



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 10 OF 2012

SIMON WAMBUA MUKEWAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original Conviction and Sentence of the Chief Magistrate's Court at Machakos by Hon. S.K. Gacheru (SRM) in Criminal Case No. 37 of 2009 dated 24th August, 2011)

JUDGMENT OF THE COURT

1. The appellant was charged with the offence of gang rape contrary to **Section 10** of the **Sexual Offence Act No. 3 of 2006**. It was alleged that on the **8th November, 2009** in Machakos County, accused in association with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of **RN** without her consent. The accused was convicted and sentenced to serve fifteen (15) years imprisonment.
2. This being the first appeal, the court has reviewed and re-evaluated the evidence before the trial court so as to reach its own decision.
3. In the trial court the prosecution called a total of eight (8) witnesses. PW1 was the complainant. She said that on **8th November, 2009** at about 6.45p.m, she was sent by one **Nduku** to go to a shop at Kwa Munyaka near her home on Kivutini sub-location to buy some rice. She said that on her way there, she met the accused and one Sammy who waylaid her. The two men then held one of her hands each and led her from the foot path into a nearby bush. PW1 said that accused and the other suspect removed her pants, then the other man held her on her neck as accused proceeded to defile her after inserting his penis into her vagina. She said that the other man who is still at large also inserted his penis in her vagina and defiled her. The two men then let PW1 free and they went away as Pw1 went back home where she told **Nduku** (PW2) what had happened.
4. PW2 testified that on **8th November, 2009** at about 6.45p.m she had sent PW1 to Ngelane market to buy some rice and that PW1 went home later crying and told PW2 that she had been gang raped by two men. She further testified that PW2 was bleeding from her vagina and that her dress also had some blood stains. PW2 then called PW1's father (**PW4**) and told him about the matter. PW4 who was at Kivutini market then went home and found PW2 and PW1, where PW1 told him that she was gang raped by two men who she could identify psychically. PW1 told PW4 the scene where she was raped. PW4 then made enquiries and he was told that PW3 who was a mason, and had been seen passing near the scene. PW4 then went and asked PW3 whether on his way home he had met with two men one of whom was wearing

a red shirt and the other one was wearing a black coat and PW3 told him that he had met with **Simon Wambua** (*accused*) alias **Kabzeneni** and **Sammy Musyoka** who were wearing the said clothes. PW4 then went back to his home and on **9th November, 2009** in the morning, he went and informed a village elder at Ngelani about the matter. The village elder (PW5) and PW4 then went to accused's home and arrested him and as they were taking him to Ngelani Area Assistant Chief's office they met with PW3 who identified accused as **Simon Wambua** whom he had found with another one not before the court the previous day near where PW1 was said to have been raped. PW4 and PW5 went to look for the other suspect at his home but they found that he had disappeared.

5. PW3 testified that on 8th November, 2009 at about 6.50p.m as he was going home from Ngelani market, he met with accused and another man both of whom were drunk standing at the roadside. Accused was staggering. Later at about 9.00p.m on that day, PW5 went to PW3's home and asked him who he had seen on the way wearing a red shirt and the other wearing a black coat and he said that he had met accused and another man. On the following day, PW3 identified accused as one of the two men that he had found at the roadside on the previous day. After, PW4 and PW5 arrested accused and they took him to Ngelani Assistant Chief's (PW7) office where PW1 told PW7 that accused and another man gang raped PW4's daughter. PW1 then went to the said Assistant Chief's office where she positively identified accused physically as one of the two men who gang raped her on **8th November, 2009**. PW7 in company of PW4, PW5 and PW1 then escorted accused to Machakos police station later on **9th November, 2009**, and handed him to the investigating officer (**PW8**) where PW1 and PW4 told PW8 that accused and another man gang raped PW1 in a bush on **8th November, 2009** when she was sent by PW2 to buy some rice at a shop near their home. PW8 testified that PW1 appeared to have unstable mind although she could talk and that **PC Atieno** recorded her statement as PW8 recorded statements for other witnesses. PW8 then referred the complainant to Machakos General Hospital where she was taken for examination and treatment. PW8 later issued a P3 form for PW1 which was filled at Machakos General Hospital by **Dr. Mochama (PW6)** on **10th November, 2009**. The investigating officer testified that after he investigated the case, he charged accused with the offence herein but that the other suspect was still at large. PW4 testified that PW1 was disabled on her left leg and on her left hand and that she had been at the Machakos School of the disabled people. He further testified that PW1 was also suffering from epilepsy.

6. **PW6** was **doctor Mochama** who testified that he examined PW1 on **10th November, 2009** after she was allegedly raped on **8th November, 2009**. The doctor's evidence was that PW1 had been treated at Machakos General Hospital before. Upon examination, PW6 found that PW1 was found to have vaginal bleeding when she was first treated following the said rape. He testified that the labia minora was lacerated and the hymen was perforated. PW6 said that no discharge was noted and that PW1 was epileptic. He filled PW1's P3 form on **10th November, 2009** which he produced as exhibit 1.

7. Upon being placed on his defence, accused gave unsworn statement of defence without calling any witness. Accused testified that on **9th November, 2009** he was woken up by three (3) people at his home one of who was a village elder. He said the three told him that he and another man had raped a woman. He was then taken to the home of the Area Chief and on their way there they met with a man who said that he had seen him. Accused testified that the complainant had stated at the chief's home that she did not know accused. He was later taken to Machakos police station from where he was charged with the offence herein.

8. The appellant in his Amended Petition of Appeal, has put forth ten (10) grounds of appeal, which when summarized raises two issues for determination as follows:

a. Whether the appellant understood the language used during trial.

b. Whether the case was proved beyond any reasonable doubt.

9. Parties filed submissions. The Appellant submitted that the trial court erred both in law and in fact when it conducted an unfair trial in which the appellant did not follow the proceedings because of language barrier as he needed an interpreter. The Appellant relied on **Article 50(2) (m)** of the **Kenyan**

Constitution, 2010 which states that *“every accused person has the right to a fair trial, which includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”*

10. The Appellant submitted that in the present case, it is evident that when the accused was first arraigned in court and charges were read to him, accused replied in Kikamba, and that the accused was never represented in the trial. The Appellant submitted that in most instances, he did not do cross-examination the prosecution witnesses. The trial court did not provide him with services of interpreter despite the fact that he first spoke to court in Kikamba. The accused person might have been ignorant of his constitutional rights of having an interpreter and no one came to his rescue. Due to this allegation, the appellant submitted that the entire trial was unfair as it was conducted in a language which the accused did not understand. The Appellant pointed out at the evidence of **PW1 RN**, where the language which the said witness used to give evidence is not indicated in the court record, as was the language the accused/appellant used to cross-examine the witness. The Appellant also referred to evidence of **PW2 Veronica Nduku Mutisya**, where also the language she used to give her evidence is not indicated. This alleged omission, it was submitted, applied to other witnesses as well.

11. The appellant also raised the ground that the trial magistrate erred and misdirected himself for failing to note that there was no proof of penetration and also there was no positive identification of the appellant as alleged or at all. In the present case, it was submitted that **PW1 (complainant)** testified in lower court that he met the accused and one **Sammy** at around 6.45p.m who both gang raped her. She did not adduce sufficient evidence on how that penetration took place. It was submitted that in the absence of further evidence and details as to evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, penetration was not proved beyond reasonable doubt.

12. The other ground of appeal is that the trial magistrate erred in law in finding that he cautioned himself on the evidence of the complainant in court particularly on her identification of the accused in court and that he was satisfied the same was done beyond reasonable doubt, yet there was no parade conducted at all. Further, it was submitted that the trial magistrate erred in law and in fact in failing to find that the accused was identified by the victim at Kaloleni Chief’s office where she allegedly positively identified him as the one who gang raped her with another man. The Appellant submitted that the identification was not sufficient to place a conviction given that there was no identification parade conducted by the police.

13. The prosecution on its part denied that the accused did not understand the language used at the trial or that the prosecution did not prove its case beyond any reasonable doubt.

14. I have carefully considered these issues. The record shows that during plea the charges were read to the appellant who denied the facts in Kikamba language. A plea of not guilty was entered and the matter was set down for hearing. During hearing the court record does not show the language that was used, however it is worth to note that during trial the Appellant cross-examined almost all the prosecution witnesses and he responded to various applications made by the prosecution. When the Appellant was put on his defence he gave evidence. It is clear from the record that the Appellant understood the proceedings and participated fully. There is no record that the accused complained of any language barrier as alleged by the appellant. This court finds that once the trial court record shows that the accused person actively participated in the trial, he cannot be heard to say he was prejudiced for simple reason that the language used in the trial is not indicated in the proceedings. The upshot of the foregoing is that this ground of appeal lacks merit and I dismiss it.

15. On whether the charges were proved beyond reasonable doubt, it should be had in mind that the appellant was charged with the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. The essential elements in such an offence are that the assailant must be in the company of another; and for the offence of rape to be proved the ingredients provided for under **Section 3** of the **Sexual Offences Act** include accused intentionally and unlawfully committing an act of penetration into the victim’s genital organ without consent, or that consent was obtained by duress and finally that there was positive identification of the assailant. In this case, the issue of identification is not necessary, since it is a case of recognition as opposed to that of mere identification of the Appellant. According to the

evidence of PW1 the incident occurred at about 6.45p.m where the conditions were favourable for positive identification. She further testified that the appellant was well known to her physically before the fateful day. PW1 evidence was corroborated by PW4 whose evidence was that PW1 described to her the physical appearance of the person who raped her and she was able to identify him when he was arrested. According to the evidence of PW1 she testified that the appellant with another not before court without her consent used their genital organs namely penis to penetrate into her genital organ namely vagina one after the other. PW1 evidence was corroborated by PW2 who testified to wit that when she met PW1 her dress had blood stains and upon vaginal examination she noted she was bleeding from her vagina. PW1 and PW2 evidence was also corroborated by **PW6 Dr. Edwin Mochama** who examined the complainant and his findings were that PW1 had vaginal bleeding, her labia minora was lacerated; her hymen was perforated and vaginal discharge was noted. Clearly, evidence on record properly proves that there was penetration. The only evidence as to whether the penetration was with or without consent was that of complainant. She testified that the penetration was without her consent. The proviso to **Section 124** of the **Evidence Act** provides:-

“Provided that where in a criminal case involving a Sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

16. The complainant testified that the appellant with another not before court held her hands and pulled her into the bush and removed her pants. The suspect not before court held her neck while the appellant raped her. In the process she got injured on the left hand, right knee and on the neck. It is the finding of this court that the prosecution proved all the ingredients for the offence of gang rape beyond any reasonable doubt. Therefore this ground of appeal lacks merit and I dismiss it.

17. On sentencing, Section **10** of the **Sexual Offences Act** provides that any person who has been found guilty with the offence of gang rape and is liable to conviction shall be imprisoned for a term of not less than fifteen (15) years imprisonment. The trial court sentenced the Appellant for the minimum sentence provided under law.

18. This court finds that a minimum sentence cannot be harsh and neither can it be excessive. It is a legal and lawful sentence. The court’s discretion is removed in so far as passing a sentence less than the minimum prescribed is concerned.

19. Pursuant to the foregoing, it is the finding of the court that the appeal herein lacks merit. The same is dismissed. The conviction and sentence of the trial court is upheld.

THAT is the judgment of the court

DATED AND DELIVERED AT MACHAKOS THIS 1ST DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Machogu for State

Mr. Kamanda holding brief for M/S Mutinda Kimeu for Appellant

Court Assistant – Mr. Munyao