



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 13 OF 2018

BETWEEN

HENRY EPIMI.....1ST APPELLANT

JOEL SANDE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence imposed in Maseno Criminal Case Number 396 of 2017 by Hon. R.S. Kipngeno (SRM) on 31.01.18)

J U D G M E N T

Background

1. The Appellant **HENRY EPIMI** (who was the 2nd accused in the lower court) and **JS** (who was the 1st accused in the lower court) were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006 (the **Act**). The offences were committed on 07.04.14 against one **CJ** without her consent.
2. The prosecution called 6 witnesses in support of the charges. **PW1, CJ** the complainant stated on 07.04.14 at about 02.00 am, she was in the house of her mother in law and that there was a tin lamp in the one roomed house. She recalled that about 7 men forced their way into the house of whom she identified the 2nd Appellant popularly known as C who is her husband's friend and nephew to her father in law as he started by covering her mouth and slapping her. She stated that she also recognized the 1st Appellant's who she referred to as a brother in law by his voice. She stated that the men searched the house after which they ordered her to accompany them to her house which they also searched after which they took her to a nearby rocky place and there she identified the 1st Appellant because there was moonlight and being the first person that raped her after tearing her pants and assaulting her when she resisted. It was her evidence that the 2nd Appellant was the third person to rape her and that the 7 men raped her one after another after which they dumped her in the homestead of **PW3** who escorted her home. She reported the matter to police the following day and Appellants were subsequently arrested and charged.
3. **PW2 SN** the complainant's mother in law was informed about the ordeal by the complainant who said she had been raped by C and Epimi. At a later date, she caused the arrest of the 2nd Appellant who was said to have been one of the assailants and after his arrest complainant identified him.
4. **PW3 Dishon Juma** found complainant crying outside his house on the night of 07.04.14 and she told him that she had been raped. **PW4** a police officer whose name was not recorded in the proceedings received a report from **PW2** on 08.04.14 who told her that complainant had been raped by men among them one Joel Sande. He later re-arrested the 2nd Appellant from members of public that arrested him.
5. **PW5 CPL Nicholas Onyango** stated that he arrested the 1st Appellant on 16.04.14 after he was identified by complainant and **PW3**. **PW6 Mark Aggrey Ambetsa** a clinical officer examined complainant on 08.-4.14 and found her with neither injuries nor bruises. He however found the presence of epithelial and pus cells on the basis of which he concluded that she had been raped. He produced complainant's treatment records as **PEXH.1** and P3 form as **PEXH. 2**.
6. In his unsworn defence, the 1st Appellant denied the offence. He stated that he was arrested together with changaa revelers and was later

charged with an offence that he did not commit. The 2nd Appellant in his unsworn defence stated that he was arrested from his house and was charged with an offence that he did not commit.

7. In a judgment dated 31.01.18, the Appellants were convicted and sentenced to serve 20 years' imprisonment.

Appeal

8. Aggrieved by this decision, the Appellants lodged the instant appeal on 14.02.18. From the grounds of appeal and amended grounds filed by the 2nd Appellant on 26.09.19, I have deduced the following main grounds THAT:

1. **The charge sheet was defective**
2. **That their rights under Article 50 (2) (j) were violated**
3. **Crucial witnesses were not availed**
4. **Medical evidence did not support the case**
5. **The circumstances of the case did not warrant a conviction**
6. **Their defences were not considered**

9. When the appeal came up for hearing on 23.07.19, I directed that the appeal be argued by way of written submission which the parties dutifully filed.

SUBMISSIONS BY THE PARTIES

Appellant's submissions

10. The 1st Appellant argued that the fact that the complainant did not name or describe her attackers to PW2, PW3 and the police demonstrates that circumstances of identification were not conducive. He also submitted that the trial court did not consider the light of the tin lamp and the moonlight to consider if it enabled proper identification of the attackers.

11. The 2nd Appellant on the other hand submitted that his right under Article 50 (2) (j) was violated for he was not supplied with the witness statements and that the prosecution did not prove its case beyond any reasonable doubt.

Submissions by the State

12. It was submitted for the state that the complainant's testimony demonstrated that she had identified the Appellants among the 7 persons that raped her.

Analysis and Determination

13. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

14. Section 10 of **the Act** provides that 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. Under section 3 of **the Act** rape is committed if one intentionally and unlawfully commits an act which causes penetration with their genital organs, where the other person does not consent or the consent is obtained by force.

16. From the evidence I have outlined it is clear that the Appellants were known to the complainant before the material date. The complainant told court that there was a tin lamp where she was first attacked and that there was moonlight where she was raped. The assailants were with the complainant for a considerable length of time and according to her, the Appellants were no strangers to her since they are her husband's relatives. The complainant informed her mother in law PW2 that she had been raped by C and Epimi among others. From the foregoing, I have no doubt that the complainant had positively identified the Appellants among the persons that raped her.

17. Complainant's evidence that she was raped is corroborated by the treatment records as **PEXH.1** and P3 form as **PEXH. 2** which show that although she had neither injuries nor bruises, the urinalysis revealed epithelial and puss cells which according to the doctor confirmed

that sexual intercourse took place. I therefore find that penetration was proved without a doubt.

18. Complainant told court that she did not consent to have sex with the Appellants and others. Section 42 of *the Act* provides as follows:

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

19. On the other hand, Section 43 of *the Act* provides as follows:

(1) An act is intentional and unlawful if it is committed—

(a) in any coercive circumstance;

(b) under false pretences or by fraudulent means; or

(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;

(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person;

[Emphasis mine]

20. PW1 testified as follows: **“C is nephew to my father in law. He closed my mouth and slapped me”**

21. Complainant further testified that:

“They then took me to a rocky place about 400 meters away..... On the rocks they told me to lie down and I refused. Then Henry Epimi lifted me up and threw me on the ground”.

She also stated that:

“Henry took off my pants by tearing it and throwing it away. He told me to part by legs and I refused. He took a chain and started beating me on the thigh. Henry then held me on the leg and parted it then he held the other leg. He was the first person that raped me.”

22. The evidence on record clearly demonstrates that there was coercion, force and assault on the complainant. Clearly, the complainant did not consent to the sexual assault on her.

23. The next issue was whether it was a gang rape. Section 10 of the Sexual Offences Act, reproduced above, defines gang rape as rape done **“in association with other”**. Association with others means acting jointly or having common purpose or interest. From the evidence on record, it is apparent that the complainant was not raped by one person but by the Appellants herein and five others.

24. The trial court considered the Appellants’ defences and after weighing them against the prosecution case rightly rejected them and from the foregoing analysis, I have no reason to interfere with that finding.

25. There is no evidence that any crucial witness to the prosecution case was not called. The prosecution does not have to call each and every witness. Section 143 of the Evidence Act provides that no particular number of witnesses shall in the absence of any provisions of law to the contrary be required for the proof of any fact. Further Section 124 of the Evidence Act (the proviso thereto) clearly stipulates that the Court can convict the accused person in a prosecution involving a Sexual Offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief: **(See George Kioyi V R Cr. Appl 270/2012 (Nyeri) and Jacob Odhiambo Omumbo V R. Cr. Appl 80/2008 (KSM).**

26. I have perused the record of the trial court and the Appellants did not raise the issue of non-availability of statements during the trial. Had it been raised; I have no doubt that the learned trial magistrate would have given such orders and directions as are necessary to give effect to Appellants’ right under Article 50 (2) (j) of the Constitution. I therefore find no merit in this ground of appeal.

27. On the whole, I find that the prosecution case was proved to the required standard and that the Appellants were rightly convicted of the offence of gang rape.

28. On sentence, the Court of Appeal has in several cases including **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR** considered the constitutionality of mandatory sentences. The court has adopted the holding of the Supreme Court in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion to impose an appropriate sentence.

29. Section 10 of *the Act* under which Appellants were charged provides for sentence of not less than 15 years and which can be enhanced to life. The Appellants were sentenced to a lawful sentence of 20 years. The provision is indicative of the seriousness with which the Legislature and the society take the offence of rape. In appropriate cases therefore however, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand (**See Dismas Wafula Kilwake v Republic [2018] eKLR**).

30. Appellants were sentenced to 20 years' imprisonment. The sentences are lawful. In the spirit of complying with the Supreme Court decision in the **Muruatete case** (supra), however, I shall allow the appeal only on sentence.

31. The Appellants are first offenders. The 20 years' sentence imposed on them is substituted with an imprisonment term of **10 years** which will run from **31st January, 2018** when they were sentenced.

DELIVERED AND SIGNED IN KISUMU THIS 07th DAY OF November 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Okodoi

1st Appellant - Present in person

2nd Appellant - Present in person

For the State - Ms. Gathu