



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 7 OF 2017**

**GEDION OLOLTUYO SUNKULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. B.O Ochieng' – PM dated 26<sup>th</sup> October, 2012 at the Principal Magistrate's Court at Kilgoris in Criminal Case No. 512 of 2012)*

**JUDGMENT**

1. The appellant, GEDION OLOLTUYO SUNKULI, was charged and convicted of the offence of rape contrary to section 10 of the Sexual Offences Act ('the Act'). The particulars of the offence were that on 22<sup>nd</sup> June 2012 at about 7.00 p.m at [particulars withheld] within Transmara District of Narok County, he in association with others intentionally and unlawfully caused his penis to penetrate the vagina of NN without her consent.
2. The appellant was sentenced to 20 years imprisonment and has now appealed. The thrust of his appeal according to the petition of appeal, supplementary grounds of appeal and written submissions is that the prosecution failed to prove its case beyond reasonable doubt.
3. In considering this appeal, I am alive to the fact that as the first appellate court, I am required to re-appraise the evidence and come to an independent conclusion as to whether should I should uphold the appeal bearing in mind that I neither heard or saw the witnesses testify (see **Okeno v. Republic [1972]EA 32**).
4. The complainant (PW 1) testified that on 22<sup>nd</sup> June 2012 at about 6 p.m as she was going home from the local trading centre, she was waylaid by three men. One of them forcefully held her and pushed on the ground, unzipped his pant and proceeded to sexually assault her as he held her mouth. After he finished, he called another person who also raped her and also the third person. They all left. She testified that she was able to recognize all the assailants and the appellant is the person who raped her first. She was in a state of shock and distress for 3 days and could not tell her husband, PW 2, what had happened.
5. PW 2 told the court that PW 1 arrived home at about 7.45 pm on the material day, she went straight to the bedroom. He heard their child asking her what injured her and when he went to check, he found she had blood oozing from the mouth. PW 2 testified that PW 1 refused to tell her what happened until he got harsh with her whereupon she told him that the appellant was one of the three men who raped her.
6. PW 2 explained that since he did not have money, he took two days to look for money before he went to the police to report. He also took PW 1 to hospital for examination and treatment.
7. PW 4, a police officer attached to Kilgoris Police Station, testified that PW 1 and PW 2 came to the police station on 28<sup>th</sup> June 2012 to make the report that PW 1 had been raped. He issued a P3 form. He was also told that the appellant could be found and gave them a warrant of arrest which PW 2 took to the General Service Unit(GSU) at the Olololo gate of Maasai Mara. The officers then arrested the appellant who was brought to Kilgoris Police Station.
8. PW 1 was examined by PW 3, a clinical officer at Transmara District Hospital on 2<sup>nd</sup> July 2012. Although there were no injuries on her body, he observed that the external part of the vagina had bruises and small cuts on the labia minora and majora and also some lacerations. He also observed slight trauma on the cervix and the laboratory examination confirmed the presence of spermatozoa.
9. I have noted that the original examination done on 27<sup>th</sup> June 2012 as evidenced by the treatment notes stated that there was no spermatozoa seen but according to PW 3, he did a further examination which revealed spermatozoa.
10. When placed on his defence, the appellant denied that he raped PW 1 and gave an account of his arrest on 4<sup>th</sup> July 2012 at a camp within Maasai Mara. He denied that he knew PW 1.

11. The issue in this case is whether PW 1 was raped by the appellant. PW 1 gave clear evidence of how she was waylaid and sexually assaulted. Although she did not tell her husband immediately, she explained that she was afraid of him. PW 2 also confirmed that it is only when he became harsh with her that she opened up. PW 1's testimony was further corroborated by the fact that PW 2 saw her in a state of distress when she came home on the material evening and saw the injuries on her mouth. Further corroboration is also provided by the medical evidence of PW 3 which show that PW 1's vagina was injured as evidence of forcible penetration. PW 3 testified that the bruises on the vagina could only be the result of non-consensual sexual intercourse.

12. I also find and hold that the appellant was not a stranger to PW 1 and PW 2. Although the appellant denied that PW 1 knew him, she stated in cross examination that he was a neighbour and in answer to the court's question, she stated that his mother was her aunt. Likewise PW 2 told the court that they did not live far from each other and he is the one who directed GSU officers to arrest the appellant.

13. The incident took place in the early evening and because she knew the appellant, she was able to identify and name him to PW 2 when she was able to. There is no suggestion in his defence or even in cross examination that he was being framed or that PW 1 was plainly lying.

14. The totality of the evidence is that the appellant, in a group of two other known people, acted together with a common intention to forcibly have sexual intercourse with PW 1. In other words, the act of penetration was done without PW 1's consent within the meaning of section 3 of the Act. I affirm the conviction.

15. The minimum sentence for the offence of gang rape is fifteen years imprisonment which may be enhanced to life imprisonment. I allow the appeal only to the extent that I reduce the sentence to 15 years imprisonment.

**Dated and delivered at Kisii this 12th day of July 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.