



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA , AZANGALALA & KANTAI JJ.A)

CRIMINAL APPEAL NO. 34 OF 2013

BETWEEN

TOM JOASH LIPURE & ANOTHER.....APPELLANTS

AND

REPUBLIC..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (Thuranira, J.) dated 21st November, 2012

in

H.C.CR.A. NO. 71 OF 2010)

JUDGMENT OF THE COURT

1. Both **THOMAS JOASH LIPURE** and **JASEPH MUTEREMA** were charged with the offence of gang rape contrary to **Section 10** of the Sexual Offences Act. In the alternative they were charged with indecent assault contrary to **Section 11(1)** of the same Act. They pleaded not guilty to both the charges but after trial they were convicted on the main count and were each sentenced to 20 years imprisonment. Their appeals to the High Court were dismissed thus provoking this second appeal.
2. In their memoranda of appeal, the appellants have raised more or less the same grounds of appeal which are that they were detained for more than 24 hours before they were taken to court; that the charge against them was incurably defective; that contrary to **Articles 49** and **50** of the Constitution they were not afforded a fair trial; that there was no sufficient evidence to support their conviction; and that the learned High Court Judge failed to properly re-evaluate the evidence on record.
3. At the hearing before us, the 1st appellant relied on his written submissions while the 2nd appellant relied on his memorandum of appeal. In his written submissions, the 1st appellant argued that contrary to Article 49 of the Constitution, he was not informed of the reasons for his arrest. He also argued that he was detained in police custody for more than three days before he was taken to court. In court, despite his application, he was not supplied with copies of witness statements. He said that violated his constitutional right to a fair trial under Article 50 of the Constitution.

4. Regarding the charge against them, the 1st appellant argued that while the charge sheet talked of the offence of gang rape the evidence adduced in court related to the offence of defilement. In his view, that made the charge incurably defective.

5. The 1st appellant cited to us this Court's decision in the case of **Murunga v. Republic, Criminal Appeal No. 35 of 2006 (CA Nakuru)** and further argued that it is impracticable for more people to jointly rape a woman.

6. On the merits of the appeal, the 1st appellant submitted that having not been medically examined and his blood sample having not been taken for DNA examination, there was no evidence to support his conviction. On those submissions the 1st appellant urged us to allow his appeal.

7. In his memorandum of appeal, besides raising the same issues as those in the 1st appellant's submissions as summarized above, the 2nd appellant added that the learned trial magistrate erred in relying on the evidence of a single identifying witness to convict him and that his alibi defence was not adequately considered. He also urged us to allow his appeal.

8. Opposing the appeal Mr. Sirtuy, learned Principal Prosecution Counsel, and submitted that the learned Judge properly re-evaluated the evidence on record, according to him. In the circumstances, this appeal has no merit and the same should be dismissed in its entirety.

9. We have considered the grounds of appeal in the appellants' memoranda of appeal, the evidence on record and the 1st appellant's said submissions. On the first ground, we do not wish to go into the issue of whether or not the appellants were unlawfully detained by police before they were taken to court. As we have repeatedly stated, any accused person who is unlawfully detained by police has a cause of action against the state for damages. We therefore find no merit in ground 1 of the appeal and we accordingly dismiss it.

10. We have no evidence to support the appellants' assertion that they were not informed of the reason for their arrest. Even if that were so, we do not think that they were in any way prejudiced as the reasons for their arrest became clear when they were taken to court and the charges were read out to them and they pleaded not guilty. We also do not think that failure to supply the witness prosecution witnesses' statements caused any prejudice to them.

This is because at the trial they extensively cross-examined the witnesses meaning that they understood the evidence of those witnesses.

11. The charge was not incurably defective as the appellants have alleged. **Section 10** of the Sexual Offences Act states that;

"[a]ny 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 as gang rape and is liable upon conviction to imprisonment for a term of not less than 15 years but which may be enhanced to imprisonment for life."

12. It is clear from this provision that the offence of gang rape includes rape of adult women and defilement of minor females.

Although the particulars of the charge alleged that the appellants "*jointly*" raped the complainant they added that the rape was '*jointly and in turns*'. That clearly shows that the appellants defiled the complainant in turns. That differentiates the charge in this case from the one in the **Murunga case** that the appellants referred to. We therefore find that the charge was not defective as the appellants alleged and we accordingly also dismiss the ground of appeal in that regard.

13. The 2nd appellant's claim that the learned trial magistrate erred in relying on the evidence of a single identifying witness to convict them has no basis as this was a case of recognition. The 1st appellant was the complainant's uncle and the 2nd appellant was a person well known to the complainant. So, the issue of mistaken identification does not arise.

14. At any rate both the two courts below believed the evidence of the complainant. Pursuant to the proviso to **Section 124** of the Evidence Act, in sexual offences, the evidence of the victim, if it believed suffices to found a conviction without corroboration. In this case besides the complainant's evidence there was medical evidence that she had been defiled. We therefore find no merit in the appellant's ground that there was no evidence to support his conviction.

15. The last ground is that the learned Judge failed to re-evaluate the evidence on record. Having read the High Court judgment we are satisfied that the Judge fully re-evaluated the evidence on record and found no reason to disturb the appellants' convictions.

Having ourselves re-evaluated the evidence on record; we find that there was ample evidence that the appellants in this case committed the heinous crime. The first appellant took his niece to the second appellant who defiled her after paying the first appellant Kes.200/=. Thereafter, the first appellant took her to his house and also defiled her until the following morning. In the circumstances, we find no merit in this appeal and we accordingly dismiss it in its entirety.

DATED and delivered at Kisumu this 12th day of February 2015.

D.K.MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR