



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED J.J.A.)

CRIMINAL APPEAL NO. 18 OF 2014

BETWEEN

ALFRED OGENDI OTIENO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya

at Kisumu, (Chemitei, J.) dated 27th January, 2014

in

H.C.CR.A. NO. 11 OF 2013)

JUDGMENT OF THE COURT

[1] This is an appeal against the judgement of the High Court (**Chemitei, J**) dismissing the appellant's appeal against conviction and sentence of ten years imprisonment, for the offence of rape contrary to **Section 3(1)** of the **Sexual Offences Act**.

[2] The appellant was charged with the offence of **gang rape** contrary to **section 10** of the **Sexual Offences Act**. He was alternatively charged with the offence of **indecent act** with an adult contrary to **section 11(a)** of the **Sexual Offences Act**. His co-accused **Joseph Odhiambo Ochieng** was charged separately but in the same charge sheet with similar offences. In addition, the appellant and the co-accused were charged with the offence of **assault, causing actual bodily harm** contrary to **section 251** of the **Penal Code**. The complainant in all the counts was the same person. For purposes of this appeal, we abbreviate her name as E.A.A.

[3] After the trial, the trial magistrate made a finding that the appellant raped the complainant and that the charge of gang rape was not proved beyond reasonable doubt. The co-accused was acquitted of the offence of gang rape but was convicted for the offence of assault, causing actual bodily harm and sentenced to a fine of Shs. 20,000 and in default one-year imprisonment. On his part the appellant was sentenced to 10 years imprisonment for the offence of rape contrary to **section 3(1)** of the Sexual Offences Act.

[4] The complainant's evidence was briefly as follows:

On the night of 15th December 2009, she was asleep in her house. Her son (**JM**) had been buried a few days before and she had visitors in the house, among them **FA**, the widow of her deceased son. The complainant's son **BO** aged 10 years was also in the house. At about 11 pm five people, among them, the appellant and the co-accused forced the door open. The five people assaulted the complainant after which she was pulled outside her house and pushed down by the appellant. She was whipped and hit on the left thigh and breasts. She became unconscious. She gained consciousness at about 3.00 a.m. and found herself inside the house. She noticed that watery substance was oozing from her private parts. She was taken to hospital and admitted for three days.

In her evidence in cross-examination by the appellant's counsel she stated:

“accused 1 pulled upwards my dress. He touched my abdomen as we struggled before I went unconscious. We fought for over 5 minutes with them. I asked accused 1 why he was touching my private parts. I was felled down by them. Other

members of the group touched my thighs as others hit my head. I saw accused 1 having sex with me by face. I went unconscious thereafter.”

[5] **BO** testified that the appellant and about three other persons forced themselves into the house, assaulted the complainant and took her outside, and that after the attackers left, he went to call his brother, **JOA (J)**. The complainant’s son testified at the trial that after his brother **BO** reported the incident to him, he went to the complainant’s house and found her lying outside. She was dirty, bleeding and had cuts on the thighs, neck and face. He took her into the house and reported the incident to the village elder on the following morning.

Anthony Oliech, the Assistant Chief testified that after getting the report, he went to the complainant’s home after three days, who reported to him that people in black clothes went to her house and beat her unconscious, and that he forced her to report to the police.

The other material prosecution witness was **George Mwita**, a clinical officer who examined the complainant on 21st December 2009. According to him, the complainant had a bruise on the right eye, healing wounds on the frontal chest, swollen left breast and bruised left knee. On examination of her private parts, a white discharge was seen, bacterial and fungal infections were seen and the private parts were swollen but no sperms were seen.

[6] The appellant gave sworn testimony at the trial. He denied assaulting and raping the complainant. His evidence was in essence, that he went to the complainant’s house after being informed that the complainant wanted his sister **FA** to be remarried; that on arrival at the complainant’s house, he found his sister locked in the house, the complainant opened the door and his sister came out and told him to take her away; that his other four sisters were there and he went away with them.

FA was a defence witness. She testified, amongst other things; that her husband **JM**, a son of the complainant, died and was buried on 12th December 2009; that the complainant wanted her inherited by one **L**, that she was against wife inheritance; that on the material day, she was in the complainant’s house with her sisters; that the would-be inheritor came at 5.00 a.m.; that the complainant wanted customary rituals to be performed before she (**FA**) could go away; that she rang her cousin, **Pastor Odhiambo Ochieng** who sent the appellant; that when the appellant arrived she reported to him and told him that she could go away with him and, that, she eventually left the complainant’s house in the company of the appellant and her sisters. She testified that neither the appellant nor the co-accused assaulted or raped the complainant.

Ruth Adongo gave similar evidence for the defence and stated that the appellant did not assault or rape the complainant.

[7] The trial magistrate made a finding of fact that the complainant was assaulted and raped. The trial magistrate relied on the medical examination report (P3 form) as evidence of corroboration of the complainant’s evidence and made a finding that the P3 form was positive, that the complainant was assaulted, penetrated and infected with a disease.

The finding of rape was the main ground of appeal in the High Court. However, the High Court relying on the evidence of the complainant and the P3 form came to the same conclusion as the trial magistrate. Aggrieved by this decision, the appellant filed this appeal.

[8] **Mr. Ouma**, learned counsel for the appellant argued only one ground of appeal – that the learned judge misapprehended the evidence and failed to re-evaluate the evidence and submitted that the evidence did not warrant conviction for rape. He referred to the evidence and asked us to go beyond the evidence of the complainant considering the circumstances and find that rape was not proved beyond reasonable doubt.

Mr. Ketoo, learned counsel for the respondent supported the judgment of the High Court and submitted that the evidence of the complainant was supported by the evidence of the clinical officer.

[9] The appellant contended both at the trial and in the High Court that the prosecution did not prove the offence of rape. The two courts below made a concurrent finding of fact that the appellant raped the complainant. The appellant now complains that the High Court misapprehended the evidence and failed to re-evaluate the evidence particularly the evidence of the appellant and defence witnesses. The prosecution case was simply that the five people, among them, the appellant went to the complainant’s house, forced the door open, assaulted and raped the complainant. The appellant’s case and that of his witnesses was that the complainant, after the death of her son, wanted his son’s widow **FA** to be inherited by one **L** and customary ritual performed on the material night and that the appellant went there and rescued his sister who resisted the customary ritual of inheritance. The trial magistrate did not consider that aspect of the defence case. The High Court apparently believed the evidence but stated that the inheritance story and the performance of the ritual by one **L** was apparently advised by the complainant.

[10] In light of the circumstances disclosed by the defence case, were the concurrent findings of fact of rape based on credible evidence? It is clear that the complainant did not disclose to the trial court that the mission of the appellant and others was to forestall **FA** being inherited and the performance of the customary ritual by **L**. The complainant did not also state in her evidence in-chief that the appellant raped her. Her reference of rape was only in her evidence in cross-examination. Her two sons who gave evidence did not testify that the complainant complained of rape. They testified only in respect of assault.

The complainant did not tell **Anthony Oliech**, the Assistant Chief that she was raped. This is the witness who forced her to report to police. According to the P3 form, the complainant reported to the police on 21st December 2009. The P3 form shows details of the alleged offence thus:

“the complainant was assaulted by known thugs who invaded her house and that the police requested the medical officer to examine the degree of injury caused.”

The P3 form further shows that it was during medical examination that the complainant complained of “defilement”. **George Mwita**, the Clinical Officer examined the complainant on 21st December 2009, about six days after the incident. It is clear that the evidence of the

clinical officer that there was penetration was not based on conclusive clinical evidence.

The finding by the trial magistrate that there was no gang rape discredited the evidence of the complainant who had caused the appellant and the co-accused to be charged with offence of gang rape.

The complainant was angry after the appellant and others stopped the inheritance of *FA* and rejected subsequent efforts to resolve the matter amicably.

In the premises it is apparent that the High Court did not properly re-consider and re-evaluate the evidence and the concurrent findings of fact of rape was not supported by cogent and credible evidence.

[11] There was however ample evidence that the appellant and others assaulted the complainant. The co-accused was sentenced to a fine of Shs. 20,000/- in default one year imprisonment. Ideally, the appellant should suffer the same sentence. However, the appellant has been in prison for over one year. In the circumstances, the sentence should be reduced to the period already served.

[12] For the foregoing reasons, the appeal is allowed. The conviction for the offence of rape is quashed and the sentence of 10 years imprisonment is set aside. In substitution, the appellant is convicted for the offence of assault causing actual bodily harm in count III and sentenced to the period already served. The result is that the appellant shall be released from prison forthwith unless lawfully held for another offence.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR