REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 61 OF 2015

(CORAM: J. A. MAKAU – J.)

GRAISION SHIDA ODHIAMBO.....1ST APPELLANT

ONYANGO MARK ODUOR.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 3.7.2015 in Criminal Case No. 393 of 2013 in UKWALA Law Court before Hon. OANDA – S.R.M.)

JUDGMENT

1. The two Appellants **GRAISION SHIDA ODHIAMBO** and **ONYANGO MARK ODUOR** were the 1st and the 2nd accused respectively in the trial before the lower court. They were charged with eight (8) main counts and three alternative charges, but were both found guilty and convicted on count 1 and the 2nd Appellant was found guilty and convicted of count lll.

2. The two Appellants in count 1 faced a charge of Gang Rape contrary to Section 10 of The Sexual Offences Act No. 3 of 2006 the particulars are that 1. Graision Shida Odhiambo and 2. Onyango Mark Oduor on the 21st 21st day of September, 2013 at Sega township in Ugenya District of Siaya county, intentionally and unlawfully caused his penis to penetrate the vagina **P A A** without her consent.

3. The 2nd Appellant under Count III faced a charge of Rape contrary to **Section 3 (1) (c) of the Sexual Offences Act No. 3 of 2006.** The particulars were that on the 21st day of September, 2013, at [particulars withheld] in Ugenya District of Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of G A O without her consent.

4. After full trial the Appellants were found guilty of both counts 1 and the 2nd Appellant guilty on count III, but were acquitted on all other six counts, the three alternative charges and accordingly each of the appellant sentenced to serve 15 years imprisonment on count 1 and the 2nd Appellant was discharged under **Section 35(1) of the Penal Code** inregard of count III.

5. Both Appellants were aggrieved by the conviction, and the sentence. They then filed this appeal through the firm of M/s. Ko'winoh and Company Advocates dated 21st July, 2015 setting out six (6) grounds of appeal thus:-

> ***a) The Hon. Trial Magistrate erred in law and fact in convicting the appellants while the charges against the appellants were not proved beyond reasonable doubt.***

b) The learned trial Magistrate erred in law and fact in convicting the appellants while the circumstances obtaining at the time of commission of the alleged offences were not suitable for a positive identification.

c) The learned trial Magistrate erred in law in convicting the appellants on the basis of insufficient evidence on identification.

d) The learned trial Magistrate erred in law and fact in convicting the appellants on the basis of insufficient and contradictory evidence of the prosecution.

e) The conviction is against the weight evidence on record.

6. Mr. Ko'winoh learned Advocate appeared for the Appellants whereas M/s. M. Odumba learned prosecution Counsel appeared for the State.

7. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal in the case of **Okeno V. R. (1972) E.A. 32** where the Court set out *the duties of a first appellate court thus:-*

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434)"

8. The proceedings before the trial court are part of the record of appeal and I need not reproduce the same in this appeal I shall however summarize the prosecution case and the defence.

9. The facts of the prosecution case are that, PW1 G A O was on 21.9.2013 at 9.30 p.m. was at Sega Stage waiting for a matatu. That a motor cycle with two occupants came and forced PW1 to mount the cycle and started travelling towards Bumala but on the way they were involved in a minor accident and they walked to a certain house, in which one of the people opened, forcing PW1 into the house while beating her. PW1 was locked in the house and after a while one of the two people ordered around PW1 to undress and forced her into the bed and started to rape PW1. That some people came and she was instructed by her assailant to keep quiet as he continued raping her. He would walk out to smoke bhang and return to rape continue to rape her. PW2 meanwhile was at 10.30 p.m. at Sega Stage when the Appellants approached her demanding to know why she was at the stage and proceeded to tell PW2 that she was proved and that they would rape her. The appellants later returned in a motor cycle, whereby the 2nd appellant started to whip PW2. PW2 started running and the 2nd appellant followed her. The appellant got hold of PW2 and told her they were going to teach her a lesson. They carried her into the forest. The 1st Appellant removed a knife and ordered PW2 to undress which PW2 did. The 2nd Appellant ordered PW2 to lie down. The 2nd Appellant left and the 1st Appellant raped PW2. That after that the two walked around in the forest as the 1st Appellant went on raping PW2. PW2 was subsequently taken to a certain house where they found another girl (PW1). She entered a house where she found another girl. In the house the 2nd Appellant started to rape PW2. PW1 testified the guy who had been raping her, when PW2 was brought he went to the other lady. That as PW2 was being raped by the 2nd Appellant and as the 1st Appellant wanted to rape PW1 Police came, rescued the complainants and arrested the two Appellants. That Police found the complainants and the Appellants in the house all naked. The complainants (PW1 and PW2) and the 1st and the 2nd Appellants were arrested and taken to Ukwala Police Station, then to Ambira sub-district hospital. The Police recovered ***Nyaunyo*** (**whip**),

jungle jacket, and gumboots from the scene. PW1 and PW2 were issued with P3 forms and the same were filled at Ambira hospital. PW1 identified the 2nd Appellant as the person who raped her and the 2nd Appellant as the person who whipped her.

10. The Appellants on being put on their defence opted to give sworn evidence and opted to call no witnesses.

11. The 1st Appellant denied the charge. The 1st Appellant's defence is that on 21.9.2013 at night he had a friend (Pamela PW2) who he asked to join him to a bar and that they went to Comer Bar, next to the stage that they started to drink and were also with the 2nd Appellant. That as they were drinking he heard a commotion behind the bar and went to join the group which was watching football involving Man-U club. That on return he found the ladies had left to the stage. That the Appellants joined them and told them not to go to Ugunja and a struggle ensued and Police came to the scene and arrested the appellants at the bus stage. The 1st appellant testified he had known G (PW1) for two (2) months as they used to meet in public places. That when he left, he had left Pamela (PW2) with the 2nd Appellant and Gladys who was a friend to the 2nd Appellant.

12. The 2nd Appellant gave unsworn statement, denied the charge and stated that on 21.9.2015 he was eating in an hotel where his girlfriend, G O works when the 1st Appellant, his friend, called him to join him at Comer Bar. The Appellant asked G to join him and all proceeded to Comer Bar. The 1st Appellant ordered beer for them. That behind the bar Man-U were playing Chelsea and they went to join the other fans who were cheering and they stayed there for 15 minutes. On returning they found the ladies had left for the bus stage in company of other men. They questioned them about their liquor and the ladies told them they had not provided enough and that they were leaving for Ugunja as the appellants were wasting their time. That arguments then ensued, prompting arrival of police, who arrested the appellants, placed them in police cells and later charged them with the offence. The 2nd Appellant denied raping the complainants.

13. I have very carefully considered the appellants appeal and I have considered the proceedings and oral submissions by both counsel.

14. Mr. Ko'winoh for the two Appellants in the submission under ground No. 2 of the appeal which he combined with grounds Nos.1, 3, 4 and 5 and argued them as one ground, urging that the appellants gave evidence that the two complainants were their girlfriends and that the four were drinking together hence they consented to the sexual intercourse. Mr. Ko'winoh in support of this proposition referred to the case of Court of Appeal **Musa Kisongok V R. Criminal Appeal No. 116 of 2001 (Nakuru)** on page 3 where the Court of Appeal addressed itself thus:-

> ***"The issue of consent or no consent was an important one in the trial and deserved serious consideration. In the case of Abasi Kibazo v Uganda [1965] EA 507 the predecessor of this Court held that in every charge of rape the fact of non-consent must be proved beyond all reasonable doubt before convicting.***
>
> ***In the case before us we observe that the testimony of the appellant was not challenged by the prosecution."***

15. Mr. Ko'winoh learned Advocate for the Appellants urged that the complainants were not credible witnesses in that they denied having known the appellants and yet at the time of rape they did not scream or resisted the rape. That the two refused to attend court till warrant of arrest was issued against them on 26.5.2014 and that showed they were reluctant to testify against the appellants because they were their friends.

16. Mr. Ko'winoh submitted that count 1 was defective as the particulars of the offence of Gang Rape did not state with whom Garision Shida Odhiambo was in association with in gang raping P A A without her consent. He urged if he was in association with the 2nd Appellant the particulars should have state so.

17. M/s. M. Odumba learned Prosecution Counsel opposed the appeal against both the conviction and sentence and urged that there was no consent either expressly or impliedly by any of the complainants. On credibility of the witness M/s. M. Odumba submitted failure of the complainants to attend court was explainable and it did not go to their credibility, urging their evidence was credible. On count 1 the Counsel submitted the charge was defective as the appellant's associate was not disclosed or the person with whom he was in association with the 1st Appellant was not indicated, however she urged that, was an oversight which could not have caused any prejudice to the 1st Appellant. She further submitted the evidence was called in presence of the appellants on how the two raped PW1 and she urged the charge was proved beyond reasonable doubt. She urged further should the court find that the charge was not proved to the required standard the court should find the 1st appellant guilty of a lesser offence, convict and sentenced him accordingly.

18. Mr. Ko'winoh learned Advocate in quick rejoinder urged, on issue of a lesser offence, the prosecution did not prove the the same, urging PW1 testified she was not raped by the 1st Appellant but by the 2nd Appellant.

19. Whether the complainants were girlfriend of the appellants and whether on the material night of the commission of the offence they consented to have sexual intercourse with the two appellants? PW1, G A O testified that she was at Sega Stage at around 9.30 p.m. when a motor cycle with two occupants came, the occupants forced her to mount the motor cycle and that they forced her into a house while beating her, they locked her inside the house and after sometime one of them came back, forced her to undress, ordered her into bed and started raping her severally taking breaks to smoke bhang. That later another one came with a another lady, PW2 P A A. PW2 testified that on 21.9.2013 while at Sega Stage accused persons came, talked to her and told her she was proud and that they would rape her. That they later came with a motorcycle and started to whip PW2, and as she ran away they followed her, got hold of her and told her they would teach her a lesson. They carried her to to the forest, 1st Appellant threatened PW2 with a knife, as he forced her to undress, commanded her to lie down and he raped he repeatedly in the forest and thereafter took her to the house where PW1 was held by the 2nd Appellant, whereof the 2nd Appellant, started to rape PW2. PW1 denied that the 1st Appellant was her boyfriend and stated that PW2 came t o know PW1 on that day.

20. Significantly PW1 and PW2 did not know the Appellants before the material night of the rape. They did not in their evidence refer to anyone of the appellants by their names simply because they did not know them. The Appellants' Counsel at the trial did not put it to PW1 that she was girlfriend of any of the appellants. PW2 denied being girlfriend to the 1st Appellant. **PW4 Kevin Ochieng Akimba** who was at the stage with PW2 testified how some youths known to him canned them and took PW1 away by force forcing him to go and report to police. PW6 testified how they got information of two young ladies having been kidnapped by youths at Sega Bus Stage. They proceeded to where PW1 and PW2 were detained, forced the door open and found PW1 and PW2 and the two appellants totally naked. PW6 recovered jungle jacket, one whip rubber, a military boot which were worn by the 1st Appellant.

21. The evidence of PW1, and PW2 point to one thing thus, they were not known to the two Appellants as they did not refer to them by their names but as the accused persons. That if the two appellants were their boyfriends, the two complaints would have referred to the two by their names rather than by the 1st accused and the 2nd accused. The Appellants did not put to PW1 that she was a girlfriend to the 2nd Appellant. PW2 denied being a girlfriend to the 1st Appellant. The Appellants did not put to other prosecution witnesses that the two were their girlfriends. When PW6 found two complainants and the appellants completely naked after he went searching for PW1 and PW2 after PW4 reported to Police of their kidnap the appellants never resisted any complaint to Police that they were being arrested for nothing and that the two were their girlfriends and had consented to sex. The 1st Appellant in his defence stated he was a friend to Pamela PW2 who he had asked to accompany him to Comer Bar next to stage Bar. He claimed he had known her for two months. I find that his evidence is doubtful as he did not state Pamela (PW2) was his girlfriend indeed, but a friend and that they used to meet in public, that if she was a girlfriend he would have said so and stated what kind of friendship they had. In his defence he talked of them having disagreement and never mentioned having sexual intercourse at all, leave alone there being a consent. The 2nd Appellant in exercise of his constitutional rights gave unsworn statement and as such

his evidence could not be tested on its credibility.

22. I have very carefully evaluated and analyzed the prosecution and defence evidence on the alleged relationship between the complainants and the appellants and in the totality of the evidence I find that the complainants were total strangers to the Appellants who kidnapped the two girls, took them to a certain house and raped them. The conduct of the two appellants in assaulting the complainants, forcing them to undress and forcing them to stripe completely naked in a room occupied by the four is not an act from which one can state that the complainant's expressly consented to the sexual intercourse. PW2 met PW1 for the first time on the material night and that it is not conceivable for two total strangers to stripe naked in presence of each other and in presence of opposite sex and have sexual intercourse openly. Boyfriends do not go about whipping their girlfriends for sex as was the case here. I find, in this case this is nothing but a case of violence against the complainants simply because they are girls. Violence against women and girls which takes form of kidnapping and raping them in my view cannot be said to be a case involving a girlfriend and a boyfriend. This is a pure criminal act and the defence of there being a relationship of a boyfriend and girlfriend and there being a consent is an after thought. I reject such defence and existence of any relationship between the complainants and the appellants.

23. **Section 42 of the Sexual Offences Act** Provides:-

> ***"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."***

24. In view of the facts of this case as I have stated herein above, I find the two complainants were not girlfriends of the Appellants and never expressly or impliedly consented to have sexual intercourse with any of the appellants as they could not have agreed by choice to have sexual intercourse with any of the appellants nor did they have freedom and capacity to make that choice. I find they were forced, harassed and whipped to submit to the act of sexual abuse as they were kidnapped and held against their wishes as they were raped forcefully, sexually assaulted and that they had no choice. They were raped by the appellants as they subjected them to torture, and inhuman or degrading treatment and punishment against their constitutional rights which were violated by the appellants.

25. In the instant case was the offence of rape proved to the required standards?

> **"Rape is defined as follows in the Black Law Dictionary, Eighth Edition (Bryan A. Garner-Editor in Chief) on page. No. 1288:-**
>
> ***"unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will."***

26. PW1 G A O in her evidence testified that the 2nd Appellant ordered her to undress and forced her into bed and raped her, severally but before the 1st Appellant could rape her the police came. That the 1st appellant only whipped her. PW2 testified that the 1st appellant raped her severally in the forest and later took her to a house where she found PW1 and the 2nd Appellant who raped her once but was found by police as he continued with raping her. PW3 Howard Okeyo a Clinical Officer attached to Ambira sub-district hospital testified that he examined G A O, PW1, who claimed of having been raped, and assaulted with a rubber whip. She had a torn skirt, neck pain, bilaterial shoulders joint tenderness, Bilateral tenderness with oedema. On the genitalia she had reddened labia minora, reddened vaginal walls, hymen not intact, whitish discharge, lab test showed spermatozoa with pus cells, daytime pregnancy cells. Findings showed a forced vaginal penetration. PW3 produced P3 form as exhibit P4. On examination of P A A, (PW2) who was brought by Police for post-rape care, she had wet stained pants, lower tenderness on genitalia, normal external genitalia, hymen not intact, with front degree perennial tear with a tender vaginal wall with white discharge, tests showed pus cells. Bilaterial cell and spermatozoa which were inactive with negative pregnancy test. The instant findings showed forceful penetration. PW3 produced P3 form as exhibit P5. PW4 in his evidence stated that he knew the appellant and witnessed them assaulting them and PW1 before kidnapping PW1. PW4 reported the matter to police. PW6 in company of F.P. Masinde and other Police Officers proceeded to where PW1 and PW2 where held b y the

Appellants. PW6 found the complainants and the Appellants inside a house completely naked. The two Appellants were armed and produced the items recovered. PW1 and PW2 were kidnapped, and found to have had forced sexual intercourse as per evidence of PW3. PW3 evidence corroborated the complainant evidence on penetration and assault as P3 forms revealed that the complainants were penetrated and they had injuries arising out of assault. I therefore find that the prosecution has proved the ingredients of rape, the identification of the perpetrators, intentional and unlawful penetration and lack of consent by the two complainants. None of the Appellants was husband to any of the two complainants and they had unlawful sexual intercourse with the complainants whom they forced to sexual intercourse against their will.

27. Whether the complainants were credible witnesses? The Appellants argued that the complainants were not credible witnesses in that they denied relationship with the Appellants, denied having known the two appellants before and more specifically at the time of the alleged rape and by refusing to attend court till warrants of arrest were issued against them. I have to state from the onset that the issue for determination of credibility of a witness lie with the trial court which has the opportunity of seeing and hearing the witnesses and determine their demeanour. This I have already stated in this judgment. In the instant case the trial court was satisfied with the complainants evidence, that the court found the complainants credible witnesses. I have read the proceedings and the reasons and grounds given for the failure of the complainants to attend court till the warrants of arrest were issued. In their evidence they explained to the court what had happened and as such I find no basis for the Appellants asserting that the complainants were not credible witnesses. I find the trial court found the complainants credible witnesses and believed their evidence. I find no error in such finding.

28. In the instant case the trial court in its judgment did not make a finding that any of the complainants was not a credible witness. The issues raised by the Appellants are issues of facts and denying that the appellants were not boyfriends to any of the complainant at the time of rape or were not known to any of the complainant and the fact that the court issued warrant of arrest against the complainants do not make any of the complainants a incredible witness in absence of other evidence to show that their credibility is questionable. I have looked for that other evidence and found none and even I would have found any, I would only find them to be untruthful witnesses. On issue of issuance of warrant of arrest for non-attendance the complainants gave explanation for their failure to attend court during the hearing of the case, they stated bus fare send to them was not enough to enable them make it to court. This was not proved to be untrue, I therefore find as the two complainants appeared before the court and gave evidence before the trial court, this court cannot make a finding on their demeanor as that issue was not raised before the trial court and a decision made as part of the trial court judgment . I find no merits in this ground of appeal.

29. The Appellants contend thus count I was defective as the particulars of the offence of Gang Rape did not mention with whom Grainsion Shida Odhiambo was in association in ***gang raping*** Pamela Ahono Andeche, so is count 1 defective? Count 1 appears as follows:-

> ***"CHARGE: <u>Gang Rape Contrary to Section 10 of The Sexual Offences Act No. 3 of 2006</u>:***
>
> ***<u>1. GRAISION SHIDA ODHIAMBO 2. ONYANGO MARK ODUOR:</u>***
>
> ***On the 21st day of September, 2013 at Sega township in Ugenya District within Siaya county in association with Graision Shida Odhiambo, intentionally and unlawfully caused his penis to penetrate the vagina of PAMELA AHONO ANDECH without her consent."***

30. The particulars in support of the charge partly states " ---------- ***in associates with Garision Shida Odhiambo, intentionally and unlawfully caused his penis to penetrate the vagina of Pamela Ohono Andeche, without her consent." A***n offence of gang rape is committed by one person with another or others but not by a single individual. The omission to state the appellant with another and the failure to name the other seemingly the charge appears to be defective as the particulars do not seem to support the charge and in such a situation accused may be acquitted unless the charge is amended or substituted.

31. **Section 214 of the Criminal Procedure Code** Provides:

> ***"214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that -***
>
> > ***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
> >
> > ***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***
>
> ***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***
>
> ***(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.***
>
> ***Decision"***

32. In the instant case the 1st Appellant and the 2nd Appellant where jointly charged with the offence of Gang Rape. Their names appears before particulars of the charge which mentions the name of the 1st Appellant omitting the name of the 2nd Appellant. The prosecution called evidence from PW1 and PW2 in which evidence the complainants stated the role played by each of the two appellants in raping PW2 P A A. That during the hearing of the case court heard the evidence of PW1 and PW2 and other prosecution witnesses and in cross-examination of the complainants through their Advocates they had opportunity to challenge the evidence relating to gang rape as per count 1, they cannot therefore be heard to say they were ambushed with the charge sheet and the evidence which was laid before court in their presence.

33. **Section 134 of the Criminal Procedure Code** provides:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

34. In the case of **Isaac Nyoro Kimatia & AnotherV R in Criminal Appeal No. 187 of 2009, (Nairobi),** the Court of Appeal dealing with the issue of defective charge sheet based on the phrase "**jointly**" charged addressed itself thus:-

> ***"4. A court of law should not be hyper technical but should strive to do substantive justice in each case. That was the command under Article 159 of the Constitution.***
>
> ***5. The Court should however, not ignore the requirements of the law. Section 134 of the***

Criminal Procedure Code required in mandatory terms that every charge should be precise sand abundantly clear to the appellant.

6. The Court had no doubt that the appellant knew that it was practically impossible for him and others to have :jointly" defiled the complainant. He therefore understood the charge against him to have been that on the material date, while together with others engaged in an illegal enterprise, they successively defiled the complainant. It was confirmed by the fact that in the trial, the appellants extensively cross-examined prosecution witnesses and defended himself.

7. The defects in the charge sheet were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial. Therefore, that being the Court of Appeal's view of the matter, they departed from the holding in the Paul Mwangi Murunga v R [2008]eKLR.

8. The law was clear that the evidence of the complainant, a minor, required corroboration. In sexual offences, however, where the minor was the victim of the offence, the evidence of that minor, if believed by the trial court, could, without corroboration, found a conviction."

35. I have very carefully considered the appellants ground of appeal on the charge being defective and in my view the court is enjoined to do substantive justice in each case and administer justice without due regard to procedural technicalities as per **Article 159 (2) (d)** which provides:-

"159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) ……..

(b) ……..

(c) ……..

(d) justice shall be administered without undue regard to procedural technicalities; and …."

36. I am also alive to the provisions of **Section 134 CPC** which requires in mandatory terms that every charge should be precise and abundantly clear to the appellants. It is clear from the cross-examination in the lower court the appellants knew what "***Gang Rape***" means. The 1st appellant who was jointly charged with the 2nd Appellant had their names preceding the particulars of the charge, in which they were alleged to have raped the complainant in association with one another. The two appellants understood the charge against them, that the two engaged in unlawful act, in that they raped the complainant at the material time while together. This is confirmed by the trial court's record in that their Advocate Cross-examined the complainants at great length and defended the Appellants. I find the defect in the charge sheet was minor and did not prejudice the appellants nor did it occasions any miscarriage of justice nor violated the appellants constitutional rights to a fair trial as enshrined under Article 50 of the Constitution of Kenya 2010. I therefore find no merits in this ground of appeal and I dismiss the same.

37. **The upshot is that the appeal is dismissed. I uphold the conviction and confirm the sentence.**

DATED AND SIGNED AT SIAYA THIS 8TH DAY OF JULY, 2016

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 8TH DAY OF JULY, 2016

IN THE PRESENCE OF:

Mr. Ko'winoh for the Appellant.

M/s. Maurine Odumba for the State.

C.C.

1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE