



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO. 140 and 169 OF 2010

1. DANSON MLAGHU KISAGU.....1ST APPELLANT

2. GABRIEL NYAMBU KITONGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 526 of 2010 of the

Senior Principal Magistrate's Court at Wundanyi – Hon. Orange - RM)

JUDGMENT

The two appellants above named were Convicted and Sentenced to fifteen (15) years imprisonment for the offence of gang rape contrary to section 10 of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

“On the 1st day of August, 2010 in Taita-Taveta County, having a common intention intentionally and unlawfully caused his penis to penetrate the vagina of M M”.

The prosecution called six (6) Witnesses in support of their case. The defence called two. (The Accused persons).

This being the first appellate Court its duty bound to reconsider and re-evaluate the evidence on record so as to arrive at its own conclusions bearing in mind, that it did not have the opportunity to hear and observe the demeanor of the Witnesses. ***Okeno –Vs- Republic EALR page 36.***

Brief facts of the case.

The Complainant a standard seven (7) pupil at [Particulars Withheld] Primary School at the time of this incident she was sent by her grandmother (PW 3) to go and buy vegetables at the home of the first Accused parents. She found the two Accused persons and bought the vegetables. On the way home the 2nd Accused blocked her way at the path. The first Accused approached her from the back and she was pushed into the bushes. The first Accused used a leso and covered her mouth. He proceeded to remove her petticoat and underpants and had sex with her. She felt a lot of pain and bled. The first Accused had used a condom. She went to the home of one Mkachuma and they proceeded to the home of the 1st Accused where they reported the matter to the first Accused mother.

They proceeded to the scene and recovered her petticoat and underwear. She was later taken for treatment at Mwatate Hospital and had the matter reported at the police station. The two Accused persons were later arrested and charged with this offence. She further told the Court that the 2nd Accused was present at the time and that he was the one who held her hands and pushed her down on the ground and she could not scream as she had been gagged with a lesso.

The Complainant had reported the matter of the rape to Denise Kadege (PW 2). They proceeded to the home of the first Accused and reported the matter to his mother. They proceeded to the scene where they recovered the Complainant's petticoat and underwear. The clinical officer Charity Mwambola (PW 4) examined the Complainant. She was presented with an underskirt which was blood stained and torn and underpants which were blood stained. The clothes were dusty. She complained of neck pains, pain to the thorax and hands and the thighs. The labia was not inflamed and there were no sperms noted but blood was oozing from her vaginal orifice, the hymen was absent.

The two appellants in their unsworn statements denied having committed the offence of gang rape. The first appellant alleged to have been confronted by three men who took him to PW 1's home where she demanded that he marry her daughter. When he refused. He was taken to police station and was charged with this offence. The 2nd appellant denied knowing the first appellant.

The charge facing the appellants and in which they were Convicted is that of gang rape contrary to section 10 of the Sexual Offences Act.

Section 10 of the Act provides,

“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 (15) years but which may be enhanced to imprisonment for life”.

In the present case, there is evidence to the effect that the 2nd appellant obstructed the Complainant whilst she was on her way home after buying vegetables from the home of the first appellant. She had found the two at the home of the first appellant. The two pushed her into the bushes where the 2nd appellant held her by the hands and pulled her down. The first appellant proceeded to forcefully undress the Complainant tore her petticoat and had sexual intercourse with her without her consent. When these undergarments were recovered they were all blood stained and the petticoat was torn an indication that force was used.

The Complainant upon examination by the clinical officer was found to have had pain on the neck, abdomen, right shoulder and both thighs. All these are indicative of application of force.

Blood was oozing from the vaginal orifice and the hymen was absent. This was indicative of penetration.

The two Accused persons were known by the Complainant and there is no allusion to mistaken identity. The 2nd appellant aided and abetted in the commission of the offence.

The ingredients of gang rape were proved. The appeal has no merit. The Conviction and Sentence are upheld. The appeal is dismissed.

Judgment delivered, dated and signed this **13th** day of **October, 2015**.

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M. MU YA

JUDGE

13TH OCTOBER, 2015

In the presence of:-

Learned Counsel for the prosecution Miss Maithya

Learned Counsel for the defence absent

Court Assistant Musundi

M. MUYA – JUDGE