REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 44 AND 45 OF 2015

(Being an appeal from the judgement of Kitale Chief Magistrate J.M. Nang'ea delivered on 25/3/2015 in Criminal Case No. 2278 of 2014)

JOHN WANYOYNI MUKHWANA

DENNIS WANJALA NAKITARE }.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

In the amended charge sheet the appellants were charged with the following offences **Gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006.**

The particulars of the offence were that on the night of 5th/6th June 2014 at [Particulars Withheld] area Kitale within Trans Nzoia County in association with Dennis Wanjala Nakitare intentionally and unlawfully caused your penis to penetrate the vagina of S W without her consent.

The appellants were charged with alternative charge of **committing an Indecent Act with an adult Contrary to Section 11(a) of the Sexual Offences Act No 3 of 2006.**

The particulars of the offence were that on the night of 5th/6th day of June 2014 at [Particulars Withheld] area Kitale within Trans Nzoia County intentionally caused the contact between your genital organ namely Penis and genital organ namely vagina of S W without her consent.

The 1st appellant faces the 3rd count of Stealing contrary to Section 275 of the Penal Code .

The particulars of the charge were that on the night of 5th/6th June 2014, at [Particulars Withheld] area within Trans Nzoia county, you stole a mobile phone Nokia X-2 valued at Kshs 5,000/- the property of S W.

The 1st appellant faced an alternative charge of **Handling Stolen Goods contrary to Section 322(1) (2) of the Penal Code.**

The particulars of the charge were that on the night of 5th /6th June 2014 at St Mary's Kibomet area at Kitale within Trans Nzoia County, otherwise than in the course of stealing, dishonestly received or

retained mobile phone X2 knowing or having reason to believe them to be stolen goods.

They were each convicted and sentenced. They have appealed against both conviction and sentence. Before analysing their grounds of appeal it shall suffice to summarise the proceedings as presented at the trial court.

PW1 S N the complainant told the court that on 5th June 2014 at around 7 pm she decided to visit his friend, Kevin at a place called Lukhuna. He boarded a motorcycle whose rider told her that he knew the place. The said boda boda boda rider instead took her to the house of the 2nd appellant which was not Lukhuna. They then forcefully dragged her to the 2nd appellant's house and proceeded to rape her in turns. In the course of the night the 1st appellant left leaving behind the 2nd appellant who proceeded to rape her. Early in the morning the complainant managed to escape and she found PW2 who informed her of the ordeal.

PW2 Catherine Nasimiyu upon being notified at around 7pm took her to the village elder Samuel Makoma who reported the matter to the police. PW2 knew the 2nd appellant as they were neighbours.

PW3 Francis Musumba a brick maker said that he saw a young lady at the house of Pw2 at around 7 am crying . PW2 informed him that the lady had been raped the previous night at Dennis house whom he apparently knew as he was also a brick maker. He saw the 2nd appellant that morning as he spoke with PW2. He alerted the police concerning the whereabouts of 2nd appellant who at that time was at Namawanga Trading Centre. He also testified that the 2nd appellant led the police in arresting the 1stt appellant.

PW4 APC Julius Keter Tum testified that on 6/6/14 at around 7 am the village elder Samuel Makona reported the incident at their camp. Together with his colleague they went to the house of the 2nd appellant who apparently had left for his brick making business. He was arrested and in the process of being interviewed he told them that the real culprit was the 1stt appellant who was a motorcycle rider. They then traced him to Bikeke area where he was arrested. Further the first appellant's wife surrendered the complainants phone to PW4 which Sim Card had been removed and a different one inserted.

PW5 John Koima a Clinical Officer produced the P3 Form which showed that the hymen was torn though it looked old.

PW6 P.C. Rose Sabuli took over the investigations from a colleague who had been transferred. He bonded the witness as well producing the exhibits.

When put on their defences each of the appellants gave unsworn evidence. The 1st appellant testified that he was arrested by 4 people on 6/6/2014 and taken to the APs Camp where he found someone else having been arrested. He denied the charge.

The 2nd Appellant equally was arrested and take to police station where according to him he was beaten up to confess the offences. He denied the charge.

<u>Analysis And Determination</u>

The appellants have raised weighty grounds in their appeal. Their grounds are that there was no positive identification by the complainant and that there was no sufficient evidence to suggest that the complainant had been raped.

This being a first appeal this court is enjoined to re evaluate the evidence afresh with a view of arriving at an independent finding with full caution that it did not have the benefit of seeing the witnesses or the complainant.

For the offence of this nature to be proved the essential ingredients inter alia are

a) there ought to be requisite consent

b) there must be prove of penetration

c) there ought to be positive identification of the perpetrators.

I have perused the lengthy submissions by the appellants as well as the respondence. On the first issue of consent it is clear that the complainant was heading to her friend's home one Kevin where she was to spent the night. The means of transport to that place was a boda boda ride. The 1st appellant was the person who ferried her. I do not think the evidence of PW1 on who took her that evening was controverted. It was not denied least of all by the 1st appellant that he was a boda boda rider.

More importantly the complainant's evidence of being taken to a different place was not controverted.

PW2 a neighbour of the 2nd appellant testified as much. How else did she get into the vicinity of the 2nd appellant home as well as Pw2 and Pw3?

I easily conclude therefore that the complainant was taken to the home of the 2nd appellant by the 1st appellant.

The appellants have then argued that there was no evidence that the complainant was sexually assaulted. On the contrary the Clinical evidence state as much.

Equally it would be foolhearted for the complainant to wake up in the morning having spent at a stranger place, get out and begin crying and seeking help from the neighbours.

Morover PW3 saw the 2nd appellant in his house that morning.

I therefore find that the complainant was truly sexually assaulted and the same was without her consent.

Section 42 of the Sexual Offence Act states as follows;

> ***"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"***

In this incident there is no evidence of such freedom. The two appellants had a common intent namely to rape the complainant.

The appellant have equally raised the issue of identification arguing that in all probability the complainant was not in a position to identify them and that a parade identification ought to have been carried out.

The evidence of PW1 then answers the appellants assertion. She said in her evidence in chief that;

> **"He also raped me for an hour. All along the torch was on"**

Even so the 2nd appellant surrendered the complainant belonging that morning after being reported to the village elder and PW2.

When cross examined by the 1st appellant she said

> **"I saw you well with torch light in the house. At one time your accomplice shown the torch over your face. I described your appearance to the Aps and village elder. I told them you were light skinned"**

I do find therefore that the complainant duly identified the assailants. In any case she spend considerable time with them and even on voice identification she had sufficient time to identify them.

Finally on the question of whether the alternative count against the 1st appellant was proved I find that there was no sufficient evidence. There was no distinctive mark to show that the phone belonged to the complainant. Neither was there any receipts to indicate purchase by the complainant. There was no inventory to show that the same was recovered from the 1st appellant house or from his wife.

It was therefore unsafe to convict the first appellant on that count.

CONCLUSION

I find therefore that this appeal is unmeritorious. The appellant clearly hatched a plan to sexually assault the complainant. The 1st appellant after pretending that he was capable of ferrying the complainant to Lukhuna decided to change course and went to the 2nd appellant's house whom from the evidence was his cousins. The complainant had no option but to submit. The two men would have harmed her more should she have raised any alarm. The court therefore correctly found that the charges had been proved against the appellant and I shall so upheld.

Save for the 1st Count I shall set aside the alternative charge against the 1st appellant of Handling Stolen Goods. There was no sufficient evidence to establish the same. The phone as a matter of fact was not in his possession. The same was not proved to belonged to the complainant.

Consequently the appeal is disallowed except on the 3rd count against the 1st appellant the conviction and sentence is set aside .

Orders accordingly.

Delivered this 25th day of January 2017.

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H.K. CHEMETEI

JUDGE

In the presence of:

Kakoi for state

Appellants – present

Kirong – Court Assistant