



REPUBLIC OF KENYA



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**Tsuma & another v Republic (Criminal Appeal E019 of 2023)
[2023] KEHC 26987 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E019 OF 2023
M THANDE, J
DECEMBER 19, 2023**

BETWEEN

IDII YAWA TSUMA 1ST APPELLANT

JOSEPH MUTINDA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the conviction and sentence of Hon. Nelly Chepchirchir
PM delivered on 16.3.23 in Mariakani Sexual Offences Case No. 83 of 2019)*

JUDGMENT

1. The Appellants were charged with the offence of gang defilement contrary to Section 10 of the [Sexual Offences Act](#) (SOA). The particulars of the offence are that on 22.12.19 on diverse hours between 1030 hrs to 1730 hrs at [Particulars Withheld] village in Samburu location within Kwale County the 1st Appellant in association with Joseph Mutinda and Samuel Munga Ndegwa, unlawfully and intentionally cause his penis to penetrate the anus of MA a boy aged 7 years (the Complainant). The 1st Appellant faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the SOA. The particulars of this offence are that on the same day and in the same place, the 1st Appellant unlawfully and intentionally touched the anus of the Complainant, with his penis.
2. Following a full trial, Samuel Munga Ndegwa was acquitted, while the Appellants were convicted of the charge of gang defilement and sentenced to 15 years imprisonment each. The alternative charge facing the Appellants was held in abeyance as finding had been made on the main charges facing them.
3. Being aggrieved by the decision of the trial Magistrate, the Appellants have appealed to this Court against both the conviction and sentence.



4. The Appellants' conviction was premised on the evidence of only one identifying witness, the Complainant. He told the trial court that on the morning of the material day he left home to play when the 2nd Appellant Joseph Mutinda, who he said was a "fundi" and referred to him as such, called him by name and gave him Kshs. 10/= to buy sweets. Fundi then took the Complainant to Rasta's place and Rasta called the 1st Appellant and they locked the door and did bad things to him. Rasta gave him a red liquid to drink and hit him on the back of the head with a cooking stick. He stated that Rasta removed his clothes. He felt dizzy and slept. He stated that he was asleep when they did "kitu". I saw them doing things "mambo". When he woke up, he felt pain in his buttocks and found himself in hospital. He stated that he knew all 3 accused persons by appearance and had seen them before in Samburu. He stated that the 2nd Appellant has a shop and that the 2nd Appellant lives near their home. When the Complainant arrived home and his mother saw blood on his trouser, she started screaming and took him to hospital.
5. The summarized grounds of appeal as set out in the memorandum of appeal dated 21.3.23 are that the trial Magistrate erred in fact and in law in:
 - i. Convicting them on evidence based on theory, inconsistencies and lies and that did not meet the required evidentiary standards.
 - ii. Finding that the Appellants were properly identified in the commission of the offence.
 - iii. Concluding that the offence of gang rape was proved without considering the evidence of the clinical officer.
 - iv. Finding that the elements of the offence were proven beyond reasonable doubt.
 - v. Rejecting the alibi defence without cogent reason.
 - vi. Passing sentence that is harsh and excessive under the circumstances and not in accordance with the principles set out in law.
6. The Appellants urged the Court to allow the Appeal, and quash the conviction and set aside the sentence.
7. The Respondent filed a notice a notice of enhancement of sentence dated 31.8.23 in which it stated that it shall at the hearing, apply for enhancement of sentence from 15 years to life imprisonment.
8. I have given due consideration to the parties' respective submissions. It is noted that in their submissions, the Appellants raised the following issues for determination:
 - i. Whether the prosecution proved the charges against the Appellants.
 - ii. Whether the Court should make an adverse inference for the prosecution's failure to call crucial witnesses.
 - iii. Whether the Appellants' alibi defence was credible.
 - iv. Whether the sentence imposed upon the Appellants was harsh and excessive.
9. I have given due consideration to the submissions filed by both the Appellants and Respondents. As a first appellate Court, I have also subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation, while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.



Whether the prosecution proved the charges against the Appellants

10. The Appellants submitted that the prosecution totally failed to prove the charges against the Appellants beyond reasonable doubt as its case was full of contradictions. It is the Appellants' case that while the age of the Complainant is not disputed, the prosecution did not prove the element of penetration. The P3 form produced as Pexh 2 did not prove penetration. They contend that although the Complainant stated that Rasta gave him a red liquid to drink and hit him on the head with a cooking stick, the P3 form produced did not note any injuries on the Complainant's head. Further, that the Complainant stated that when he took the liquid, he felt dizzy and slept and that is when the Appellants allegedly defiled him. He woke up and found himself in hospital. The Appellants asserted that which raises serious doubt on the Complainant's allegations. Further the 2 medical officers PW1 and PW2 in their testimony did not indicate that any toxicology tests were done to ascertain whether the Complainant had been drugged. Further that the testimony of PW2 that the Complainant looked very stable and that this cast doubt as to whether there had been penetration. It is the Appellants' further contention that the testimony of the child was deceitful and untruthful and fabricated to fit into the prosecution false narrative. The trial court thus erred in relying on evidence by prosecution witnesses which was full of inconsistencies and contradictions.
11. For the Respondent, it was submitted that PW1 the medical expert who examined the Complainant found he had a tear at 12 o'clock point with minimal bleeding. He also noticed that the Complainant's trousers were blood stained. He concluded that the victim had been penetrated. The Respondent further submitted that there were no inconsistencies, theories or lies in the evidence against the Appellants and that the evidence supported the charge and the particulars of the offence with which they had been charged. Further that the Appellants' evidence did not raise any doubt in the trial court's mind which would have gone in their favour as beneficiaries of reasonable doubt.
12. Section 10 of the *Sexual Offence 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 fifteen years but which may be enhanced to imprisonment for life.
13. The elements of the offence of gang defilement that must be proved and which are similar to those of the offence of defilement are age of the victim, penetration s defined by section 2 of the SOA and positive identification of the assailant. In addition, it must be proved that the accused person committed the offence in association with another or others, or that the accused person, with common intention, is in the company of another or others who commit the offence of defilement. In order to secure a conviction, the prosecution must prove these elements beyond reasonable doubt. This is because in any a criminal trial, the accused person enjoys a presumption of innocence. As such the prosecution bears the burden of presenting a watertight case that meets the threshold of beyond reasonable doubt in order to secure a conviction.
14. Contradiction or inconsistency in the evidence tendered renders evidence relied upon by the prosecution in any criminal case, unreliable. This was the holding in *Richard Munene v Republic* [2018] eKLR where the Court of Appeal stated:

Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.



It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

15. In the present case, the age of the Complainant is not disputed. The inconsistencies identified are in relation to the element of penetration. The Complainant stated that after drinking the red liquid given to him by Rasta and being hit on the back of the head, he fell asleep. While asleep, the accused persons did bad things to him.
16. PW1, a clinical officer at Samburu Health Centre where the Complainant was taken for treatment, filled in the P3 form. In his testimony, he stated that his colleague PW3 who examined the Complainant saw a tear at 12 o'clock in the anus with minimal bleeding. The swab taken to the laboratory showed red blood cells but no spermatozoa and tested negative for both HIV and syphilis. PW1 stated that from the history and the injury, he concluded that anal penetration took place and that the penetration was by a penis. PW1 also stated that he saw the child the day after PW3 had examined him, when came to collect medication and the P3 form. PW1 did not examine the Complainant's anus. He observed that the child was mentally stable although his gait was not normal. He further stated that a child who had been sodomized ought not be stable. Other than the injury in the anus, there were no other physical injuries.
17. In his testimony, PW3 stated that upon examining the Complainant, he found that he had a tear at the entry of the anal orifice at the 12 o'clock point with minimal bleeding. The yellow trouser worn by the Complainant had blood stains on the anal area. He also found that the child was alert and oriented. There was no neck stiffness and all other systems were normal. He requested an anal swab and the results were that there was no spermatozoa seen and the tests for HIV, syphilis and hepatitis were all negative. He concluded that something had penetrated the Complainant's anus. He further stated that he did not see any other bruises or scratches on the child and noted that the child was in pain but calm. He then said that if 3 men had sodomized a boy of the Complainant's age, the injuries could have been very severe and the rectum could come out. On why he did not run blood tests to determine whether the child had been drugged, PW3 stated that neither the Complainant nor his parents had told him that he had taken a laced drink.
18. The Court notes that PW1 concluded that the Complainant had been penetrated by a penis. He did not however state how he arrived at that conclusion especially given that there was no spermatozoa in the swab taken and he himself did not examine the Complainant's anus. Notably, both PW1 and PW3 were in agreement that the penetration was not severe. PW3 who received the Complainant on the day of the incident and examined his anus stated that had 3 men sodomized a boy of the Complainant's age then the injuries would have been very severe and the rectum could come out. This testimony is clearly inconsistent with the claim that the Complainant was sodomized by 3 men. Further, although PW3 stated that the Complainant's trouser had blood stains on the anus area, no tests were done on the blood. Additionally, although the Complainant stated that he had been hit on the back of the head with a cooking stick, upon examination, he was found to have no other physical injuries other than the anal tear. This contradicts the claim by the Complainant that he had been hit on the head with a cooking stick by Rasta.
19. I now turn to the testimony of PW5 PC Loise Mailu the investigating officer. She stated that the Complainant had said that he had been given a drink and he became confused after which he was defiled. In order to do comprehensive investigations, a toxicology report to determine the composition



of the red liquid allegedly ingested by the Complainant ought to have been obtained. Further expert evidence ought to have been adduced as to the effect of the said liquid on the Complainant and whether and to what extent he would have been aware of his surroundings after consuming the same. The Court finds it curious and wonders why the Complainant did not tell PW3 who examined him that he had been made to drink the red liquid after which he passed out. The foregoing raises the question as to whether there was such drink at all.

20. The foregoing factors taken together raise doubt in the mind of the Court as to whether the Appellants did what the Complainant accused them of. Without proof of penetration, there is reasonable possibility consistent with the innocence of the Appellants. The doubt is substantial and fundamental to a key issue in question, namely penetration, and that by the Appellants. As such, the Appellants are entitled to benefit from the doubt created by the evidence tendered. Accordingly, the conviction cannot stand.
21. In this regard, I associate with Mativo, J. (as he then was) who in the case of *Caroline Wanjiku Ngugi v Republic* [2015] eKLR, aptly expressed himself as follows:

To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty.

22. On the alternative charge, the learned Magistrate stated:

The alternative charges facing the accused persons are held in abeyance as a finding has been made on the main charges facing each of them.

23. My view is that the learned Magistrate erred on this score. He ought to have pronounced himself on whether the charges have been proved or not. After reviewing the evidence, I have found that like the main charge, the alternative charge, which only the 1st Appellant faced, has also not been proved.
24. Having found as I have, that the element of penetration, a vital element of the offence of gang defilement, was not proved beyond reasonable doubt, it is unnecessary to delve into the issues as to whether the Appellants' alibi defence was credible or whether the Court should make an adverse inference for the prosecution's failure to call crucial witnesses. Similarly, the issue whether the sentence imposed upon the Appellants was harsh and excessive is now moot, given the finding of the Court.
25. In the end, and for the stated reasons, I find and hold that the Appellants' conviction was unsafe and I accordingly allow this Appeal. The Appellants' conviction is quashed and the sentence is hereby set aside. The Appellants are set at liberty unless otherwise lawfully held.

DATED AND DELIVERED IN MALINDI THIS 19TH DAY OF DECEMBER 2023.

M. THANDE

JUDGE

In the presence of: -

.....for the Appellants

.....for the Respondent



.....Court Assistant

