REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 110 OF 2015

SAMSON MZUNGU KIRINGI…………………………. APPELLANT

VERSUS

REPUBLIC ……………………………………….…. RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 47 of 2013 of the Chief Magistrate's Court at Malindi – J.N. Wandia, RM)

JUDGEMENT

The appellants were charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. Each appellant was separately charged with offence. The particulars were that each of the appellant on the 11.1.2013 at [Particulars withheld] Village in Maganini District within Kilifi County, committed an indecent act by touching the vagina of K Z without her consent.

Each of the appellant was also separately charged with an alternative count of incident act contrary to section 11 A of the Sexual Offences Act No. 3 of 2006. The trial court convicted the appellants and sentenced each to serve 35 years imprisonment. Mr. Obaga appeared for both appellants. The grounds of appeal are that the prosecution failed to discharge its burden in law of proving the case beyond reasonable doubt. That there was doubt on the prosecution case which ought to have benefited the appellants. That crucial witnesses were not called. That the evidence on identification was not free from error and that the medical evidence was not sufficient to prove that there was penetration.

Counsel for the appellant submitted that the charge sheet was defective. It is not possible for two or three men to penetrate a woman at once. The charge sheet should have read that the appellants penetrated the victim in turns. Only three witnesses testified. The incident occurred at night. The prosecution relied on the evidence of recognition. The appellants' names were not given to the police in the first report. No description of the appellants was also given to the police. Counsel relies on the case of **FRANCIS MUCHIRI JOSEPH V REPUBLIC, Nyeri Court of Appeal Criminal Appeal No. 56 of 2014**.

It is further submitted that the complainant alleged that she comes from the same area with the appellants. She did not give out their names and therefore this was not a clear case of recognition. Further, the complainant testified that she identified the appellants by their voices. No voice parade was done. It is not clear how the appellants were arrested and who arrested them. There are no details on the place of arrest or first report. Mr. Obaga submitted that the sentence is excessive. Section 10 of the sexual Offences Act provides for a minimum sentence of 14 years. That sentence can only be enhanced on appeal but the trial court cannot impose a higher sentence.

The State opposed the appeal. Mr. Fedha submitted that the charge sheet is proper. The words jointly are not used. If there is any defect, then section 184 of the Criminal Procedure Act can cure it. Under section 124 of the Evidence Act the evidence of the victim is sufficient to convict in sexual offences. PW1 knew the appellants. Medical evidence was adduced. The law as provided under section 10 of the Sexual Offences Act gives courts powers to sentence between 14 years to life imprisonment. Counsel urged the court to enhance the sentence.

This is a first appeal and the evidence has to be re-evaluated and the court makes its own findings. PW1 was the complainant. She is a female adult. On 11.1.2013 she was heading home at about 8.00 pm when she met three people. One of them held her by the neck and pulled her to the bush. The third person who was not charged had a knife. They tore her clothes and she was stabbed on her hand. She also got a cut on the head. They subdued her and raped her in turns. She later struggled and reached the house of her friend who took her to the village elder and later to the police. She was taken to hospital and treated. During the incident, she lost consciousness. She regained consciousness in the morning and that is when she managed to go to her friends' home. The appellants were later arrested. The appellants used condoms while raping her. She was issued with a P3 form and it was filled at the Malindi District hospital. She knew the appellants as they come from the same area. She further testified that she tried to scream but was stopped. There was no light during the incident. The incident took place for about two hours and the rapists were talking during the incident.

PW2 IBRAHIM ABDULAHI is a clinical officer who was based at the Malindi District hospital. He examined PW1 on 18.1.2013 and filled her P3 form. PW1 had multiple facial bruises and scratch marks. There was a stab wound on her left elbow. He concluded that PW1 was raped as her private parts were swollen. PW1 indicated that she was raped by people known to her. The P3 form was filled seven days after the incident.

PW3 P.C. ADEN MOHAMED investigated the case. He produced PW1's skirt and blouse. The case was initially handled by P.C. Kiptor Kiplangat who was transferred to Lamu. He did not go to the scene.

The 1st appellant offered to give unsworn evidence while the 2nd appellant opted to remain silent. In his evidence the 1st appellant stated that he has no parents. He has a brother who has broken his leg and children who are looking up for him.

The issues for consideration are whether PW1 was raped and whether it is the appellants who raped her. PW1's evidence is that she was accosted by three people who pulled her to the bush and raped her. It was about 8.00pm. One of the rapist had a knife. She lost consciousness and in the morning managed to go to her friend's home. The medical evidence does prove that indeed PW1 was raped. I do find that PW1 was indeed raped.

According to PW1, the rape ordeal took about two hours. The rapists were talking during the incident. She identified their voices. She identified the first appellant in court. It was PW1's evidence that the first appellant had a green T-shirt. The evidence of PW1 is quite clear. It is her evidence that she knew the appellants as they come from the same area. She was able to identify them because she was with them for two hours. There was moonlight.

Counsel for the appellant contend that it is not clear how the appellants were arrested. One of the charge sheet indicate that they were brought to court ton 22.1.2013. The date of arrest is not given. The PW3 form indicate that the case was reported on 13.1.2013. The offence occurred on 11.1.2013. The appellants were therefore arrested between 11.1.2013 and 22.1.2013. This is a period of about ten (10) days after the incident. The original investigation officer did not testify. PW3 did not inform the court when the appellants were arrested and how they were arrested. However, it is evident that they were arrested as a result of PW1's report to the police. The incident took place at night.

PW1 was able to know who held her by the neck and that was the 2nd appellant. She knew the appellants and when they tried to rape her she declined and they struggled before she was subdued. Even if PW1 lost consciousness, it is possible that she identified the appellants before falling into unconsciousness.

She was able to see that the rapists were using condoms. It was at 8.00 pm and she struggled with her rapists. I do find her evidence believable. She did not just pick on the appellants. She knew them and gave their names. That is why they were arrested.

With regard to the issue of the charge sheet, the appellants were separately charged. The effect of that is that although they were in a gang of three, each appellant raped the complainant. Mr. Obaga contends that the words **"in turns"** ought to have been used as all of them could not have raped her at the same time. There is no indication in the charge sheet that the appellants raped the complainant jointly or simultaneously. What can be deduced from the charge sheet is that each appellant raped PW1. We should not be seen to be introducing technicalities in such incidents. The court should be alive to the fact that PW1 was raped. The details as to how the rapist did it is of less importance. According to PW1 she saw the rapist using condoms in the process. This proves that PW1 was raped. The medical evidence does prove the offence of rape. Each appellant was charged separately. They were in a gang of three but each appellant raped the complainant individually. The incident took about two house and the appellants had the opportunity to rape PW1 **"in turns"** as contended by their counsel. I do find the charge sheet to be proper.

The record shows that only three witnesses testified. The complainant's friend could have been a crucial witness as she is the first person who met PW1 after the incident. It was up to the investigating officer to call that witness. PW1 cannot be blamed as to how the case was investigated or prosecuted.

The defence evidence did not raise any doubt on the prosecution case. The second appellant did not testify. The evidence of the 1st appellant does not relate to that of the prosecution. I do find that the conviction is propr. The evidence of PW1 is sufficient to sustain a conviction.

On the issue of sentence; section 10 of the Sexual Offences act provides for a minimum sentence of fifteen (15) years imprisonment. The sentence can be extended to life imprisonment. The sentence contention by the appellants' counsel that the trial courts are only allowed to impose the minimum sentence is not backed by the law. The trial courts can impose any sentence above the minimum provided by the law. Given the fact that the appellants are first offenders, I do find that the 35 years imprisonment is quite excessive.

In the end, I do find that the appeal on conviction is not merited and is dismissed. The sentence imposed by the trial court is set aside replaced with fifteen (15) years imprisonment. Each appellant shall serve fifteen (15) years imprisonment form the date of conviction.

Dated and delivered in Malindi this 6th day of February, 2017.

S.J. CHITEMBWE

JUDGE