



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 5 OF 2016

(Consolidated with No. 6 & 7 of 2016)

(Being an appeal arising from conviction and Sentence in Eldoret Chief Magistrate's Court Criminal case No. 244 of 2014 delivered by C. Obulutsa Senior Principal Magistrate on 15/1/2016)

SIMON KINYUA.....1ST APPELLANT

CEDRICK JEDDY.....2ND APPELLANT

DOMINIC MUKAA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellants were charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code** as well as **Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006** as follows that **on the 7th day of September, 2013 within Uasin Gishu County jointly with others not before court being armed with an offensive weapon namely a piece of timber robbed AK of cash Kshs 600/= and one mobile phone make Tecno valued at Kshs 3000/= and immediately before such robbery wounded the said AK.**

2. The **1st Appellant Simon Kinyua** was charged with the **second count of Gang Rape contrary to Section 10 of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 7th day of September, 2013 within Uasin Gishu County in association with others before court intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of AK without her consent.**

3. On the alternative charge, He was charged with an **Indecent act contrary to Section 11(a) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 7th day of September 2013 at [particulars withheld] within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to come in contact with the genital organ (vagina) of AK.**

4. The **2nd Appellant Cedric Jeddy** was charged with the **2nd count of Gang Rape contrary to Section 10 of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 7th day of September 2013 within Uasin Gishu County in association with others before court intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of AK without her consent.**

5. He was equally charged with the alternative charge of **Indecent act contrary to Section 11(a) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge were that **on the 7th day of September 2013 within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to come in contact with the genital organ (vagina) of AK.**

6. The **3rd Appellant Dominic Mukaa** was charged with the **second count of Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that **on the 7th day of September, 2013 within Uasin Gishu County in association with others before court intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of AK without her consent.**

7. He was equally charged with the alternative charge of **Indecent act contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006**. The particulars were that **on the 7th day of September 2013 at [particulars withheld] within Uasin Gishu County, intentionally and unlawfully caused his genital organ (penis) to come in contact with the genital organ (vagina) of AK.**

8. They were each sentenced to suffer death on the 1st count and 30 years imprisonment for the 2nd charge of Gang Rape. They have filed the appeal herein citing several grounds. It is worthwhile before discussing the merits or the demerits thereof to summarise the evidence as presented during trial.

9. **PW1 the complainant** testified that on 7/9/013 at around 9.36 Pm she was heading to a funeral vigil with one Wekesa within Kisumu Ndogo at Langas. Suddenly some 10 people appeared and separated them. The 3 appellants whom she knew forcefully took her tore her jumper and frog marched her to Panama house area. They proceeded to rape her in turns. She said that she was able to recognise each one of them as they were common in the area. There was also lights from the shops around.

10. After wards they left her. She was injured and struggled to reach her daughters place. She came with her and managed to come back to the scene and found her identity card. The 3rd appellant was there smoking. She reported the matter to the police and was referred to Moi Teaching and Referral Hospital for treatment. A p3 form was equally filled.

11. She gave the names of the suspects to the police. The 1st appellant was arrested when she went to the police station.

12. **PW2 MM** the daughter to PW1 testified that her mother went to her house in the morning and told her that she had been raped and robbed. She went with her to look for her identity card at the scene and saw the 3rd appellant smoking with others. She said that PW1 knew the appellants whom she mentioned by names.

13. **PW3 P.C. Bernard Lelei** from Langas police station took over the matter from P.C. Kiusya who had been transferred.

14. **PW4 Dr Paul Rono** from Moi Teaching and Referral Hospital produced the P3 form on behalf of Dr Imbenzi who examined PW1. The same showed that she had injuries in the right cheek, and swelling on the nose and face as well as injuries on the knee. She had fresh tears on her private parts.

15. When placed on their defences the three appellants each gave unsworn testimonies denying the charge. The **1st Appellant Simon Kinyua Kamau** denied that he knew the complainant nor his co-accused. He spoke of a phone which he had been given by his friend Edgar as a collateral and how he gave him Kshs 800/=. He said he was later arrested over the said phone.

16. The **2nd appellant Cedrick Jidey Duchi** said that he runs a barber shop and that it was his first time to see the complainant in court. He said that he was arrested on 24/9/13 by the police for attacking the complainant.

17. The **3rd Appellant Dominic Mukaa** said that he operates a pool table and he did not know the co-appellants nor the complainant. That he was arrested on 15/1/2014 as his licence had expired. He generally denied the charge.

Analysis and Determination

18. The court has read the proceedings as well as the submissions by the appellants. What is not in dispute is the fact that the complainant was gang raped and injured on the material day. Although no stolen items were recovered from them despite them mentioned in the charge sheet, the amount of violence meted against the complainant were clearly visible and corroborated by the production of the P3 form.

19. The centrality of this case centered on identification. The complainant stated that she knew the boys by name and from that area. She clearly pointed them in court and from her further evidence she informed clearly the police when she reported the matter.

20. She said of the 1st appellant that she met him from the time his mother passed away. She said that she knew the 2nd appellant as a boda boda rider. For the 3rd appellant she said that he was the one who commanded the rest and especially the 2nd appellant when he hesitated on raping the complainant.

21. All in all I am satisfied that the appellants were well known to the complainant and there was nothing to suggest that they even attempted to conceal themselves during the act. The complainant stated that there was light from the nearby shops that night. This was therefore a case of recognition not identification.

22. I would therefore dismiss the appeal on this score. The unsworn evidence of each of the appellants were useless to say the least. None of it was so convincing even in that state to create any doubt that they did not commit the offence.

23. On the question of whether ingredients of robbery under the provision of Section 296(2) were met, I do not think so. Although they were many in number, they did not possess any offensive weapon. At least the complainant did not state so. Even the timber stated in the charge sheet was never alluded to in her testimony.

24. Consequently I find that the proper section in which they should have been charged is Section 295 of the Penal code. I therefore set aside the sentence of death imposed upon the appellants and order that they should instead serve a custodial sentence of 14 years from 17/10/2014 as they did the case while in custody and there is no evidence that they were out on bond.

25. As regards the charge of gang rape, I notice that they were each sentenced to 30 years imprisonment. From the evidence on records, they are all young men under 20 years. I shall however interfere with the 30 years period imposed on them with a view that the period they shall serve in custody shall shape them to be a better citizen. Section 10 of the Sexual Offences Act provides for 15 years as a penalty.

26. I shall order therefore that from the charge of Gang Rape they shall each serve a period of 15 years in jail running from 17/10/2014 instead of the 30 years imposed by the trial court.

Conclusion

27. The sentence of death imposed upon each of the 3 appellants is hereby set aside and substituted with the sentence of 14 years imprisonment from 17/10/2014.

28. The sentence of 30 years imposed upon each of the appellants is set aside and substituted with 15 years on the count of Gang Rape.

29. Both sentences shall run concurrently.

Orders accordingly.

Judgment read, delivered, signed and dated at Eldoret on this 12th day of October , 2018.

H.K. CHEMITEI

JUDGE

12/10/18

In the presence of:

Mr. R. Karanja for the Respondent

Appellant – present

Curt Assistant – Christine

Judgment read in open court.