



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 12 OF 2015

BETWEEN

JOSEPH RIANANGURAAPPELLANT

AND

REPUBLIC.....RESPONDENT

***(Being an appeal from original conviction and sentence by Hon. M. M. Wachira – Resident Magistrate dated 21.8.2015 in Kapenguria
PMC Criminal Case no. 516 of 2015 (SO))***

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of *gang rape contrary to section 10 of the Sexual Offences Act, No. 3 of 2006*, the particulars being that on the 5th day of April 2015 at [Particulars withheld] area within the West Pokot County jointly in association with JACKSON CHEMNGANYANG and another not before court, unlawfully and intentionally caused his penis to penetrate the vagina of RC.
2. In the alternative, the appellant, was charged with committing an *indecent act contrary to section 11A of the Sexual Offences act, No. 3 of 2006*, the particulars thereof being that on the 5th April 2015 at [particulars withheld] area within West Pokot County, he unlawfully and intentionally caused his penis to touch the vagina of RC.
3. The appellant together with his co-accused Jackson Chemnganyang denied committing the offence. The prosecution called 6 witnesses in support of its case against the appellant and his co-accused. At the close of the prosecution case, the appellant was found to have a case to answer and placed on his defence. He gave a brief unsworn statement in which he denied the allegations made against him.

Judgment of the trial court

4. After a careful analysis of all the evidence on record, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt and accordingly found him guilty of the offence of gang rape and convicted him. The appellant was sentenced to serve 20 years imprisonment.

The Appeal

5. Being aggrieved by the whole of the judgment of the learned trial court, the appellant filed this appeal on 16.9.2015. The appeal is premised on grounds:-

1. **THAT the learned trial magistrate erred in law and fact by convicting the appellant by relying on the evidence of one identifying witness.**
2. **THAT the learned trial magistrate erred in law and fact by convicting the appellant without the evidence of certain crucial witnesses to support the evidence of the complainant PW1.**
3. **THAT the learned trial magistrate erred in law and fact by failing to appreciate that the KPR witness did not in fact find**

the appellant committing the offence.

6. At the hearing of the appeal on 5.11.2019, the appellant filed amended grounds of appeal together with his written submissions. In these grounds, the appellant complained that he was not taken to hospital for medical examination with a view to confirming if he had indeed committed the offence. He also complained that the case against him was so poorly investigated that he should have been acquitted. The appellant also complained that the charge sheet was defective and thus violated **section 43 of the Criminal Procedure Code**. The appellant also contended that the sentence imposed upon him by the learned trial magistrate was too harsh and excessive in the circumstances and finally that his defence was not appropriately considered by the learned trial magistrate.

7. As this is a first appeal, this court is under a duty to subject the entire evidence adduced by the prosecution during the trial to its own fresh evaluation and analysis before reaching a conclusion as to whether the findings of the learned trial magistrate can be supported. In exercising this appellate jurisdiction, this court has to remember that it neither saw nor heard any of the witnesses who gave evidence and to make an allowance for the same. For this proposition, see the Court of Appeal decision in **Samuel Robi Wangwi versus Republic [2019]eKLR** in which the Court cited the well-known case of **Okeno versus Republic [1972] EA 32** in which the Court of Appeal for Eastern Africa held, *inter alia*, that the first appellate court must make its own findings and draw its own conclusions on the evidence laid before the trial court before deciding whether the magistrate's findings should be supported.

The Prosecution Case

8. From the record, the case for the prosecution is that on 5th April 2015 at about 10.00pm, the complainant and her husband were coming from the market when they met three people on the way. The three people descended on her husband with stones as they also tore off her underpants and raped her in turns. As if that was not enough, she was stabbed in her private parts with a knife. The complainant who testified as PW1 screamed. Neighbours who heard the complainant's screams went to the scene. One of those neighbours was Abraham Pkutat PW3, a Kenya Police Reservist. He went together with his KPR neighbour one Bakari Marso. On reaching the scene, PW3 flashed a torch and saw two people who ran away. The third person whom PW3 said was the appellant did not manage to run away, and was apprehended while in the act of raping the complainant.

9. That same night the area Chief was informed and the appellant together with the second accused person during the trial were arrested.

10. PW2, SA, husband to PW1 corroborated PW1's testimony as to what befell them on the material night as they walked home from [particulars withheld] market. He added that during the attack, he was hit on the head, fell down and became unconscious for about 30 minutes. When he regained consciousness he was informed by the complainant that she had been raped by the attackers.

11. PW1 and PW2 were taken to Chepareria Health Centre and also made a report to Chepareria Police Post. On the following morning a report of the incident was made to Kapenguria Police Station.

12. PW4, Bakari Marso corroborated PW3's testimony and added that when they went to the scene of the attack, they found the appellant lying on top of the complainant and he was immediately arrested.

13. Number 69187, PC Sheila Kiptoo of Kapenguria Police Station received the report of the incident. She testified that the appellant and his co-accused were taken to the police station by PW3, and PW4. After recording statements, she charged the appellant and his co-accused.

14. Simon Maderang, a clinical officer from Kapenguria District Hospital testified as PW6. He examined the complainant and also filled her P3 form which he produced as Pexhibit 1. According to PW6, the medical examination revealed that the complainant had been raped. Externally the complainant had torn and blood stained skirt and pants. On physical examination, the complainant had pain on the face, and a bruised elbow. There was also a cut wound between the anus and the vagina. There was also a blood stained discharge from the vagina in addition to many human spermatozoa leucocytes. There was also blood in the urine.

The Defence Case

15. The appellant gave unsworn testimony and stated he was arrested on 6th April 2015 at around 6.00am and taken to Chepareria Police Post. He denied being at the scene of the alleged incident.

Submissions

16. The appellant filed very detailed written submissions replete with authorities in support of each of the grounds of appeal raised by him. The appellant's central argument is about identification of the assailants on a dark night and the fact that both PW1 and PW2 did not know their attackers before the material day. He also submitted that the sentence imposed upon him by the learned trial court was contrary to the Constitution and further that the investigations, if any, were too shoddy to nail him to the offence charged.

17. The appeal was opposed. Prosecution counsel M/S J. Kiptoo submitted that the prosecution proved its case against the appellant beyond any reasonable doubt by proving the fact of penetration, through the evidence of the complainant and that of PW6, the clinical officer. Counsel also submitted that the identity of the appellant as the perpetrator of the crime was beyond reproach, having been found in the act and arrested there and then. Counsel submitted that between his arrest and handover to the police the appellant was neither released nor did he run away out of sight of PW3 and PW4.

18. Regarding sentence, prosecution counsel submitted that in view of the circumstances of the case, the 20 year prison term was sufficient.

Issues for Determination

19. After a careful analysis of the evidence, the submissions and the law, the issues that arise for determination are:-

1. **Whether the offence of gang rape was proved namely whether the complainant was raped by more than one person and whether the act was intentional and unlawful and without consent; and**
2. **whether there was penetration and**
3. **whether the appellant was properly and clearly identified as the perpetrator together with others.**

20. *Section 10 of the Sexual Offences Act, No. 3 of 2006* 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 on conviction to imprisonment for a term of not less [than] fifteen years but which may be enhanced to imprisonment for life.”

21. The term '**gang**' is defined under section 2 of the Sexual offences Act to mean '**two or more persons**', while the offence of rape under Section 3 of the Sexual Offences Act connotes:-

1. **an intentional and unlawful act which causes penetration with his or her genital organs;**
2. **lack of consent to the penetration on the part of the other person.**
3. **consent that is obtained by force or by means of threats or intimidation of any kind.**

22. The term '**penetration**' is defined under section 2 of the Sexual Offences Act to mean '**the partial or complete insertion of the genital organs of a person into the genital organs of another person.**'

23. The first issue for determination is whether the prosecution proved the offence of gang rape. In other words is there evidence on record to show that the complainant was raped and that she did not give consent for the sexual encounter with her assailants and whether the act of raping her was intentional and unlawful. The evidence on record indeed shows that the complainant was raped, that the act was done without her consent and that it was both intentional and unlawful.

24. The complainant stated that on the material day at about 10.00pm, she was walking home from the market, accompanied by her husband PW2, when they were accosted by three people. The three people attacked her husband by hitting him on the head until he fell down unconscious. As PW2 fell down, the attackers reached for the complainant, tore off her pants and had sex with her, before stabbing her in her private parts. She did not give any consent for such an assault on her, and accordingly that sexual act was both intentional and unlawful by whoever committed it. I am therefore satisfied that the prosecution proved the charge of gang rape.

25. The second issue for determination is whether there was penetration. From the evidence on record, both from PW1 and PW6, the Clinical Officer, there was penetration. According to PW1, her assailants had sex with her and also stabbed her in her private parts. PW6 confirmed this when he stated that the complainant had a cut between the anus and the vagina, in addition to a blood stained vaginal discharge. PW6 also confirmed that there were many human spermatozoa leucocytes and blood in the urine. All this evidence proves beyond any reasonable doubt that PW1's testimony of being raped was true and that there was penetration deep into her vagina where the assailants deposited the spermatozoa. I am therefore satisfied, as the trial court was, that there was penetration on the complainant, PW1 with the genital organs of some men who accosted her and her husband and raped her.

26. The next issue for determination is whether it was the appellant with others who gang raped the complainant and caused the penetration into her vagina. It is to be noted that the question of identification in the circumstances under which the complainant was gang raped were difficult. This court must therefore be satisfied about such evidence so that no prejudice is caused to the appellant. The incident took place on a dark night at 10.00pm. According to the complainant, there was little light and she could only see a little. The attack was also very sudden, and in such circumstances visual identification was difficult, and more so because the appellants and his accomplices were unknown to the complainant.

27. In the case of *Anjanoi & others versus Republic [1976-1980]KLR 1566*, the court stated that when it comes to identification, it is usually easier to identify someone who is known than a total stranger, since the evidence of recognition is more assuring and more reliable because it depends upon some personal knowledge of the assailant in some form or another. The appellant contends and rightly so, that under those circumstances his visual identification at the scene was not free from possibility of error.

28. There is other evidence however upon which the prosecution pinned the appellant to the scene. When PW1 screamed, PW3 Abraham Pkutat and PW4, Bakari Marso, rushed to her rescue. PW3 stated that as they got to the scene, they saw three men and a lady and on flashing their torches at the people two of the men ran away but one remained behind. That man who remained behind was the appellant who was found on top of the complainant, raping her. PW3 and PW4 immediately got hold of him. They also saw PW2 who told them that PW1 was his wife. PW3 and PW4 and other KPR officers who had been sent by the chief walked with the appellant to the home of the appellant's co-accused who was just preparing to go to bed. They arrested him and took the two of them to Chepareria AP Camp.

29. Both PW3 and PW4 were consistent in their testimony that the appellant remained under their watch until they handed him over to the AP Camp at Chepareria. I am thus satisfied that the appellant was caught in the act of raping the complainant after his two accomplices ran for their lives. The evidence also shows that at no time was the appellant released between the moment he was caught by PW3 and PW4 and

his being handed over to police. In this regard therefore, there was no mistaken identity about the appellant as the one who raped the complainant in company of two other people.

30. The final issue is one of sentence. The appellant was sentenced to serve 20 years imprisonment. The appellant contends that the sentence is unproportional and wants it reviewed downwards. I have considered the reasoning of the Supreme Court of Kenya judgment in ***Francis Karioko Muruatetu & another versus Republic [2017] eKLR*** as well as recent Court of Appeal decisions concerning mandatory minimum sentences, among them ***Daniel Anyango Omoto versus Republic [2019]eKLR***. I am satisfied that the manner in which the appellant executed the crime against the complainant, including stabbing her in her private parts after raping her, was heinous. The appellant does not therefore deserve any pity for his actions. I accordingly find no reason to interfere with the sentence of 20 years imprisonment imposed by the learned trial court.

31. There is a final issue raised by the appellant. That the charge sheet was defective. His complaint is that the date of the alleged offence as given in the charge sheet is not in tandem with the date given in the evidence. PW1, PW2, PW3 and PW4 all refer to 5th April 2015 as the date of the alleged offence. In my considered view such discrepancy, if any was not prejudicial to the appellant and is in any event curable under ***section 382 of the Criminal Procedure code***.

Conclusion

32. On the basis of all the above, the conclusion of this matter is that the appellant's appeal is devoid of any merit on both conviction and sentence and is accordingly dismissed.

33. Right of appeal within 14 days of the date of this judgment.

34. Orders accordingly.

Judgment delivered, dated and signed in open court at Kapenguria on this 2nd day of December, 2019.

RUTH N. SITATI

JUDGE

In the Presence of

Present in court – Appellant

Mr. D. D. Sitati for Respondent

Mr. Juma Barasa – Court Assistant