**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 186 OF 2014**

**BETWEEN**

**BENJAMIN OCHERI MATALANGA……..APPELLANT**

**AND**

**REPUBLIC……..RESPONDENT**

**(Being an Appeal against original conviction and sentence of 15 years imprisonment in Judgment delivered on 19th December, 2014 by Hon. E. Olwande (SPM) in Butere PMC's Criminal Case No. 174 of 2014**

**J U D G M E N T**

## Introduction

1. The appellant herein was arraigned before the Principal Magistrate's Court at Butere on the principal charge of gang rape contrary to Section 10 of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on the 5th day of May, 2014 at [particulars withheld] in Butere District within Kakamega County in association with another not before court [he] intentionally and unlawfully caused his penis to penetrate the vagina of S.A.O.

2. In the alternative, the appellant was charged with committing an indecent act with an adult contrary to Section 11(a) of the Sexual Offences No. 3 of 2006, the particulars being that on the 5th day of May, 2014 at the same place and time he intentionally touched the vagina of S.A.O with his penis against her will.

3. The appellant pleaded not guilty to both. The principal and alternative counts. The prosecution called 6 witnesses to support claims against the appellant.

4. At the close of the prosecution case, the appellant was found to have a case to answer and was put on his defence. From the record, the appellant gave sworn evidence in which he denied committing the alleged offence. He did not call any witnesses.

## Judgment of the learned trial Court

5. After carefully considering the evidence adduced by both the prosecution and the defence, the learned

trial Magistrate Hon. E. Olwande Principal Magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt on the principal count of gang rape and convicted him accordingly. The appellant was sentenced to 15years imprisonment.

**The Appeal**

6. Being dissatisfied with both convicted and sentence, the appellant brought this appeal premised on 9 grounds. The appellants main complaints are that the evidence against him was uncorroborated, fabricated, inconsistent, discredited and m……. with a lot of contradictions and aimed merely at implicating him. He also complains that there was no proper identification of the complainant's assailant since the offence happened at night and further that no DNA test was done to prove beyond doubt that it was the appellant who assailed the complainant. The appellant also faults the trial court's judgment on grounds that the learned trial court failed to consider the fact that whereas the complainant was found to be HIV+, the appellant was found to be HVI -. Finally the appellant avers that the trial court completely failed to consider his alibi defence and therefore came to wrong conclusions in its judgment.

7. The appellant prays that the appeal be allowed, conviction quashed and sentence of 15 years imprisonment set aside so that he can be set free.

**Duty of this Court**

8. This is the first appellate court and as such it is under an obligation to rehear the appellant's case and come up with its own findings and conclusions on the evidence on record, only remembering that it has no opportunity of seeing and hearing the witnesses who testified during the trial. In the now well-known case of **Okeno – vs – Republic [1972]EA 32 the Court of Appeal for Eastern Africa** in considering the duty of first appellate court to consider and evaluate evidence and draw its own conclusions had this to say at page 36 letters B,C,D and H:-

> "An appellant on a first appeal is entitled to expect the evidence as a while to be submitted to a fresh and exhaustive examination (**pandya vs. republic [1957] E.A 336)** and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**shantilal M. Ruwala Vs – Republic [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 findings and conclusions' 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 – vrs – Sunday post, [1958]E.A 424. The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well of course as deal with any questions if law raised on the appeal, see **Selle vs. Associated Motor Boat Co; [1963] E.A 123**."

9. In the case of **Wathiaka & Another – vs – Republic [2008] KLR1,** the court of Appeal (K) sitting in Nyeri restated the duty of the first appellate court as set out in the Okeno case (above). In the case of **Muthoko & Another – vrs – Republic [2008] KLR, 297**, the court of Appeal stated this:-

"The Superior Court, being the first Appellate Court had the duty to analyse and evaluate the same evidence afresh. That was the principle enunciated by this court in the case of **Gabriel Njoroge- vs – Republic (982 – 88) 1 KAR 1134** where it stated at page 1136 as follows;-

> "As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inference and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (**see Pandya V Republic (1957) EA 336. Ruwala – vrs – Republic (1957 (EA**

**570)"…….** In the case of **Ngui –V- Republic (1984) KLR 729** where the court found that the first Appellate Court had failed in its duty to analyse and evaluate the evidence afresh, it treated the omission as a point of law and made its own evaluation of the evidence so as to satisfy itself that no failure of justice had been occasioned by the defects in the first Appellate Courts judgment."

10. It is clear from the above cited cases that the duty placed on a first appellate court to reconsider and evaluate the evidence afresh is an onerous one. With the above in mind, I now proceed to set out the prosecution as well as the defence cases and to reconsider and evaluate it afresh against the backdrop of the complaints raised in the appeal. In addition to the evidence the grounds of appeal and the judgment of the learned trial magistrate, I have also carefully considered the submissions by learned counsel by which Mr. Jamsumba for the state vehemently opposed the appeal. He submitted that all the evidence on record irresistibly points at the appellant as the assailant and that he committed the offence in association with another who is still at large. The appellant relied on his written submissions and urged the court to make a finding that the prosecution case against him was a fabrication.

**The prosecution Case**

11. From the evidence, the prosecution case is as follows;- On 05.05.2014 at about 5.00pm, S.A.O (S) who is the complainant in the case was heading home from the posho mill, and because it was threatening to rain, she was running to avoid being rained on. Then the rain came down and she increased her speed. As she ran, she saw 2 men who were running in the same direction but behind her. The 2 men caught up with her and one of them caught hold of her and demanded sex with her in exchange for kshs.500/=. S declined the offer and tried to free herself from his grip. The second man who is the appellant in this case looked drunk, so did the first man. They had taken her flour and put it on the ground as the first man demanded sex. During the struggle, the first man produced a panga and also started strangling her as the appellant tripped S's feet until she fell down on the road. The first man had sex with S as the appellant looked on and urged him to it quickly so that he (appellant) too could enter her. After the first man finished, the appellant also had sex with S.

12. S screamed but because of the rain, no one came to her rescue, but before motorcycle Samuel Shikumo Luchachi PW2 appeared riding his motorcycle. He was carrying a pillion passenger, Jairus Ondinga who testified as PW3. When PW2 got to the scene, PW2 saw a man carrying a paper bag and a panga. The man was identified as Otieno and was well known to PW2. PW2 also saw the appellant in the act of raping S and on seeing PW2 the appellant got up and started to zip up his fly as he also ran away. PW2 disembarked from the motorcycle and gave chase and managed to catch up with the appellant when something tripped the appellant and he fell down. PW2 caught up with the appellant about 70 metres away from where the incident took place and when he realized that appellant could overpower him, he called for help from PW3 and together they subdued the appellant. Later the appellant was taken to Manyala Police Post by Martin Odhiambo Olingo PW4, who arrived at the scene after PW2 and PW3 had already apprehended the appellant. PW4 was a community policing Officer, and told the appellant to cooperate with him lest he could be lynched.

13. The report by PW2 to Manyala Police Patrol Base was received by No. 6933 Police Constable Douglas Migiri at about 6.00pm when the appellant was escorted to the base by PW4. Upon receipt of the report and after booking in the appellant, PW6 took both the appellant and the complainant to Manyala Sub-District Hospital for examination. PW6 took witness statements and also received the soiled clothes of the complainant, namely blouse and a skirt(MFI – P1). Panty(MFI – P2) skirt )MFI –p4), T-shirt (MFI – p3) vest (MFI – P5) and a bra. All the clothes were produced as Exhibit – p1 – 5. After visiting the scene, PW6 charged the appellant with the offence of gang rape, and in the alternative with the offence of committing an indecent act with an adult.

14. Thadeus Nyongesa Tile, a Clinical Officer working at Mabole Health Centre, testified as PW5. He is the one who examined the S and the complainant when he was working at Manyala Sub-District Hospital.

15. From his evidence, S was 19 years old. He attended to her at about 5.00pm on 05.05.2014 with a history of having been sexually assaulted by 2 people known to her. On examination PW5 found S

clothes soiled but not torn and had no blood stains. Though not drunk, she looked anscions. She bad tenderness on the supra public area (lower abdomen) and the genital vulva was wet and soiled with mud and some grains. She had a whitish creamish discharge which had a foul smell. There was no hymen and no bleeding in the vagina. After treatment the complainant was put on PEP. Laboratory tests indicated the complainant was HIV+ and was oncare. She was found to be pregnant and there were pus cells on her urine. Spermatozoa were also seen. PW5 signed P3 form. He produced the treatment notes and the signed P3 form as exhibit P6 and 7 respectively.

16. The appellant was also examined and the treatment notes and his P3 form were produced as exhibits P8 and P9 respectively. The appellant was taken to Manyala sub-district Hospital by police from Manyala Police Patrol Base. Though the appellants innerwear was soiled with mud and his penis wet, the penis had no injuries.

17. During cross examination, PW5 stated that from the history of the sexual assault, the appellant ejaculated thrice in the complainant.

The Defence Case

18. The appellant gave sworn testimony, though this fact is not apparent until cross examination time. He recalled that on 05.05.2014, he completed his work at 2.00pm and passed by his aunt's place at Etativa Village until 3.00pm when he left his aunt's place, he walked along the road as the other areas were muddy. It was also about to rain. There were other people using the road, including motorcyclists. At the junction he turned into a murram road leading to his home. By now, the rain was falling. He started to run in order to avoid getting wet. After running for about 200 metres, he heard a lady screaming from behind him, saying she had been raped. He stopped to see who was screaming and as he did so, he saw another man signaling to him to stop running. The man who was signaling him was PW2. When PW2 eventually got to where the appellant was he (PW2) told the appellant that he (appellant) and another had raped the woman and that that was the reason why the woman was screaming. Inspite of expressing his innocence PW2 insisted he was the woman's assailant. He was later taken to the police station.

19. During cross examination, the appellant conceded that the woman who was screaming was S but denied that he and another raped her. He also denied that he was drunk. He also testified that the reason he was running was because of the rain.

**Analysis and Determination**

20. Section 10 of the Sexual Offences Act, No 3 of 2006 provides as follows;-

> "10 Gang rape.
>
> Any person who commits the offence of rape or defilement under this Act in association with another or others or any person who, with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed, gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

21. In the case therefore, the prosecution must prove any of the following to prove the offence of gang rape;-

- That the offence of rape or defilement is committed in association with another or others; or
- That the appellant, with common intention was in the company of another or others during the commission of the alleged offence of gang rape. A consideration of the following issues will show whether or not the evidence by the prosecution meets the threshold set by Section 10 of the S.O.A.

Whether the appellant committed the offence and if so whether he did so in association with another or

others.

22. Though the appellant does not give the time when he got to the scene of the alleged offence, it is common evidence that between 3.oopm and 5.00pm on 05.05.2014, S was accosted by 2 men who demanded sex with her and when she resisted, she was thrown to the ground and sexually assaulted. According to S, the time was about 5.00pm and it was raining. The incident took place on the road, and PW2 stated that when he reached the scene together with PW3 he saw Otieno (appellants accomplice who is still at large) standing on the side of the road carrying a paper bag and a panga, and he also saw the appellant lying on the ground with a certain lady who was crying for help. PW2 further stated as follows;-

> " I saw the man who had the panga. I know him well. He is Otieno. When I reached where they were, I realized that the accused was raping the lady. On seeing us, the accused got up and started to run as he zipped up his fly. I stopped the motorcycle and asked my customer to hold the motorcycle. I started to run after the accused. He was not running very fast. He ran into a maize field, but something tripped him and he fell. I was then able to catch up with him. I caught him and he started to struggle with me. I called the customer who was still on the road about 70 metres from where we were. He came and helped me to subdue the accused."

23. In cross examination, PW2 stated the following. "I applied brakes upon realizing what was happening, but the motorcycle did not stop immediately. It stopped about 10 metres from you. I turned and ran after you. You were putting your organ back in. The incident happened on the main road. It was about 5.00pm. When I caught you [you] tried to plead with me to let you go. …….I know your partner very well. He was standing beside the road. He had a panga and a paper bag which had flour. He ran away when I stopped. You got up and tried to put your organ back in as I came after you. You were running and I came after you. You struggled with me and even tore my jacket. You were drunk but not very drunk. I caught you when you fell in the maize farm. Had the customer not come to assist me, you would have overpowered me……. I caught you as I saw you in the act of raping the complainant."

24. And this is what PW3 stated in part of his evidence.

> " when the rider stopped, I looked in the direction of the woman who was screaming and I saw the accused on top of her. He was doing bad manners to her. When the rider turned to go to them, he got up and started to run. The rider ran after him and caught him. I then went to assist the rider. The rider left me with the accused as he went to seek help. He came back with Odhiambo……. We left accused with Odhiambo, as we proceeded with our journey."

25. The following is what S said in part of her evidence.-

> "When the first man who held me finished, the accused also had sex with me. I screamed but no one could hear me. It was raining. So there was no one around. Shortly a motorcyclist came along the road. He found the accused on top of me. The first man who had caught me was standing aside. The accused stood up and started to run away as the bodaboda motorcyclist stopped the 2 men carried my flour and started to run."

26. The sum total of the above evidence is that the appellant was caught in the act of raping S by both PW2 and PW3. As soon as he saw them, he got up and started to run away, but he was pursued by PW2 and with the help of PW3, he was apprehended and handed over to Odhiambo who later that same evening took him to Manyala Police Patrol Base. The above being the position, I find the appellant's complaint that the evidence on record was not corroborated, was fabricated, inconsistent, discredited, marred with contradictions and implicative to have no merit. There is no suggestion from the cross examination that PW1 – PW4 had any reason to implicate the appellant.

27. I also find that the appellant committed this offence in association with Otieno who was identified by PW2 and who is still at large.

Whether the offence of rape was proved.

Section 3 of the S.A.O provides as follows;-

" Rape;

(i) A person commits the offences termed rape if

(a) He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind."

28. Section 2 of the SOA defines "penetration" to mean "the partial or complete insertion of the genital organs of another person. Section 43 of the Act defined. "Intentional and unlawful acts"

29. In the instant case, PW5, the clinical officer testified that on examination of the complainant, "she had tenderness on the supra pubic area (lower abdomen) and she also had a whitish creamish discharge which had a foul smell. There was no hymen." He also testified on cross examination that "According to the history you ejaculated thrice in the complainant." I am therefore satisfied that there was penetration. S testified as follows in part of her evidence in chief;-

" The accused then tripped me with his legs and I fell down on the road. The man who held me then slept with me first. He removed his thing and put it inside me. I mean he had sex with me. After he was done, the accused also had sex with me."

30. There is no doubt in the mind of this court that the appellant's penis penetrated and entered S's vagina and there was ejaculation not once but thrice. I am satisfied that the appellant's both act of having sex with S was both intentional and unlawful. S did not give her consent. To the sexual acts and when she resisted Otieno's overtures, Otieno pulled out a panga thereby constructively telling her that if she resisted any further, the panga he had would do its work. That was intimidation of a very high degree.

31. With the above findings, this court is satisfied that the offence was committed at around 5.00pm and not at night as stated at ground 3 of appeal. There was no issue of identification because the conditions for proper identification were ideal. PW2 even knew the appellant's accomplice whom he referred to as Otieno. When considering the time when the offence was committed, I have paid special attention to the principles for proper identification as set out in the case of Republic – vrs – Turnbull[1976]3 All ER 549 at P 552 and the case of Wamunga vs – republic [1989] KLR 424. I am satisfied that the evidence of identification of the appellant was free from error and from the possibility of mistaken identity.

32. From the evidence also, and the fact that S was examined on the very day of the sexual assault, the fact that she was HIV + and the appellant was HIV- does not mean that the appellant is not the one who raped her. The consequences of the appellant's act of raping the complainant could not have been known that day.

33. The appellant also complains at ground 9 that the trial court did not consider his alibi defence. He say the least on this ground, there was no alibi defence. The evidence places the appellant squarely at the scene of crime though the appellant made it appear as if he got to the scene after the event. Even if he had testified that he was away from the scene, the prosecution evidence given by PW1, PW2, PW3 and PW4 completely displaces that defence. That ground as well as all the other grounds of appeal have no merit.

Conclusion

34. The upshot of what I have stated above is that the appellants appeal on both conviction and sentence has no basis and the same is dismissed in its entirety.

35. If the appellant still feels dissatisfied with this judgment, he has a right of appeal to the court of Appeal within 14 days from the date of this judgment.

Orders accordingly

**Judgment delivered, dated and signed in open court at Kakamega this 1st day of December 2016.**

**RUTH N. SITATI**

**JUDGE**

**In the presence of;-**

**Present in person……...for Appellant**

**Mr. Oroni……...for Respondent**

**Polycarp……...Court Assistant**