



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.237 OF 2012**

**BETWEEN**

**JULIUS KEA NYARIBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal against both conviction and sentence of the PM's Court at Nyamira**

**in SPM's criminal case No.17 of 2010 dated 15<sup>th</sup> July 2010 – L. Komingoi, PM)**

**JUDGMENT**

The appellant JULIUS KEA NYARIBO was charged with the offence of gang rape contrary to **Section 10** of the **Sexual Offences Act No.8 of 2006** the particulars of which were that on 29<sup>th</sup> day of December 2009 at [particulars withheld] sub location in Nyamira District within Nyanza Province willfully with others not before court with common intention intentionally and unlawfully penetrated the vagina of T K with their penis one after the other.

He faced an alternative charge of Indecent Act contrary to **Section 11(A)** of the **Sexual Offences Act No.3 of 2006** the particulars of which were that on 29<sup>th</sup> day of December 2009 at [particulars withheld] sub location in Nyamira District within Nyanza Province unlawfully and indecently assaulted T K by touching her private parts namely vagina.

He pleaded not guilty, was tried, convicted on the main charge of gang rape and sentenced to 15 years. Being aggrieved by the said conviction and sentence he filed this appeal and in his grounds of appeal raised the following grounds:-

- a. *The sentence of 15 years was excessive.*
- b. *His mitigation was not taken into account.*

When the appeal came up for hearing, the appellant who was not represented filed written submissions which he relied upon while Mr. Majale appeared for the state and opposed the appeal.

**SUBMISSIONS**

It was submitted by the appellant that his constitutional right to fair trial was contravened during the trial. He submitted that he was arrested and prosecuted as a result of mistaken identity. He submitted that PW1 mentioned one JOISA KEA as the accused in the dock but further stated that he was JERESA KEA. It

was further submitted that PW1 in her evidence stated that she was raped by three people who she mentioned as ONYANCHA KEA, JOISA KEA, JERESA KEA and further stated that she saw ONYANCHA, SIRIBA and KEFA KERONCHI which therefore raised doubt in her evidence.

He further submitted that if it was the case of recognition then why didn't the complainant mention the appellant by name to the police. He further submitted that PW2 in the prevailing circumstances could not have identified anybody. It was further submitted that there was contradiction in the prosecution case and that there was nothing which connected him with the offence as charged.

Mr. Majale for the state submitted that the appellant was convicted on the evidence of recognition by both PW1 and PW2 who even gave their names. He submitted that the sentence meted out to the appellant was the minimum provided for under the law and therefore the trial court acted within the law.

The following issues have been identified by the court for determination:-

- a. *Whether the appellant was properly charged with the offence of gang rape.*
- b. *Whether the appellant was properly identified.*
- c. *Whether the prosecution case against the same was proved beyond reasonable doubt.*

This being a first appeal, the court is under duty to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that unlike the trial court, it did not have the advantage of hearing and seeing witnesses.

PW1 testified that on the material day at 10 p.m one Onyancha Kea called from outside and asked for water. He told her that he had been sent by her husband for his coat and that she was able to recognize his voice. She stated that the appellant was known as Joisa Kea and Jeresa Kea. When she refused to open the door they forcefully entered the house and she was able to see them clearly since she had lit a lamp and three of them started to rape her.

It was her evidence that she raised an alarm and PW2 responded and when he reached nearby he saw three people who flashed a torch on him and was able to identify them as Nyakundi Siriba and Onyancha (the appellant) as they ran away from the home of PW1. He was able to identify the appellant at the chief's camp when he was arrested.

PW3 JUSTUS OGENDI MOMANYI confirmed that he heard the screams of PW1 and PW2 and responded to the same but did not find the assailants. He accompanied PW1 to the area Assistant Chief. PW4 WILFRED GICHONGO rearrested the appellant from members of the public while PW5 LAMECK KARANJA a clinical officer at Nyamira District Hospital examined the complainant and formed an opinion that there had been penetrative sex.

PW6 CPL EUNICE CHEPNGETICH received a report from PW1 who gave her the names of the attackers including the appellant. When put on his defence, the appellant gave unsworn statement and stated that he had leased land from the complainant and planted vegetables which she had plucked. When asked about it she called the appellant a lizard and ordered him to leave the shamba. They reported the matter to the Assistant Chief who arrested the appellant on 2<sup>nd</sup> January 2010.

From the evidence tendered it is clear that the appellant was in a gang of three who raped the complainant in turns. The appellant was properly recognized by the complainant both through his voice and face when they forced their way into her house. She gave their names when she reported the rape. PW2 was able to identify the appellant having met him and his gang immediately he responded to the alarm raised by the appellant.

The appellant in his defence raised the issue of a dispute over vegetable from the farm he had leased from the complainant but from the proceeding, it is not worthy that he did not put this issue to the complainant during cross examination.

Upon re-evaluation of the evidence herein, I find that the appellant's conviction was safe and would hereby dismiss his appeal on both conviction and sentence.

**Signed and dated on this 11<sup>th</sup> day of March, 2015.**

**J. WAKIAGA**

**JUDGE.**

In the presence of:

Boyon for the Respondent

In person for Appellant