



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 118 OF 2013

BETWEEN

SHADRACK OLUOCH OLOO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E.M. Makori, PM dated 24th September 2010 at the Mumias Principal Magistrates Court)

JUDGMENT

1. The appellant, **SHADRACK OLUOCH OLOO** together with his co-accused were charged and convicted of the offence of gang rape contrary to **section 10** of the **Sexual Offences Act**. He was sentenced to 15 years' imprisonment. The particulars of the case against him were that together with his co-accused on 8th November, 2008 within Butere Mumias District of the then Western Province he had carnal knowledge of F.A without the knowledge or consent.
2. The appellant now appeals against the conviction and sentence mainly on the ground that the case against him was not proved beyond reasonable doubt. He urges that he was not identified at the scene of the incident and that DNA evidence was not produced to prove that there was penetration. The state opposes the appeal on the grounds that the prosecution proved all the elements of the offence.
3. As this is a first appeal, I am required to analyse all the evidence afresh and come to an independent conclusion as to whether or not to uphold the conviction all the time bearing in and that I neither saw nor heard the witnesses so as to make a finding on their demeanour.
4. Although the trial magistrate conducted a *voire dire* before taking the testimony of FM (PW 1), it was unnecessary as she was aged 16 years and not a child of tender years as the case of **Kibageny arap Kolil v R [1959] EA 92** established that the phrase, 'a child of tender years' means a child under the age of 14 years. PW 1 nevertheless gave sworn testimony. She recalled that on 7th November 2009 at about 4.00pm, she was in the company of about seven other people leaving a funeral in the neighbourhood. Along the way, near a quarry, she was confronted by two people whom she knew, they chased her whereupon she fell. The appellant forcefully proceeded to have sexual intercourse with her.
5. PW 3, who was also with PW 2, testified that as they were coming from the funeral, she heard a voice and when she went to see what was happening, she found the appellant struggling with PW 2 while his co-accused was holding her by her throat. She quickly rushed home to tell her parents what was happening.
6. PW 5 was among the people with PW 2 as they left the funeral. He recalled that he heard the appellant's voice on the way. They all started running away leaving PW 2 behind. He testified that he could see the appellant's co-accused holding her. He reported the incident to his uncle.
7. When PW 3 reached home, she told her mother about the incident and they went to report the same to the Assistant Chief (PW 4). PW 4 told the court that on 8th November 2008, he was asleep on the material night when he was awoken at about 3.30am by the village elder and other members of the public who informed him that PW 2 had been abducted by the assailants. He summoned Administration Police officers and they went to arrest the appellant and his co-accused from their respective homes. After arrest, the appellant and his co-accused were taken to Imanga Police Patrol Base where they were re-arrested by the investigating officer (PW 7)
8. PW 7 issued the P3 form and referred PW 2 to Butere District Hospital for examination. The Clinical Officer at the hospital, PW 1 confirmed that PW 2 was treated at the hospital on 8th November 2008. He examined her and noted that she was shy and could not express

herself. He observed tenderness on her neck. PW 2's vulva was swollen and the hymen was broken. A laboratory examination of the whitish discharge emanating from the vagina confirmed the presence of spermatozoa. He concluded that there was defilement.

9. The appellant denied the offence and gave an account of his arrest which took place at about 5.00am while he was in his house.

10. Before I deal with the evidence, I note that the offence charged was gang rape yet the particulars of the offence disclosed the offence of rape. **Section 10** of the **Sexual Offences Act** provides:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any other 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.

11. The essence of the offence of gang rape is that there must be more than one perpetrator who acts in association with others even though not all of them carry out the actual rape or defilement. It is clear that charge as framed does not refer to the appellant in conjunction or in association with another person causing the act of penetration. Although the charge was defective, the question for consideration is whether there has been prejudice to the appellant. This issue must be considered in light of the entire evidence.

12. It is clear from the testimony of PW 2 that she was sexually assaulted. In light of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, her testimony was sufficient to support a conviction without corroboration if the trial magistrate, for reasons to be recorded, believed that the complainant was telling the truth. The trial magistrate found her to be, "truthful and consistent". If any corroboration was required, it was to be found in the fact that her muddy clothes were produced in evidence and the medical examination by PW 1 which confirmed the assault and act of penetration.

13. In addition, the fact that the appellant was the one who committed the act was based on evidence of recognition. The appellant was well known to PW 2. She clearly recognised him and given the fact and length of interaction in moonlight negated any claim of mistaken identity. The other witnesses, PW 3 and PW 4, also knew the appellant, they had been together at the funeral and they put him at the scene of the incident. Thus, when the appellant's defence is considered alongside all this evidence, it is a sham. The fact that he was arrested at his house at about 5.00am only means that the appellant went back home after committing the felonious act.

14. I return to the issue of the defective charge. In **JMA v. Republic [2009]KLR 671**, it was held inter alia that:

It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.

15. In my view, the defective charge sheet does not render the conviction a nullity and is curable under **section 382** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides;

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

16. The charge referred to "carnal knowledge" yet such a phrase does not exist in the **Sexual Offences Act** as **section 2** thereof defines defilement by reference to act which causes penetration of the genital of one person to another person. I however do not find these errors fatal as the appellant knew the substance of charge he was facing. This is evidenced by the fact that he was able to cross-examine witnesses and defend himself against the charge whose substance was penetration of a child.

17. As regards the child's age, PW 1 produced the immunization booklet which show that she was born on 30th April 1993 which means she was aged 16 years old at the time the offence was committed hence the sentence applicable is under **section 8(4)** of the **Sexual Offences Act** which provides for a minimum of 15 years' imprisonment.

18. Accordingly, I set aside the conviction on the offence of gang rape and convict him of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**. I sentence him to **fifteen (15) years' imprisonment**. The term of imprisonment shall run from the date of sentence before the trial court.

DATED and DELIVERED at KAKAMEGA this 3rd day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.