 31 31 of 2018(S.O. 1/18)).

JUDGMENT

1. **Livingstone Asirikwa** the appellant was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant on the 11th day of January 2018 at Givogi village, Gimamoi sub location, Gisambai Location in Hamisi Sub county within Vihiga County in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of E.M a woman aged 21 years without her consent.

He also faced an alternative count of committing an indecent act with an adult Contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006.

2. He denied the charges and the case proceeded to full hearing after which he was found guilty, convicted and sentenced to ten(10) years imprisonment.

3. He was aggrieved by the judgment and filed this appeal raising the following grounds:-

(i). That the learned trial magistrate grossly erred in law and facts in failing to observe that the appellant was not subjected to corresponding medical investigation as required under Section 36 (2) of the Sexual offences Act No. 3 of 2006.

(ii) That the learned trial magistrate grossly erred in law and fact in finding penetration proved even in the wake of flimsy and inadequate evidence.

(iii) That the learned trial magistrate grossly erred in law and fact in misdirecting himself in law and facts failing to observe PW3 evidence that urinalysis was conducted and revealed no infections or sperms yet PW1 stated that she was raped without protection.

4. The case before the trial court was that P.W.1(E.M.) a married woman left home on 11th January 2017 at around 6 p.m. to buy drugs from her grandmother's home which is not far from her home. After getting the drugs, she left at around 6 p.m. after bidding her grandmother bye. There was rain and as she ran she was accosted by two men, one of whom was the appellant (Asirigwa). She did not know the name of the other man. The two men grabbed her and pulled her into the appellant's house. The appellant was a neighbour.

5. Inside the house the appellant threatened to kill her if she did not offer her body to them. He showed her a knife, and she screamed. He undressed her and threw her on the bed. She had worn a black skirt,(EXB 7) white T shirt (EXB 1), black top (EXB2) and black biker(EXB 3). He removed his purple long trouser and white/black stripped shirt before raping her. He continued threatening her against screaming saying he would stab her. The other man was just seated there.

6. When he finished the other one took over and raped her. They each raped her thrice. The appellant bought bread and soda which she refused to take. He hit her and they chased her out. Reaching outside she met B (P.W.2) who inquired as to what the problem was and she explained to him. She was heavily bleeding with blood all over her legs.

7. They went to P.W.2's home where his wife gave her water which she used to wipe herself with. He then took her to the village elder who in turn took her to her home. He explained what had happened to her drunk husband. She went to hospital at Mbale the next day and was treated. A report was made at Gisambai police station and statements recorded. She was referred to Serempolice station. She knew the

appellant as her husband's friend. He used to threaten her and had done to her all he had promised to do.

8. P.W.2 **BN** confirmed meeting P.W.1 who was crying at around 7 p.m. on 11th January 2018. She had blood on her legs. She told him she had been raped by Asiligwa and another. He knew Asiligwa. He assisted her with water to clean herself and showed her the village elder's home.

9. P.W.3 **Sammy Chelule** a senior clinical officer and the incharge Mbale rural health centre confirmed that P.W.1 had been treated at the facility on 12th January 2018 vide OP No. 973/17. She complained of having been raped by two known people the previous day.

10. Upon examination the following was noted.

- Healed and scarred hymen.
- Mucosa area had tears on the inner labia which was swollen and reddened.
- Gang raped without protection.

He filled and signed the P3 form EXB 5, and produced treatment notes and PRC form as EXB 6b and 6a respectively.

11. P.W.4 No. **217434 Cpl Lodrick Ngaira** confirmed receiving the gang rape report from P.W.1, on 12th January 2018 10.15 a.m. while at Gisambai AP post. She gave the suspects names as :Livingstone Asisrigwa and Vincent. Nobody rescued her as it was raining. Only Livingstone (appellant) was arrested and presented to Serempolice station.

12. P.W.5 No. **73131 Cpl Tecla Tuwei of Serempolice station** investigated the case. She confirmed that the appellant was received at the station on 12th January 2018 at 6.30 p.m. having been arrested by Cpl Ngaira and another. The complainant (P.W.1) explained to her all that had happened. She produced a torn white blouse (EXB 1) torn black skirt (EXB 7), torn blood stained biker (EXB 3) and black top (EXB 2).

13. When placed on his defence the appellant elected to give an unsworn statement with no witness to call. He told the court he was a welder. He denied committing the offence saying he is a good boy.

14. The appellant argued his appeal by way of written submissions. He contended that the evidence by the prosecution witnesses was uncorroborated hence doubted. He appears to have twisted the evidence adduced to suit his desires; He mentions that the village elder and area chief should have been called to testify. He also asked the court to reduce the sentence. Finally he said P.W.1's husband had promised to punish him.

15. Learned counsel Mr. Mwaura for the state opposed the appeal on the ground that there was sufficient evidence to support the conviction. That P.W.1 explained herself clearly and she knew the appellant well. He submitted that P.W.3 (doctor) confirmed that P.W.1 had been gang raped, as she had injuries in her genitalia.

Analysis and determination

16. This being a first appeal this court has a duty to reconsider and re-evaluate the evidence to arrive at its own conclusion. In the case of **Kiilu and Another Vs R [2005]IKLR 174** The court of appeal stated the principles governing the hearing of first appeals to be as follows:

2. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

3. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

17. I have carefully considered the evidence, grounds of appeal and the submissions by both parties, as is expected of this court. I wish to deal with after definitions first. **Gang rape** is defined under Section 10 of the Sexual Offences Act as:-

"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."

The same Act defines **gang** as:

"means two or more persons"

Section 3 of the sexual Offences Act defines **Rape** as:

(1) A person commits the offence termed rape if –

(a) he or she intentionally and unlawfully commits an act which causes 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.

18. I therefore find that PW1 bled as a result of their action. Immediately she was chased out of the house, she met P.W.2 on the way and explained to him what had befallen her. As reported by P.W.3 (Clinical Officer) she went to the hospital the next morning and narrated her ordeal. The evidence of P.W.3 clearly confirms that P.W.1 had been sexually penetrated, by more than one male person. The full report is in the treatment notes (Exb6b) and the P3 form (EXB 5) and the PRC (EXB 6a). I therefore find the issues falling for determination to be the following:

(i) Whether P.W.1's vagina was penetrated separately by more than one male organ.

(ii) Whether she consented to the penetration.

(iii) Whether the appellant was one of the two men who penetrated her.

Issue No (i) Whether P.W.1's vagina was penetrated separately by more than one male organ

19. P.W.1 explained graphically what was done to her by two men and she bled as a result of their action. Immediately she was chased out of the house she met PW2 on the way and explained to him what had befallen her. As reported by PW3 (Clinical Officer) she went to the hospital the next morning and narrated her ordeal. The evidence of PW3 clearly confirms that PW1 had been sexually penetrated, by more than one male person. The full report is in the treatment notes (Exb 6 b) and the P3 form (EXB5) and the PRC (EXB 6a). I am satisfied that PW1 was sexually penetrated.

Issue No (ii) Whether she consented to the penetration

20. The evidence of P.W.1 and the report by the clinical officer (P.W.3) clearly confirms that the sexual activity was without consent. The injuries suffered by the complainant and the resultant bleeding all attest to that. My finding is that there was no consent to the sexual activity by the complainant.

Issue No. (iii) Whether the appellant was one of the two men who penetrated PW1.

21. From the evidence adduced P.W.1 was the only identifying witness. The time of incident was about 6.00 p.m. She stated that as she ran in the rain she was grabbed and dragged by the appellant and another, and she was able to clearly see them. Furthermore she knew the appellant by his full names, knew his house as he was a neighbour and a friend to her husband.

22. In the case of **Simiyu and Another V R [2005] IKLR 192** the Court of Appeal had this to say of such evidence.

“ 3. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity.”

23. As per the above holding the conduct by P.W.1, speaks for itself. The moment she left the house from where she was gang raped she did the following:

- She informed P.W.2 who was the first person she met and gave him the appellant's name.
- She reported to the village elder the same night. The village elder took her to her home.
- She informed the husband.
- She went to hospital the next morning.
- She reported to the police the next morning and gave the names of the appellant.

24. This was confirmed by police officers P.W.4 of Gisambai AP post and P.W.5 of Serempolice station. It is noted that the appellant did not have much to ask the witnesses in cross examination. In his submissions he said P.W.1's husband had promised to punish him. He however forgot to indicate why P.W.1's husband would have wanted to punish him.

25. His defence was a mere denial. Section 124 of the Evidence Act provides:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person

for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

26. The learned trial magistrate who heard and saw P.W.1 testify was satisfied that she was a reliable witness. This is what she explained in line with the proviso to Section 124 of the Evidence Act at page 3 lines 24-29 of the judgment:

“Infinding so, I have considered the fact that there is no required number of witnesses to prove or disapprove a fact, the evidence of a single witness can be sufficient, in this case the complainant alone was at the scene of crime, this is a sexual offence and as provided for in section 124 paragraph 2 of the Evidence Act, I considered her demeanor, conduct and general behavior in the court to arrive at conclusion that she was a believable witness.

27. I am satisfied that the learned trial magistrate arrived at the correct decision in convicting the appellant. On sentencing, the minimum sentence for gang rape under section 10 of the Sexual Offences Act is 15 years imprisonment which may be enhanced to life imprisonment.

28. The appellant was very lucky to have gotten away get away with ten years imprisonment. I will not interfere with it as there was no application sought for enhancement.

29. The upshot of all this is that the Appeal lacks merit and is hereby dismissed in its entirety.

Orders accordingly.

Delivered, signed and dated this 12th day of September 2019 in open court at Kakamega.

H.I. ONG'UNDI

JUDGE