**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 23 'A' OF 2012**

**DAN MELLY MAGANGA alias OMWABI.....1ST APPELLANT**

**JOHN ODHIAMBO ADUNDO AJO.....2ND APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 270 of 2010 of the*

*Chief Magistrate's Court at Kisumu – T. Obutu -SRM)*

## J U D G M E N T

## Introduction

**1).** The appellants were charged with the offence of Gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006 Laws of Kenya.

The particulars are that on the 27th day of May 2010 at Black gate area in Kisumu East District within Nyanza Province intentionally and unlawfully in association penetrated the vagina of C O R with their penis.

**2).** The appellants were equally charged with the alternative charge, namely Indecent Act with an adult contrary to section 11 (6) of the Sexual Offences Act No. 3 of 2006 of Kenya.

The particulars are that on the 27th day of May 2010 at Black gate area with Nyanza province committed indecent act to C O R by touching her vagina.

**3).** The appellants were convicted and sentenced to 20 years imprisonment each hence this appeal. The appellants have filed 8 grounds of appeal in challenging the conviction and sentencing. The substance of the grounds are:

1. **the charge was defective.**

2. **the identification evidence was uncorroborated.**

**Facts and Evidence**

**4).** The prosecution called eleven (11) witnesses in support of its case. PW1 the complainant told the court that on the material day at around 5.20 a.m she went jogging in the company of her househelp (PW2). This was from her house towards Coptic church along Kisumu Kakamega road. In the course of jogging, and while PW2 had run ahead of her, she heard some footsteps behind her and thinking that they were other joggers she permitted them to pass. However, the footsteps stopped right behind her and the next thing she heard was a panga being placed on her neck. She was then dragged away by two people from the road and taken to the bush by the assailants who proceeded to rape her in turns. She was later allowed to walk away after about 20 minutes.

**5).** PW2 on the other hand had waited for her at the Coptic church and noticed that she had taken unusually long time. She decided to board a matatu back home and while in the matatu she spotted PW1 walking along the road. She alighted and went to where she was. PW1 told her of the rape ordeal. On the way they met PW3, PW1's husband who took her to Riat Police Station where they reported the incident.

**6).** They later on the same day went to Aga Khan hospital where PW1 was examined and treated by PW9 one Dr. Juma who also took some sample from her vulva which on examination was confirmed to be semen. Dr. Juma notes were then handed over to one Dr. Juliet Orenge (PW7) a medical officer at New Nyanza General Hospital where she also filled the P3 form.

**7).** On 1-6-2010 PW1 and PW3 were driving along Kisumu - Kakamega road when PW1 spotted the appellants at Black gate stage. They then informed the police who later arrested the appellants albeit on different occasions. This arrests were done by PW5 and PW8. PW11 on the other hand conducted an identification parade where PW1 positively identified the appellants. It is further from the evidence noted that the appellants underwent some test where samples of their blood and saliva were taken to the Government Chemist in Nairobi as well as the swabs from PW1. PW10 told the court that he conducted the test and concluded that PW1 had engaged in a sexual activity with a group O secreta who could have either been one of the suspects or both of them.

**8).** In his sworn defence, the 1st appellant stated that on 1-2-2010 at about 9 a.m the police officers came to his house and arrested him and took him to Riat police station. He was later taken to Kisumu central Police Station where he was identified by PW1 in an identification parade. He called one witness (DW2) who testified that the 1st appellant was his employee and that he was at his premises at the time of his arrest. On cross examination however DW2 stated that he did not know the whereabouts of the 1st appellant on the morning when the alleged offence was committed.

**9).** The 2nd appellant also gave sworn testimony and stated that the police came looking for him in the presence of PW3. He said that he was at his place of work during the arrest. He was equally identified at a parade by PW1. He denied knowing the co-appellant prior to being arrested.

**Submissions**

**10).** The appellants' counsel submitted on the issue of identification where he argued that there was no sufficient light in the early morning to enable the complainant be in a good position to identify the appellants. He submitted that the identification parade was so unfairly done that it never met the requisite standards as the appellants were already known to the single identifying witness.

**11).** He further submitted that the medical evidence produced was not conclusive and neither did it point to the appellants. He argued that as DNA test was not conducted on the samples taken from both the complainant and the appellants, it was impossible to conclude who raped the appellant.

**12).** On the charge, he submitted that the same was fatally defective. He said that it was impossible to charge the appellants on one count of gang rape as it is not envisaged that both can commit the offence at the same time. In other words counsel contended that they should have been charged separately.

**13).** The learned state counsel opposed the appeal submitting that the evidence of the complainant as the single identifying witness was credible and was corroborated by the medical report which indicated that the victim was raped by a person of type O blood group and that the appellants were of such blood group.

**14).** He further said that the identification of the appellants was positive and without any possibility of error. He contended that the moonlight, though it was early in the morning was sufficient enough for the complainant to identify the appellants and that in any event the whole ordeal took about 20 minutes which was sufficient enough.

On the defective charge he concluded that the same can be cured by invoking the provisions of section 382 of the Penal Code.

**15).** Both counsels relied on various authorities which were persuasive depending on which part of the boarder each was.

**Analysis and Determination**

**16).** This being the first appeal, the court is enjoined to review the evidence a fresh with a view of arriving at an independent conclusion see **Okeno -VS- Republic [1997] E.A 32**. As earlier observed the appellants attack centered on three issues namely:

**a. Whether the identification was free from error.**

**b. Whether the charge was defective.**

**c. Whether the offence of rape was proved.**

**17).** There is no doubt that the lower court believed that the complainant was able to identify her attackers. The appellants argued that this being a single witness the trial magistrate did not warn himself on dangers of relying on such evidence especially where it is uncorroborated.

**18).** In the case of **Warungu -VS- Republic [1989] KLR 42**4 the court held that:

> **"…... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".**

**19).** PW1's attackers were indeed strangers to her. It took place between 5.30 a.m and 6.00 a.m. She contended that there was sufficient moonlight and that people were already walking on the road.

**20).** She went on to say:

> **".....He was short, his eyes were darting all over the place. The other was tall and slender. They were two people. The tall one had a bow and a quiver of arrow slang over the shoulder. The short man dragged me off the road and told me to walk".**

She further went on to state in her testimony that:

> **".....They stood one in front of the other with the tall in front just 3 meters from me. I looked at them. I saw the joint of the taller man. The moonlight was hitting on his forehead. I saw them clearly".**

**21).** This incident took about 20 minutes and from the proceedings I am persuaded that indeed there was sufficient time and light to have enabled the complainant identify the appellants. The description she gave to court was graphic and detailed.

**22).** Even from the identification parade, it is clear that the complainant had no difficulty in picking the appellants. I do not think with respect to the submission by the appellants' counsel, there was any error in identification.

**23).** Section 124 of the Evidence Act Chapter 80 Laws of Kenya provides:

> **"Provided that in a criminal case involving a sexual offence the only evidence is that if the alleged victim of the offence the court shall receive the 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".**

In respect to identification therefore and as observed above the evidence of PW1 was free from error and therefore believable.

**24).** The second element of the appellants appeal is whether the charge was defective. Counsel for the appellants argued that it was wrong for the appellants to be charged jointly in an offence of gang rape. He said that they ought to have been charged on separate counts then they be consolidated as it was not possible to jointly commit the offence of rape.

**25).** The charge reads that they **"intentionally and unlawfully in association penetrated the vagina of C O R with their penis".**

Heavy reliance was placed by the appellants' counsel on two authorities namely: **David Jefwa Kalu -VS- Republic Criminal Appeal No. 351 of 2006 Mombasa [2007]** and **Paul Mwangi Murunga -VS- Republic Nakuru Criminal Appeal No. 35 of 2006.**

**26).** In both cases the court of appeal dealt with the offence of rape as envisaged under the provisions of the repealed section 140 of the Penal Code. The court argued that the offence of rape is attributed to one individual at a go and cannot be joined.

**27).** In the Murunga case the court stated that:

> **"This court has repeatedly said that two or three men or whatever may be their number cannot jointly at the same time rape one woman. Each one of the men commits the act of rape individually and is followed by the next man. We are unable to appreciate how two or three men can at the same time "jointly" enter or try to enter her genital organ. The act is committed by each of them alone and if there be two or three or four of them each must be charged on a separate count of rape".**

**28).** The charge before the trial court was based on the Sexual Offences Act No. 3 of 2006 where section 10 thereof provides that:

> **"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 other 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 that fifteen years but which may be enhanced to imprisonment to life".**

**29).** The essential elements here are that the person or persons must be more than two as envisaged by section 2 of the Sexual Offences Act 2006. The person must equally be in association with another or others and that the intention ought to be common.

Black Law Dictionary 8th Edition has defined **"gang"** as **"A group of person or persons who go about together on act in concert especially for antisocial criminal purposes".**

**30).** The matter before this court squarely fitted the definition above. The appellants were two and the

allegation before them was gang rape. It would have been different if they had been charged under section 140 of the penal code which apparently has been repealed. Section 10 of the Sexual Offence Act clearly envisaged a situation such as this. In a gang rape situation it is not necessary that both persons engage themselves in the sexual activity with the victim. Sometimes one can simply assist the other by pinning down or immobilising the victim while the counterpart proceeds with the sexual act.

Respectfully therefore I do not think that there was any defect in the charge. The appellants both understood the charge facing them and with the aid of counsel whom they had all through they ought to have raised it. In any event I do not think that there is any prejudiced suffered by them. They all clearly understood the offence facing them namely gang rape and they chose to proceed to the end without raising any objection. This in my mind is so clear that there is no need of invoking the provisions of section 382 of the Criminal Procedure Code. In short therefore, the charge was not defective at all.

**31).** The third issue to determine is whether the offence of rape was proved. Section 3 of the Sexual Offence Act establishes three ingredients which ought to be established namely:

> **a. the accused intentionally and unlawfully commits an act which causes penetration into the victim's genital organs;**
>
> **b. the other person does not consent to penetration;**
>
> **c. the consent is obtained by force or by means of threats or intimidation of any kind;**

**32).** From the evidence on record it is stated by PW1 that both appellants took turns and raped her. PW9 one Dr. Juma state in her finding that:

> **"She appeared anxious. She was dressed in a soiled track suit. No bruises seen in her vulva. She had a day secretion in the vulva. We collected what appeared like semen. We confirmed it was semen".**

**33).** PW10, an analyst from the government chemist received a vaginal swab of PW1 and on carrying out an examination he found that the vaginal swabs of the complainant had semen of group O and many degenerated spermatozoa. He found also that her long trouser had seminal stains of group O secreta and few degenerated spermatozoa. The saliva and blood sample of the appellants were found to belong to blood group O.

**34).** The question that needs an answer is whether the spermatozoa described by the analyst were those from the appellant. Secondly and most important, was whether there penetration which is an essential ingredient of proving rape.

**35).** The absence of spermatozoa does not in itself prove the absence of rape and yet on the other hand merely claiming that one has been raped does not prove rape. There must be evidence of penetration. Apparently the two doctors namely PW9, Dr. Juma Phoebe from Aga Khan hospital who handled the complainant in the first instance did not establish this. Apart from describing PW1's anxiety, which was of course expected she did not record any other significant finding.

**36).** Significantly, the DNA analysis although sent to Nairobi was never presented. Similar disturbing matter was handled by the court of appeal in **Mwangi -VS- Republic [1984] KLR 595** and at page 603 the court rendered itself as follows:

> **"The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she had sexual intercourse nor is the absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape, which doctors evidence did not establish or corroborate".**

**37).** The P3 form produced concluded that there was rape. Dr. Orege at New Nyanza General Hospital who filled the said P3 based her findings on the notes of Dr. Juma of Aga Khan hospital. Dr. Juma did not establish whether or not there was penetration.

**38).** How then does one prove penetration? Must there be an injury on the genitalia for the court to be convinced beyond any doubt that penetration occurred?

**39).** Justice Asike Makhandia as he then was said in **Kavuvu Muli -VS- Republic [2002] e KLR** as follows:

> **"A round of rape, or sexual intercourse, conotes perhaps climaxing in ejaculation leading to release of spermatozoa. If indeed there was a round of rape, it would be spermatozoa in the vagina of the complainant. Whereas PW6 sought to explain why the absence of injuries or tear on PW1 genitalia, he was silent on the absence of spermatozoa".**

The situation at hand may not be same as the aforequoted authorities. One needs to look at the entire thread of evidence. What runs across this case is that PW1 at the point of parting with PW2, her maid, she was in good spirits and half an hour later she was distraught, crying, her hair was totally in disarray and her clothes were soiled. PW3 took her to hospital and in less than two hours span the doctors were able to establish that she had had sexual activity. The analysis from the government chemist showed that the specimen taken from the complainant came from a person of blood group O. who in this case coincidentally were the appellants. Dr. Juliette Orege concluded when filling the P3 form that:

> **"From the history and details of examination done at the Aga Khan hospital an impression of sexual defilement (rape) of the above mentioned person is made".**

**41).** My finding therefore is that despite the absence of injury on PW1 genitals or any other evidence pointing out penetration save for the presence of spermatozoa, I am persuaded that the complainant was raped.

The appellants as earlier observed were clearly identified by the complainant. There was sufficient light and time to have permitted her to identify the assailants. This finding is further buttressed by the identification parade where the appellants were identified and apart from their physical appearance by voice identification also.

In the premises I do not find the appeal meritorious and I do dismiss the same.

**Dated, signed and delivered at Kisumu this 12th day of May, 2014.**

**H.K. CHEMITEI**
**JUDGE**