Case Number:	Criminal Appeal 141 of 2017
Date Delivered:	15 Dec 2021
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Grace Lidembu Nzioka
Citation:	Alfred Otieno Oriwo v Republic [2021] eKLR
Advocates:	Mr Kiragu for the Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 141 OF 2017

ALFRED OTIENO ORIWO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. On 20th March 2015, the appellant was arraigned before the Chief Magistrate's Court at Milimani, Nairobi, charged vide Criminal Case No. 533 of 2015, with the offence of; gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006 (herein "the Act) in count one, and an alternative charge of; indecent act with a child contrary to section 11(i) of the Act.

2. The particulars of each charge are as per the charge sheet. The appellant took a plea of not guilty on both counts. The Prosecution called a total of six (6) witnesses. The prosecution's case in a nutshell, is that, on 16th March 2015, (PW1) RNA (herein "the complainant), went to collect her money from a friend. They met at a stall. Her friend was called back home by her mother. She left the complainant at the stall.

3. While at the stall, the appellant in a company of two other people, approached her and forcefully pulled her to their house. She resisted but was overwhelmed. She was then raped in turns by the accused and another. That in the course of the gang rape, her clothes were torn off; and she was threatened that she would be harmed with a knife the assailants had, if she resisted and/or screamed.

4. After the incident, she went home but did not inform her brother whom she found at home about the incident. However, she met a friend with whom she shared with what had happened, and she was advised to report the incident to the Police. She reported the matter at Huruma Police Station and was taken to MFS Hospital for treatment. Thereafter, she led the Police officers to the house where she had been gang raped. The appellant was found in the house. She identified him as one of the perpetrators and he was arrested and charged after investigations.

5. At the close of the prosecution case, the accused was put on his defence. In an unsworn statement, he told the court that, he was merely arrested at a friend's house where he had gone visiting. He denied knowledge of the incident, and stated that, he first saw the complainant in court.

6. At the close of the entire case, the trial court rendered its final decision, vide a judgment delivered on; 3rd October 2017, wherein, the appellant was found guilty as charged on the main count of gang rape, and convicted accordingly. He was then sentenced to serve fifteen (15) years imprisonment.

7. However, being aggrieved by the decision of the trial court in its entirety, the appellant filed a petition of appeal dated 16th October 2017, based on the following grounds: -

a) The learned Magistrate misdirected himself in fact and law by the fact that exhibits (clothes) which formed the key evidence by the prosecution were never produced and identified in court by the complainant in accordance with the Evidence Act.

b) The learned Magistrate erred in law and in fact in convicting the appellant without considering that his constitutional rights as stipulated under article 49(1) (f) of the constitution were violated in the sense that, he was detained for more than 24 hours before

he was charged.

c) The learned Magistrate erred in law and in fact when he failed to allow the appellant's prayer to have the complainant recalled for fresh testimony considering seriousness of the charge facing the appellant and the fact that the case had not progressed far, since it is only the complainant who had testified.

d) The learned Magistrate erred in law and in fact in stating that the complainant was truthful in her testimony, yet he did not have the opportunity to observe her demeanour and character at the time she was testifying.

e) The learned Magistrate erred in law and in fact when he misdirected himself that the contradictions by the complainant as regards whether she knew the appellant were honest mistakes while not considering the possibility of her lying.

f) The learned Magistrate erred in law and in fact when he misdirected himself that in the medicens San Frontier report indicated that the complainant was assaulted by known persons when the report shows that the assailants were known.

g) The learned Magistrate erred in law and fact in stating that, the complainant went to hospital unaccompanied when in fact the complainant states that, she went to hospital in the company of police.

h) The learned Magistrate misdirected himself in fact and law by not appreciating that the medical report by Medcins Sans Frontiers prepared by Irene Nyagwachi few hours after the incident stated that the complainant had no physical injuries in effect contradicting the P3 report by the Police Doctor Maundu which stated that the complainant had a blunt injury in the lower abdomen.

i) *The learned Magistrate misdirected himself in fact and law by not attaching considering, the evidence and submissions by the defence.*

8. The appeal was canvassed orally by the parties. However, it suffices to note that, although the grounds of appeal challenges both conviction and sentence, on 7th November 2021, the appellant indicated to the court that, his main concern is sentence.

That, the court takes into consideration the period he was in custody and order that, the sentence meted out, commence from the date of his arrest.

9. However, be that as it were, as the grounds in relation to conviction were not withdrawn, I shall consider the appeal on both conviction and sentence. In that regard, I note that, the role of the 1st Appellate court, is to evaluate the evidence adduced afresh and make its own findings, noting that it did not have the benefit of the demeanour of the witness.

10. The aforesaid role of the court was well settled as stated in the case of ***Okeno vs. Republic [1972] EA 32*** **where the Court of Appeal stated as follows; -**

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

11. As regards conviction, I find that, the trial Magistrate evaluated the evidence adduced and found that, the prosecution had proved that, the victim child was 17 years old, as evidenced by the fact that, she was born on 12th September 1998 and the offence was committed on 16th march 2015. However, I find that, that there was no birth certificate or any other documentary evidence, produced in proof of age. However, the P3 Form indicted that she was a minor and in my opinion that suffices. It is also noteworthy that, she was a student at; St, John Primary School and a child in that class is usually and generally under 18 years. Finally, the evidence on age was not challenged.

12. On the issue of identification, the learned trial Magistrate found that, the circumstances of recognition were favourable and free from error, in that, the appellant was well known to the complainant prior to the incident. I have evaluated the complainant's evidence afresh and I find that, she stated in her evidence that, "she had been seeing Fredrick (the appellant) and Ali in the area for a long time".

13. She further testified that, they were staying in the same area and although the incident took place at night, "there were electricity lights outside".

14. In my considered opinion, the complainant having known the appellant earlier than the date of the incident, the issue of mistaken identity does not apply. Thus, I concur with the trial court's finding that, the complainant was able to recognize the appellant and subsequently pointed him out to the police for arrest.

15. Furthermore, the presence of the appellant at the scene and/or in the incident, was nailed by the DNA analysis that, revealed that, the DNA samples taken from him, were found on the complainant's clothes, therefore, he had contact with the complainant.

16. I further find that, there is adequate medical evidence that, the complainant was defiled. The sum up is that, it was the appellant, in the company of others who defiled the complainant. In my considered opinion, there was adequate evidence to prove that, the appellant defiled the complainant. I therefore find that, the trial court was properly guided in finding the appellant guilty as charged on the main count.

17. As regards sentence, I find that, section 8(4) of the Sexual Offences Act, No. 3 of 2006, states that, a person who commits an offence of defilement with a child between age of sixteen and eighteen years is liable upon conviction to imprisonment for a period of not less than fifteen years. The appellant was sentenced to serve the minimum sentence of fifteen (15) years.

18. However, the provisions of section 333(2) of the Criminal Procedure Code requires that, while sentencing the accused, the court should take into account the period the accused was in custody. Therefore, the fifteen (15) years imprisonment should have taken effect from the date the accused was arraigned in court.

19. In fact, the history of this matter shows that, the prosecution adjourned the case on so many occasions that, the appellant was left helpless and was on trial for unnecessarily long period of time. The trial court did not indicate whether the period in custody was considered and/or whether it was taken into account at all. In that case, I direct that, the fifteen years take effect from the 20th of March 2015.

It is so ordered.

Dated, delivered virtually and signed on this 15th day of December 2021.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant in person

Mr Kiragu for the Respondent

Edwin Ombuna - Court Assistant