



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO.48 OF 2017

JAKIM OLUOCH NYAMBARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence in Ukwala SRM's Court SO Case No. 14 of 2017

delivered on 8.5.2017 by Hon G. Adhiambo, SRM)

JUDGMENT

Introduction

1. The Appellant herein **JAKIM OLUOCH NYAMBARE** was charged before the Senior Resident Magistrate's Court at Ukwala in Sexual Offense Case No. 200 of 2017 with the offence of Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on the 14.03.2017 the accused while at [Particulars Withheld] village in Ugunja District within Siaya County in association with others not before court intentionally caused his penis to penetrate the vagina of [NA]a girl aged 20 years without her consent.
2. The appellant also faced the alternative charge of Committing an Indecent Act with [same complainant] the adult contrary to Section 11A of the Sexual Offences Act No. 3 of 2006.
3. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.
4. The trial magistrate, Hon. G. Adhiambo after hearing the evidence tendered by the prosecution and considering the appellant's defence, found the appellant guilty of the main charge of gang rape, convicted him under section 215 of the Criminal Procedure Code sentencing him to 15 years' imprisonment.
5. Dissatisfied with the stated conviction and sentence, the appellant filed his petition of appeal based on the following grounds:
 - a) **That the complainant confessed before the Court that the accused did not rape her.**
 - b) **That the case against the accused was brought before the Court due to a land grudge as confessed by the mother of the complainant before the honourable court yet the trial Court failed to find so.**
 - c) **That he prayed for the Court to give an order for habeas corpus.**

Appellant's Submissions

6. The appeal was canvassed with the appellant filing written submissions which he adopted during the oral hearing while the Respondent's counsel Mr. Okachi made oral submissions. The appellant submitted that the testimony of (PW1) was inconsistent, unreadable, untruthful, perturbed and irregular and further that PW1 was not categorical as to what happened to her and the appellant's involvement.
7. The appellant further submitted that the judgment passed by the trial magistrate was not supported by the evidence on record and further that the trial magistrate kept shifting the burden of proof to him as demonstrated in the judgement where the learned magistrate termed the appellant's defence as "**a mere denial and in my view it did not shake the Prosecution witness in any way.**" He further submitted that he had elected to give an alibi which was even supported by a defense witness but the same was not considered by the trial court.

8. The appellant submitted that the medical evidence adduced by the prosecution was not enough to sustain a conviction against him. He stated that the 3-day delay in examination of the complainant relatively affected the finding of the doctor thus affecting the forensic evidence adduced by the doctor.

9. It was submitted by the appellant that the prosecution failed to prove the actus and mens rea against the appellant and as such the conviction of the appellant was faulted and ought to be set aside.

10. He added in his oral submissions that the investigating officer did not visit the scene of crime and that there was a quarrel between PW1 and the appellant's mother due to the children of PW1 and the appellant exchanging books. He maintained his innocence and urged this court to investigate the case properly.

The Respondent's Submissions

11. Mr Okachi Senior Principal Prosecution Counsel for the State submitted opposing the appeal and urging the court to uphold the trial court's conviction and sentence. Counsel submitted that the appellant was well known to the victim and that her evidence was not controverted in any way. Further, that the appellant having been present when the offence was committed against the victim, he should have rescued her as he was well known to her. It was further submitted that the trial court critically analysed the evidence on record before convicting the appellant based on sound evidence. It was submitted for the Respondent that sentence imposed was lenient as the offence is traumatising. Further, that the issue of the appellant being fixed by PW1 was never raised in the lower court

Analysis & Determination

12. This being a first appeal, the role of this first appellate Court is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

13. The prosecution evidence as laid out in the trial Court was as follows: The complainant testified as PW1. She stated that she is a resident of [Particulars Withheld] in Ugunja and that she was in form four in 2016 and was at the time studying computer. It was her testimony that on 14.03.2017 at about 6.30 p.m., she was within [Particulars Withheld] area as she was on her way from attending the computer lessons heading home when she took the route that passes near the appellant's home. She stated that the road as one approaches the appellant's home is a cross-road and that as she was about to reach the appellant's home, the appellant appeared before her. It was her testimony that darkness had not yet set in as it was still at 6.30p.m.

14. The complainant stated that the appellant went in front of her and ordered her not to pass that house and further told her to go back and ask her aunt the route that she should follow. She stated that by then, the appellant had disagreed with her aunt, MA on 13th. It was her testimony that as she was turning to face the direction where she was coming from, and while she was still at the spot, she saw two men one of whom had a bicycle a step away from her. She stated that the other man was very near thus creating a situation where she was in between the 3 men that is the appellant and the other 2 men. She stated that at that time, the man who was very near her slapped her face with something that felt like pepper and the tears started flowing from her eyes.

15. She further stated that someone then closed her eyes with his hands while the other person tied her hands backwards. It was her testimony that she then felt someone holding/squeezing her neck tightly and that she then fell on the ground. She stated that when she was on the ground they continued covering her eyes with the hand and that her hand remained tied backwards. She stated that she could feel some pressure on her chest and that she felt that someone was seated on her chest. The trial court noted that the complainant while testifying broke down and wept bitterly.

16. It was her testimony that on that day, she was wearing a skirt and she had a white biker but at some point she felt her clothes being removed and her body then came into contact with the grass. She stated that she could then feel some people having sex with her and that in the course of the act she fell unconscious. She stated that by the time she was falling unconscious two people had had sex with her. It was her testimony that when she gained consciousness, she found her whole body aching. She stated that she particularly felt pain on her joints and a lot of pain on her vulva and vagina. She stated that her aim then was to reach home. She stated that she struggled and walked towards the main road and further walked home. She stated that their home is just one farm away from the accused's home. She stated that she went home and went straight to bed. She stated that after 30 minutes she felt like going for a short call and when she tried to leave the bed she realized she could not hold her urine and that she was in great pain. She stated that her urine was coming out uncontrollably.

17. The complainant further testified that her sister Anyango heard her crying in pain and when her sister enquired as to what had happened to her, she just told her that she was unwell. She stated that she told Anyango to inform their aunt Margaret who used to operate a kiosk at Ugunja not to pass the route close to the appellant's home while going home but to use the main road. It was her testimony that when her aunt arrived home at 9. 00p.m she found her in bed and when she inquired why the complainant had told Anyango to warn her not to pass near the appellant's home, she decided not to disclose that she had been raped and stated that she warned her aunt because the appellant and two men had beaten her.

18. The complainant told her aunt that she did not manage to recognize the other 2 men. She stated that her aunt asked her if after that assault she met anyone and she stated that she met a school girl in a chocolate skirt and white blouse. She stated that she described the girl to her aunt who proceeded to a neighbour's home where a girl who used to wear such a uniform used to live to find out if the girl that the complainant had seen was the stated girl living at their neighbour's home but her aunt found that the girl the complainant saw was not from the neighbour's home.

19. The complainant testified that since her aunt realized that the uniform she described as the uniform the girl she saw was wearing was for

Ulwani Secondary School, the following day her aunt went to Ulwani Secondary to check whether the girl who witnessed the incident could be traced and her aunt also directed her to seek treatment at the St. Paul Methodist Hospital. She stated that she could not even walk to hospital and was only given a ride by a boda boda rider who dropped the daughter of her aunt at home from school. She stated that at first while she was admitted at the St. Paul's Methodist Hospital she did not disclose that she had been raped. She stated that she just kept crying and was unable to disclose the incident to anyone. She stated that the following morning, she opened up to a counselor who was at the stated hospital and told her that she was raped. She stated that the counselor raised up her skirt and saw that her biker was torn. She stated that it is the counselor who relayed the information to her aunt and she was then tested for pregnancy and HIV. She stated that later her aunt took her to the Ugunja Police Station where they reported the matter and were issued with a P3 Form which she stated was filled at the Ambira Hospital after she was examined all over the body. She stated that she took back her P3 Form to the police station.

20. The complainant testified that at the Ugunja Police Station, she left her inner pant and biker as well as her birth certificate and that at the Ambira Hospital she was given medication even though she was still taking the medicine given to her at the St. Paul's Methodist Hospital. The complainant identified her discharge summary sheet dated 18.3.2017 and the same was marked as PMFI 1a, as well as her P3 Form dated 16.3.2017 which was marked as PMFI 1b. She identified a white blood stained biker and black with white dots inner pant that was torn on one side (completely) and which had maroon stains as PMFI 2a and 2b. She stated that from the time she was raped to the time she went to the police station she had not taken a shower and that she was still wearing the clothes that she was wearing at the time she was raped. She further confirmed that her inner garments had blood. She stated that indeed her biker was torn as well as the sides of the inner pant were torn.

21. The complainant identified the appellant as the person she was referring to in her testimony. She stated that on 13th a day before the incident, her aunt had disagreed with the appellant and that on 12th her aunt sent food for lunch and supper, one of the foods being rice only to realize later in the evening that the rice had been stolen from her aunt's house. She stated during the period of the day when the rice was stolen from the house, it was only her sister and the daughter of the appellant who were at her aunt's house so when the aunt realized the disappearance of the rice, she went to the home of the appellant to enquire from the appellant's daughter an act which resulted to a quarrel. She stated that the appellant thereafter availed himself at her aunt's home and told her that they could even take away the land that they had sold to her aunt. It was her testimony that personally, she had not disagreed with the appellant and further that she had not framed up the appellant. She stated that there was evidence before court that she was raped. She further stated that she saw the appellant and the other 2 people who raped her.

22. On cross examination, the complainant stated that the appellant was well known to her and that even as the appellant raped her, he was well known to her. She stated that she tried to scream but one of the attackers squeezed her neck. She stated that the home of the appellant and the home of the appellant's grandfather was close to the scene. She then stated that she was held at the road next to the appellant's fence.

23. On re-examination, she stated that she started living with her aunt from 24.12.2016 and that she used to see the appellant often because she used to pass the route close to the appellant's home while going to college. She stated that there was enough light and that she saw the appellant well.

24. PW2 MAOR identified herself as a resident of [Particulars Withheld] and told the court that she sells vegetables, tomatoes and onions. It was her testimony that the complainant was her niece and that on 14.03.2017 at around 8.00p.m she was from the market heading home when JA, the complainant's sister rung her and told her not to pass the route where there are banana plants but to pass the route that leads to Methodist Hospital.

25. PW2 testified that she heeded the warning and passed through the route that leads to Methodist Hospital. It was her testimony that when she reached home, she found the complainant weeping and the complainant told her that she was on her way from Ugunja, when she met the appellant and 2 people who then told her to ask her aunt what route she should be using. PW2 testified that the complainant said that as she was turning, the appellant slapped her on the eyes and she fell then she was beaten. It was PW2's testimony that the complainant said that after she was beaten, she woke up and saw students of Ulwani Secondary School who warned her not to look at the men who had attacked her but to just leave the scene.

26. PW2 testified that she went to the neighbouring homes where students from Ulwani Secondary School used to live to enquire whether they were the students who witnessed the incident but the answer was negative. She stated that on the morning of Wednesday she availed herself at the Ulwani Secondary School and registered her concern with a view to find out if the students who witnessed the incident could be traced but she was informed that form 1 and 2 students had been sent home to collect school fees so the teacher promised he would follow up the matter later. She said that on the morning of Wednesday, she told the complainant to go to hospital and proceeded to her work place. She said that later in the evening, a motor cycle rider who took her grandchild home from school told her that he had found the complainant weeping and that he had carried the complainant to the St. Paul's Methodist Hospital. She said that she learnt that it was even difficult for the complainant to board the motorcycle on her own. She said that the complainant was hospitalized and when she went to check on the complainant at 8.00p.m, she found the hospital locked after which she went back home and on the morning of 16th she went to check on the complainant at the hospital and realized that the complainer was still weeping and further noted that the complainant had neither eaten supper nor breakfast.

27. It was her testimony that a doctor took the complainant to another room then interviewed her and that it was at that point that the complainant disclosed that she had been raped. She said that the doctor relayed the information to her and even told her that the complainant's inner clothes were torn. She said that she thereafter took the complainant to the Ugunja Police Station where they reported the matter. She said that after that she took the complainant to the Ambira Hospital with the P3 Form that had been issued to her. She said that they thereafter took the filled P3 Form to the Ugunja Police Station where they also left the complainant's biker and inner pant which were not only torn but also blood stained. She identified the said inner pant and biker as PMFI 2c and 2b respectively and stated that the fact that they were torn was evidence that force was used against the complainant. She identified the complainant's discharge summary and P3 Form as PMFI 1a and 1b respectively. She also identified the appellant as the accused person.

28. It was her testimony that the complainant did not recognize the other two men with whom the appellant gang raped the complainant. She further stated that the appellant was her neighbour whose home was not far from hers and that the land she occupies currently was purchased

by her from the younger brother of the appellant's father. She said that she had known the appellant since the year 1993. She further stated that on 12.3.2017, she sent food for lunch and supper to her home which food included rice but later in the evening she found out that the rice was stolen from inside her house when the daughter of the appellant was at her home together with the sister of the complainant. She said that she beat up the complainant's aforesaid sister by the name of JA while escorting her to the appellant's home where she found the mother of the appellant and narrated to her what had happened at her home concerning the rice. She said that she then disciplined JA together with the daughter of the appellant who were at her home at the time the rice disappeared.

29. She said that later at 9. 00p.m the appellant went to her home in the company of his mother and quarrelled her while insulting her demanding to know why she had beaten the child. She said that she told him that she only disciplined the children. It was her testimony that they were calmed down and that the following day as she was going to work the appellant's mother stopped her from passing the route she had taken. She said that on 14th the appellant and others gang raped the complainant. It was her testimony that before then, she had not had a disagreement with the appellant. She said that before then the appellant was a family friend and that she had no idea as to what devil got into the appellant.

30. PW3 No.72631 Corporal Isaack Kimorgor of Ugunja Police Station testified that on 18.3.2017 at about 3. 00a.m he was on mobile patrol within Ugunja when he received a phone call from the Investigating Officer in this case who informed him that the suspect in this case was supposed to be arrested at [Particulars Withheld] village. He stated that with the help of two informers, he managed to locate the appellant's house while he was in the company of his colleagues. He said that they knocked the door of the appellant's home then the appellant opened the door. It was his testimony that the appellant was arrested after they informed him that they were at his house to arrest him for an offence of gang rape. He said that they escorted the appellant to the Ugunja Police Station where after conducting a search on him they placed him in cells.

31. PW4 No.104732 PC Nelia Muthoni of Ugunja Police Station testified that on 16.3.2017 while she was at the said police station a case of rape that had been reported by the complainant N.A. who was in the company of her aunt was minuted to her. She said that she interrogated the complainant who by then was traumatized and who was also suffering from malaria. She said that the complainant told her that on 14.3.2017 she was on her way home from Ugunja and that when she reached the junction at [Particulars Withheld] area, she met Jackim Oluoch who stopped her and asked her to return to the main road then to find out from her aunt the right path she needed to follow to her aunt's home.

32. PW4 further testified that the complainant said that she did not argue with Jackim and that she turned to go to the main road but before she could even turn, two people whom she physically knew slapped her on the face occasioning her to fall down. She said that the complainant said that at that point she was strangled and her eyes were irritating to such an extent that she could no longer see but she felt as the people lay on her then she fell unconscious. PW4 testified that when the complainant gained consciousness, she found that the people had already left and she found herself in great pain. She said that the complainant stated that she was gang raped. It was her testimony that the complainant said that she struggled to stand up and walked home. She also said that the complainant said that when she reached home, she went to kitchen where she sleeps and then later told her sister to make a phone call to her aunt who was still at Ugunja and tell her not to follow the junction route that is next to Jackim's home. She said that the complainant told her that when her aunt arrived home, her aunt asked her what was wrong and that since she was still traumatized she just said that she was sick.

33. PW4 testified that the following morning, the complainant said that her aunt told her that if she was still unwell she should go to the hospital. She said that the complainant said that she spent the entire day in the house and in the evening was taken to the hospital on a motorcycle that had dropped her cousin's child from school. She said that the complainant said that on that 15th she was admitted at the St. Paul's Methodist until the 16.3.2017 when her aunt went to check on her in the morning and found her still weeping. She said that the complainant said that her aunt realized that she had not eaten any food and that when her aunt asked her what was wrong she could not respond. She said that her aunt at that point called a nurse and requested the nurse to ask her (the complainant) what was wrong with her. She said that the complainant said that when the nurse interviewed her in a private room, she opened up and disclosed to the nurse that she had indeed been gang raped. She said that the complainant showed her the clothes the complainant was wearing at the time the complainant was gang raped and she observed that they were not only torn but also blood stained. She said that the complainant said that since she was still on drip her aunt was told to wait until noon when the complainant was released to her aunt and they availed themselves at the Ugunja Police Station to report the matter.

34. PW4 said that she recorded the statements of the witnesses then issued the complainant with a P3 Form which was filled at the Ambira Sub-County Hospital. She said that she later arrested the appellant and charged her with the offence of gang rape. She said that she received a torn biker and torn inner pant from the complainant which were both blood stained as exhibits. PW4 produced the black inner pant dotted white torn on both sides and which had blood stains earlier marked as PMFI 2b as **P Exhibits 2b and c** while bike torn from the middle extending to the legs with maroon red stains earlier marked as PMFI 2c as P Exhibit 2a. She said that the person she arrested was the appellant herein and stated that she never knew the appellant in the past. She identified the P3 Form of the complainant dated 16.3.2016 as PMFI 1b.

35. PW5 Howard Okeyo a Clinical Officer working at the Ambira Sub-County Hospital told the court that he had worked as a Clinical Officer for a period of 13 years. He produced the post rape care form and medical notes issued to the complainant N.A. at the St. Paul's Methodist Clinic as well as the P3 Form of the said patient which P3 Form he said was filled by himself. He said that he was the person who filled the complainant's post rape care form. It was his testimony that the said patient went to the Ambira Sub-County Hospital on the 16.3.2017 for Post Sexual Assault Care and gave a history of having been sexually assaulted/raped by two males unknown to her on 14.3.2017 at around 18.30 hours. He said that the patient gave a history of having gone to St. Paul's Methodist Clinic on 15.3.2017. He said that when he examined the patient, he noted that the patient had a painful swollen laceration. He said that the patient's lower abdominal wall segment had some pain and she had an altered gait while walking.

36. PW5 stated that the injuries were probably occasioned by a blunt edged object and that he assessed the injury as harm. He said that on genital examination he found that the patient had a painful perineal laceration, reddened vaginal wall which were painful and her hymen was not intact. He said that the patient had a foul smelling per vaginal discharge and that the tests done on her did not reveal any venereal disease or pregnancy. He said that the clinical findings were indicative of an apparent within 48 hours forceful vaginal penetration and she

sustained bodily harm. He said that on the same day of the examination the patient had a torn pant with blood stains. He said that the treatment notes from the St. Paul's Methodist Health Clinic also had the same information. He produced the discharge summary sheet issued to N.A. at the St Paul's Methodist Health Clinic indicating the date of discharge as 17.3.2017 but stamped on 18.3.2017 as **P Exhibit 1a, the P3 Form of N.A.A. dated 16.3.2017 as P Exhibit 1b, and the PRC Form of N.A. dated 16.3.2017 as exhibit 1c.**

37. The prosecution sought leave for PW5 to be allowed to produce the P3 Form of the Jackim Oluoch Nyambare which was filled by his colleague Victor Achayo. He indicated that he had worked with his colleague Mr. Achayo for a period of 5 years and such he was familiar with the handwriting and signature of the said Mr. Achayo. The prosecutor explained that the said Mr. Achayo was unable to attend court as he was the only Clinical Officer manning the Ambira Sub-County Hospital. The appellant did not object to the said application for PW5 to produce his P3 Form on behalf of the maker of the said P3 Form. He said that the P3 Form of Jackim Oluoch Nyambare was filled by Victor Achayo his colleague with whom he had worked for 5 years and he was familiar with Victor Achayo's handwriting and signature.

38. PW5 testified that the said JacJackim Oluoch Nyambare kim Oluoch Nyambare was taken to the Ambira Sub-County Hospital on 18.3.2017 under police escort for examination following the gang rape of a lady on 14.3.2017. He said that by the time the said Jackim was examined he had already changed his clothes and that on physical examination nothing significant was noted. He said that the genitals examination revealed a normal penis without any lacerations and that no significant finding was made. He said that the conclusion made was that since the incident occurred 3 days prior to the examination no sufficient evidence can be obtained for tests to be done. He said that the medical findings revealed normal findings. He produced the P3 Form of Jackim Oluoch Nyambare dated 18.3.2017 as Exhibit 3.

39. On cross examination PW5 stated that at the time of examination the complainant did not have any eye problem and further stated that no suturing was done.

40. At the close of the prosecution's case, the appellant opted to give sworn evidence and not to call any witnesses. He later changed his mind and called 2 witnesses.

41. In his sworn statement, the appellant identified himself as a resident of [Particulars Withheld] and told the court that he was a farmer and a brick maker. He said that he had sworn before the court and before God to say the truth. He confirmed that he understood the charges facing him and stated that since he was born he has never thought of committing the offence with which he had been charged. He said that he could not commit the offence with which he has been charged because he is a parent and that the complainant is the age of his children. He said that if he was to do such an act to the complainant, he would wonder what will happen to his children.

42. DW2 Ayub Odhiambo Ongare who identified himself as a resident of Modindi village Ugunja sub-location told the court that the appellant was the son of his brother whom he had known since birth. He said that the appellant had never committed such an offence. He said that the wife the appellant first married died then the appellant remarried. He said that the appellant's second wife had 2 children and was expecting another child. He further stated that the appellant fetched water for people to earn a living. He said that he was of the view that the charges preferred against the appellant were untrue because the appellant had never committed such an offence in the past. He said that this case shocked the wife of the appellant and had occasioned the wife of the appellant to be unwell.

43. On cross examination, DW2 reiterated his earlier testimony and stated that he loved the appellant as his own son and he would not love to see anything bad happening to the appellant because the appellant was an orphan and his initial wife died. He admitted that on 14.3.2017 he was at home and not with the appellant.

44. DW3 Julius Onyango Oluoch who identified himself as a resident of Ugunja told the court that he heard of the charges facing the appellant while he was in court. He said that he then stood surety for the accused so that the truth could be known whether or not the accused committed the offence.

DETERMINATION

45. Having considered the grounds of appeal, the submissions for and against the appeal and the evidence adduced for the prosecution and the defence, the issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt.

46. The offence of gang rape is provided for under Section 10 of the Sexual Offences Act (hereinafter referred to as 'the Act'). The said section states:

“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 fifteen years but which may be enhanced to imprisonment for life.”

47. Under Section 10 of the Act, the key ingredients of the offence of Gang Rape include:

a) Proof of rape or defilement;

b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

48. Therefore, was the offence of rape committed?

49. Section 3 of the Act defines 'rape' as follows:

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

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

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.”

50. Section 2 of the Act defines 'penetration' as:

“the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

51. This position was fortified in the case of Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus:

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).”

52. This therefore means that it is not a must that medical evidence be availed to prove penetration, as long as there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

53. In demonstrating this particular ingredient of the offence, the complainant testified that on the material date while returning home from computer lessons at around 6.30pm, she decided to use the route that passed near the appellant's home where she met the appellant and the appellant told her to turn back and follow another route but as she was turning, she was confronted by two other men who blocked her way and subsequently defiled her. It was the complainant's testimony that the appellant was part of her attackers.

54. PW5 Howard Okeyo a Clinical Officer who examined the complainant testified that his examination of the complainant revealed results which were indicative of forceful vaginal penetration within the past 48 hours. Therefore, on consideration of the evidence on the issue in totality, I find that there was penetration of the complainant's genitalia.

55. On the age of the complainant, I observe that under Section 10 of the Sexual Offences Act, the age of the victim is immaterial since the offence of gang rape is proved on inter alia the commission of either rape or defilement. However, the charge sheet revealed that the complainant was 20 years old, a fact which was not disputed. I hence find that the complainant was an adult of around 20 years old at the commission of the offence.

56. On the aspect of the consent, Sections 42, 43, 44 and 45 of the Act deals with that aspect at length. Section 42 states:

“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.”

57. Sections 43, 44 and 45 of the Act describes instances where one's consent cannot be said to have been obtained.

58. From the above statutory description of the consent and going by the testimony of the complainant, it can be clearly seen that the complainant never consented to the sexual activity with the assailants. One of the attackers closed her eyes with his hands while the other person tied her hands backwards. She further testified that she then felt someone holding/squeezing her neck tightly and that she then fell on the ground and that when she was on the ground, her attackers continued covering her eyes with the hand and that her hand remained tied backwards. She stated that she could feel some pressure on her chest and that she felt that someone was seated on her chest. I therefore find that the complainant did not consent to the sexual acts as it all happened against her will.

59. Accordingly, I find that the offence of rape was committed on the complainant.

60. Since the offence the Appellant is facing is gang rape, I will now consider the other limb as to whether there were joint assailants and if so, whether they had a common intention in the commission of the offence.

61. The offence was committed at around 6.30pm when there was still light outside. The complainant knew the appellant very well as they were neighbours where the complainant lived with her Aunt, PW2. PW2 bought land that she resided on from the family of the appellant and this was not denied. The complainant narrated how she was surrounded by three men, including the appellant who from the evidence pretended to be telling the complainant to turn back and use a different route only for her to encounter 2 other men facing her while the appellant was on sight. She stated how they pushed her down and held her and how before she lost consciousness, two men had already raped her. The persons who committed the offence had common intention in my opinion. The question thus turns as to who had the common intention to rape the complainant. In other words, the remaining issue is on the identification of the complainant's assailants.

62. On whether the appellant was identified as one of the complainant's assailant, the complainant testified that the offence took place at around 6.30pm and that it was not dark as such the complainant was able to identify her attackers under sufficient light. She further stated that the appellant stood in front of her and ordered her to go back and find out from her aunt as to the route she ought to have followed. It was her testimony that she turned and while still on the spot where the appellant ordered her to turn back, two other men and the appellant surrounded her such that she stood at the centre of the 3 men, that is the appellant who now stood behind her as she had turned her back on him and the two men whom she confirmed she could not recognize as they were strangers to her despite her clearly seeing them.

63. According to the complainant, the appellant conversed with her and that at the time something pepperish was used to slap her eyes, the appellant was still at the scene surrounding her together with those two other men. From the above vivid testimony of the complainant, it is my humble view that the complainant had ample time to view the offenders and it was not just a fleeting glance. I further find that she viewed the offenders from a close position and that there is nothing which could have impeded her proper identification.

64. I do note that the complainant identified one of the offenders as Jackim that is she described the accused by his name. The accused did not dispute the said description of him by the name Jackim. He did not at any time dispute that he is Jackim. It is noted that not much time had lapsed between the time the complainant allegedly saw the offender at the scene of the rape shortly before she was raped and the time she identified the offender to the police.

65. The complainant stated that she knew the appellant prior to the incident of rape as the appellant was a neighbour of her aunt and she often saw the appellant as she used to be on her way to the college. She said that the route she used to take to college, passed near the appellant's home and that she used to see the appellant on many occasions while on her way to and from college. She even told the court that on 13.3.2017 her aunt had a disagreement with the appellant after rice disappeared from her aunt's home when the appellant's daughter was at her aunt's house.

66. In my humble view, the visual identification evidence of the appellant by the complainant meets the threshold set in the case of **R v Turnbull (1976) 3 ALL ER 549** where the court stated that some of the factors to be considered before determining on whether to rely on the visual identification evidence of a single eye witness are as follows: ***Whether the viewer viewed the suspect under sufficient lighting, from a close position and there was nothing which could have impeded proper identification whether the viewer had ample time to view the suspect and it was not just a fleeting glance, whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect, whether much time had lapsed between the time the viewer initially saw the suspect and the time the viewer identified the suspect to the police.***

67. The court further drew a distinction between identification of a stranger and recognition evidence when the court stated that recognition evidence is more reliable than identification of a stranger.

68. By placing the prosecution's evidence and the defence side by side and guided by case law I find that the complainant had ample opportunity to see her assailants very well only that two of them were strangers but the appellant was a person well known to her. The identification of the Appellant herein as the one who was in the company of two other men when they jointly and in turns had sex with the complainant is hence without any error. Furthermore, whether the appellant raped the complainant or not, there is sufficient evidence placing him at the scene and a high possibility that he supervised the two strangers to gang rape the complainant as he watched. His denial that he could not commit such an offence could not be believed considering his presence at the scene.

69. Weighed against the prosecution evidence, it is my opinion that the appellant's defence was a mere denial and made up. The appellant stated that he is a parent and that he cannot commit such an offence. DW2 the uncle of the appellant was not with him on 14.3.2017 at 6.30pm and he instead told the court his views concerning the character of the appellant stating that the appellant could not commit such an offence. He further stated that he would not love to see something bad happening to the appellant. DW3 on his part told the trial court that he stood surety for the accused and nothing else. The defence of the appellant and the testimony of his witnesses did not shake the testimony of the prosecution witnesses. I further find no evidence of the appellant having been framed simply because of his alleged quarrel with PW2 as the quarrel was delinked from the ordeal that the complainant underwent in the hands of the appellant and his accomplices. There was also no evidence of any based blood between PW, the complainant and the appellant's mother as alleged by the appellant.

70. The upshot is therefore that the offence of gang rape was proved against the appellant beyond reasonable doubt. I find no reason to interfere with the conviction of the appellant. I uphold the decision of the trial court on conviction and dismiss the appeal against conviction.

71. Regarding sentence, the appellant was sentenced to serve fifteen years imprisonment. Section 10 of the Sexual Offences Act provides:

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 fifteen years but which may be enhanced to imprisonment for life.

72. The appellant was sentenced to serve fifteen years which is the minimum sentence upon conviction. However, from the reading of the section, and the wordings used which are discretionary not mandatory, it is clear to this court that the trial court had the discretion to sentence the appellant to less or 15 or more years up to life imprisonment. Applying the principles espoused in the Supreme Court case of **Francis Muruatetu & Others v Republic [2017]e KLR** and reiterated in **Jared Injiri Koita v Republic [2019]e KLR** by the Court of Appeal, I find and hold that the appellant being a first offender was entitled to a lesser sentence than the minimum provided for in law. Accordingly, I interfere with the fifteen years imprisonment imposed on the appellant and set it aside and substitute it with ten years imprisonment to be calculated from the date of conviction and sentence on 8.5.2017.

73. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF OCTOBER, 2019

R.E.ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent

CA: Brenda and Modestar