



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA
CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 19 OF 2018

SAMUEL EYANAI KOLE.....1ST APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 20 OF 2018

FAITH NAANYU MUNGU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being Appeals from the Judgment of Hon Zainab Abdul RM delivered on 14/11/2018 in Chief Magistrate's Court at Naivasha S.O. Case No. 40 of 2017)

JUDGMENT

1. The 1st and 2nd appellants were charged jointly in the lower court with two offences. The first was Gang defilement contrary to **section 10** of the **Sexual Offences Act** No 3, 2006. The particulars were that:

“Samuel Eyanai Kole and Faith Naanyu Mungu: On the 18th August 2017 in Kongoni Naivasha Sub-County within Nakuru County, jointly in association with another before court, intentionally and unlawfully caused his penis to penetrate the vagina of NN a girl aged 11 years without her consent.”

2. The second offence was an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars were that:

“Samuel Eyanai Kole and Faith Naanyu Mungu: On the 18th August 2017 in Naivasha Sub-County within Nakuru County, jointly, intentionally and unlawfully caused his penis to come into contact with the genital organ namely vagina of NN a girl aged 11 years without her consent.”

3. The 2nd appellant also faced a second count, namely, the offence of child trafficking contrary to **section 13(a)** of the **Sexual Offences Act**. The particulars were that on the night of 18th August, 2017 in Kongoni Naivasha Sub-County within Nakuru County, she knowingly organized for the travel of NN from the parents' home to her resident with the intention of facilitating the commission of a sexual offence namely defilement of the said NN by Samuel Eyanai Kole.

4. After hearing the sworn evidence of four prosecution witnesses and the defendants, the trial court convicted and sentenced the two appellants as follows:

- Accused 1 was found guilty of defilement contrary to **section 8 (1)** of the **Sexual Offences Act** and sentenced to life

- imprisonment;
- Accused 2 was found guilty of Child Trafficking contrary to **section 13 (a)** of the **Sexual Offences Act** which was repealed by the Counter Trafficking of Persons Act No 8 of 2010 **section 5 (d)** and was sentenced to twenty (20) years' imprisonment;

5. Aggrieved by the trial court's decision, the appellants filed separate appeals which have been consolidated here for ease. The 1st appellant's appeal is on the following grounds:

1. That the learned magistrate erred in law and fact by failing appreciate that the charge sheet was defective.
2. That the learned magistrate erred in law and fact by failing to find that penetration was not proven beyond reasonable doubt.
3. That the mandatory nature of sentences as imposed on the appellant by the trial court was declared unconstitutional by the supreme court.

6. The 2nd appellant's appeal is on the following grounds:

1. That the learned magistrate erred in law and fact in failing to hold that the evidence tendered by the prosecution was not sufficient to warrant a conviction of the appellant.
2. That the learned magistrate misapplied the evidence and the law and hence arrived at an erroneous conclusion.
3. That the learned magistrate erred in law and fact in failing to hold that the 2nd count preferred against the appellant was a defective charge.
4. That the learned magistrate erred in law and fact in failing to hold that the evidence tendered by the prosecution did not disclose any mens rea on the part of the appellant.
5. That the learned magistrate erred in law in failing to hold that the evidence tendered by the prosecution did not meet the threshold and/or ingredient required to convict in the charge preferred against the appellant.
6. That the learned magistrate erred in law and fact in shifting the burden of proof to the appellant hence arriving at a wrong decision.

7. The brief facts are as follows. The complainant PW1, a class 6 girl, was at home with her mother and brother on 18th August, 2017. Accused 2, Faith, came at about 6.00pm and asked the complainant's mother (PW2 R) to allow the complainant to go with her to her house to keep her and her small child, company overnight. The complainant had slept in Accused 2s house several times before. The mother agreed on condition that nothing would happen to her. The two –PW1 and Accused 2 – left and went to the Accused's house.it was a one roomed house, with one bed which they shared.

8. That night at about 9.00pm Accused 1, Samuel, arrived at the house of 2nd Accused together with one Moses. They used to live with Accused 2. They lit a lamp, made some tea and invited the complainant and Accuse 2 to join them. Accused 2 declined, but the complainant agreed and took some tea. When the complainant finished her tea, she went to bed. Moses then asked the complainant to get off the bed so he could share it with Accused 2, Faith. The complainant got off the bed, and got onto a mattress which was on the floor.

9. Meanwhile Accused 1, Samuel, who had been warming himself by the fireplace, came and lay next to the complainant. He started touching the complainant's private parts. She asked him to stop and told him that she would report him to her mother. He asked her how the mother would know, and she said she would check and would notice from how she walked. Samuel then threatened that he would strangle her if she reported.

10. According to PW1's testimony, Samuel (Accused 1), whom she referred to as Mrefu, defiled her thrice, constantly threatening her not to scream or tell anyone. He did not use a condom. She remained quiet and did not even tell Accused 2 what had happened.

11. On 20th August, 2017 when the complainant returned home in the morning, her mother saw her walking awkwardly. She asked the complainant what was wrong. At first the complainant refused to say anything. The mother left her. In the afternoon, the mother threatened to beat the complainant, and it was then that the complainant spilled the beans. She told her mother that Mrefu, (Accused 1), had touched her private parts. Her mother accompanied her to the police station where she reported the incident and she was taken to Naivasha Hospital for treatment.

12. PW1s mother, R who testified as PW2, said that Faith had asked her permission to take the complainant overnight to her house to keep her company. She agreed and the two went. On return of her daughter, she noticed her walking in a funny way and asked her what was wrong. The complainant at first declined to speak. She threatened to beat her, and that was when the complainant told her what had transpired: That Accused 1 had removed her clothes and defiled her.

13. PW2 called some women, and they checked the complainant and found that her private parts had three injuries. She thereafter went to report at Kosovo Police station with her daughter. They were then sent to a clinic at Ndabibi where PW1 was given some drugs

14. Accused 1 was arrested at Accused 2's home by members of the public, but Moses escaped. PW2 further testified that her daughter was then eleven years old, having been born on 18th August 2005.

15. The Clinical Officer at Naivasha District Hospital testified as PW3 He testified that he filled in the P3 form for the complainant on 28/9/2017, one month and ten days after the incident. On examination, the complainant did not have any injuries on the genitalia but her hymen was broken. She did not have any vaginal discharge. He produced the P3 form as P. Exhibit 2. He also produced a PRC form as P. Exhibit 3. The PRC form had been filled on 24th August 2017, six days after the incident. It showed that the complainant had three bruises on the vagina. He also produced as P. Exhibit 1an age assessment dated 21/11/2017 which gave the complainant's age as 11 years.

16. In cross examination, PW3 confirmed that he did not conduct the age assessment, and that another doctor had conducted the examination recorded in the PRC form

17. The investigating officer, PW4, was Shadrack Musa. He testified that on 23rd August, 2017 he was sent by the OCS Kongoni Police station to Kosovo Patrol Base to collect suspects who had been held there after arrest. He went there, found the suspects and the complainant and her mother, and brought them to Kongoni He issued a P3 form and recorded statements. He recalled the information given by the complainant and PW2.

18. He stated that the complainant was first referred to Ndabibi Health Center on 21st July, 2017 where she was treated. Later he summoned Accused 2 and after interrogation, he found she had a case to answer and booked her. Accused 2 was later charged with Accused 1

19. In cross examination he testified that during investigations he visited the scene. It was a one roomed house on a farm. It had a polythene roof. He did not take Accused 1 to hospital for testing, but stated that would have been possible only if he had been arrested immediately. PW4 admitted that the PRC form stated the complainant was born on 18th August, 2005 making her 12 years, and the age assessment form stated it to be 11 years. There was no birth certificate as the mother had not obtained one; the incident was reported to the police on 23rd August, 2017

20. The 1st accused/appellant gave sworn evidence. He testified that on 18th August, 2017 he went to his farm and at 4.00pm he returned to his house in Duro for the night. On 23th August, 2017 he was summoned to Centre One AP Camp and informed that he defiled a girl on 19th August, 2017 and was detained. Later, PW2 was called and she asked him to pay Kshs 30,000/= to settle matter out of court, but the accused denied having committed the offence. On the same day the appellant was taken to Kongoni Police Station and detained. Later he was arraigned in court and charged. He denied the offence.

21. In cross-examination, the 1st Appellant maintained that on the material night he spent the night in his home with his family; that he did not see the complainant on the material day and PW1 was not known to him.

22. The 2nd accused/appellant in her sworn evidence stated that on 18th August, 2017 she went to PW2's house and requested the PW2 to allow PW1 sleep in her house as the husband had travelled. The 2nd appellant went ahead to state that PW1 would also be left with her, when the mother (PW2) had travelled, so it was not her first time to spend a night at her house. On the fateful day, at 7.00pm the 2nd appellant and PW1 cooked and ate; that at 11.00pm they heard knocks on the door and when PW1 opened, it was 1st Appellant and Moses.

23. The 1st Appellant and Moses lived in the neighbourhood. They lit a fire and cooked while the 2nd appellant went to bed; that she asked PW1 to also go and sleep. The 2nd appellant slept and left PW1 talking to the two men. That when she woke up the following day at 6.00am, PW1 was not in the house; that after 3 days, PW2 went to the 2nd appellant saying that something had happened to her daughter (PW1) and she wanted the 2nd appellant to lend her Kshs 5,000/= to take PW1 to hospital; that the appellant said she did not have the money and so, PW2 went away.

24. On the following day, PW2 told the appellant that she was going to report that PW1 had been defiled by 1st Appellant and Moses; that they were arrested and recorded statements including the 2nd Appellant. Later after 3 days, PW2 went to the 2nd Appellant, told her that she had made an error in her statement recorded at the police station and she was required to go and rectify it. The 2nd Appellant went to the police station where she was detained, and arraigned in court. She denied the charges.

25. In cross-examination, the 2nd appellant denied having any relationship with either Moses or the 1st Appellant. That they had previously disagreed with PW2 but had later reconciled.

26. I now deal with the appeals for each appellant.

1st Appellant – Samuel Eyanai Kole

27. The issues arising in the 1st appellant's case are:

- a. Whether the charge sheet was defective and if so whether inconsistent evidence gives rise to acquittal or retrial?
- b. Whether the ingredients for gang rape were proved?
- c. Whether the sentence was excessive?

28. In substance, the 1st appellant argued that the charge sheet was defective since it alleges that he worked in association with another to commit the offence, yet the evidence does not reveal that he worked in cahoots with anyone to perpetrate the defilement. He relied on the case of **Jason Akumu Yongo v Republic [1983] eKLR** where the Court of Appeal stated that

“A charge is defective under Section 214 (1) of the Criminal Procedure Code where:

i. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge because it charges offences in the not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

ii. It does not, for such reasons, accord with the evidence given at the trial

iii. It gives a misdirection of the alleged offence in its particulars”

29. Further, he submitted that penetration by the 1st appellant was not proved, and finally that the sentence meted was excessive and based on a mandatory minimum sentence.

30. The offence with which the appellants were charged was gang rape contrary to **section 10** of the *Sexual Offences Act* which states:

“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 *the fifteen years but which may be enhanced to imprisonment to life.*” (Emphasis added)

31. The ingredients of gang rape are:

a. the commission of rape or defilement; that is, penetration as defined by **Section 2** of the *Sexual Offences Act* without consent thereof;

b. that it was in association with another or others; or

c. that any person with common intention is in the company of another or others who commit the offence of rape

d. that there was positive identification of the perpetrator.

From the above provision it is clear that gang rape revolves around showing the associated or co-ordinated acts of more than one person resulting in the offence of rape or defilement.

32. **Section 2** of the *Sexual Offences Act* defines ‘penetration’ as:

“...the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

33. There is ample case law explaining penetration. See the case of **Mark Oiruri Mose vs R (2013) eKLR** where the Court of Appeal stated thus:

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...” (Emphasis added)

34. In this case, penetration was, in my opinion, attested to by PW1 and PW2. In addition, PW3 the medical officer, conducted medical examination of the victim at Naivasha District Hospital a month and ten days after the alleged defilement. The PRC form which was filled 6 days after the alleged defilement availed information that PW1 sustained bruises on the vagina and a broken hymen.

35. PW1 told the police she was defiled once. In examination she said thrice and in cross examination she said five times. The inconsistency in the number of times the PW1 and PW2 gave as to times PW1 was defiled raises a question of consistency but not of the fact of defilement. As to her age, it was proven that she was 12 years of age and not 11 as had been tendered into court.

36. However, there is no evidence of a common intention which is why the 2nd accused who allegedly ‘procured’ the victim was acquitted on the 1st count of gang defilement. To that extent the charge sheet was defective.

37. In the circumstances, this is a proper case for in which to set aside the conviction for gang rape, which I hereby do and order a retrial. A retrial is the appropriate and just means to proceed given that and I would so order, given that the

38. In her judgment, the learned trial magistrate when determining the charges against the 2nd appellant stated:

“As for accused 2 she is found guilty of child trafficking contrary to section 13(a) of the Sexual Offences Act No 3 of 2006. The said section was repealed by the Counter Trafficking of Persons Act No 8 of 2010 section 5(d)”

39. The Issues for determination in respect of the 2nd appellant’s appeal are:

- a. Is it fatal to rely on repealed law?
- b. Whether a retrial be ordered?
- c. Does inconsistent evidence give rise for acquittal or retrial?

40. **Section 5(d) of the Counter Trafficking of Persons Act No 8 of 2010** provides:

“5. Promotion of trafficking in persons A person who—

(a) knowingly leases, or being the occupier thereof, permits to be used any house, building, or other premises for the purpose of promoting trafficking in persons;

(b) publishes, exports or imports, any material for purposes of promoting trafficking in persons; or No. 8 of 2010 [Rev. 2012] Counter-Trafficking in Persons [Issue 1] 8

(c) manages, runs or finances any job recruitment agency for the purposes of promoting trafficking in persons;

(d) by any other means promotes trafficking in persons, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.” (Emphasis added)

41. The DPP in her submissions conceded that the provision in the charge had been repealed. She went on and analysed the position when a provision of a statute is repealed with reference to **Section 23 of the Interpretation and General Provisions Act**. The DPP conceded that the appellant should not have been tried and or convicted under that provision. She relied on **High Court Criminal Appeal No 71 of 2014 (Parties Names)** where the Court held:

“As noted above, the offences in the main counts under Section 162 (a) of the Penal Code had already been repealed by the Sexual Offences Act No. 3 of 2006. The offences are alleged to have been committed on the 28th and 29th May, 2013 and therefore the Appellant should not have been dealt with under the repealed Section 162 (a) of the Penal Code but under the Sexual offences Act No.3 of 2006. The only offences preferred against the Appellant under the Sexual Offences Act were the alternative counts namely committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006.”

42. She also cited **Nyeri Criminal Appeal No 81 of 2011 Geoffrey Kiriinya Igweta v R** of where it was held:

“Article 50. (2) (n) (i) of the Constitution expressly forbids the conviction of any person for an act or omission that at the time it was committed or omitted was not an offence in Kenya. An ‘offence’, has been defined under section 2 of the Penal Code, cap. 63 to mean an act, attempt or omission punishable by law.

At the time the appellant is alleged to have committed the offences for which he was convicted, the law that defined those offences was the relevant provision or provisions of the Penal Code. Under article 50. (2)(n)(i) of the Constitution those acts were only offences because they were so defined and punishable under particular provisions of the Penal Code. Much as the same acts may have subsequently been defined in the Sexual Offences Act, they cannot be said to have been offences under that Act, because this latter Act was not in existence. Put simply, the offence of defilement as defined under section 8(1) and (3) of the Sexual Offence Act could not have been such an offence in 2004 before this Act was conceived and therefore in the words of article 50. (2)(n) of the Constitution the appellant could not have been tried and convicted for an act that at the time it was committed was not an offence.

This article embraces the rule against retrospective application of the law that carry with it criminal sanctions. It does not, however, follow that one cannot bear criminal responsibility for his act or omissions merely because the law that defined those acts or omissions has been repealed; section 23 of the Interpretations and General Statutes Act, and in particular parts (3) (a) (b) (c) and (d) thereof are clear that a repeal of a written law does not diminish any liability under that law; it says:-

23. Provisions respecting amended written law, and effect of repealing written law

(1)...

(2) ...

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

43. I agree with the DPPs position, and with the learned Judges in both cases.

44. The applicable law as to when a retrial should be ordered has long been settled. In the case of **Fatehali Manji v. Republic [1966] EA 343** the Court of Appeal when dealing with the same issue, gave the following guideline: -

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused.”

45. In the renowned case of **Yusuf Sabwani Opicho v. Republic [2009] eKLR**, the Court of Appeal held as follows:

“In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See **Muiruri v. Republic [2003] KLR 552, **Mwangi v. Republic [1983] KLR 522**, and **Bernard Lolimo Ekimat v. Republic, Criminal Appeal No. 151 of 2004 (UR)**.”**

46. In **Muiruri v. R [2003] KLR 552**, the Court held that: -

“It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to,

1. Illegalities or defects in the original trial.

2. The length of time which has elapsed since the arrest and arraignment of the appellant;

3. Whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s.”

47. In both appeals I consider the just and proper order to give to be as follows:

a. The convictions of both the 1st and 2nd Appellants are hereby quashed and the sentences set aside;

b. Both appellants shall be retried by a magistrate other than Hon Z Abdul;

c. The appellants shall be held in custody pending appearance before the trial magistrate as ordered hereunder for retrial;

d. The matters are to be mentioned within seven days before the Chief Magistrate for directions.

Administrative directions

48. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

49. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

50. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 27TH DAY OF APRIL, 2021

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Mr. Morintat for the 2nd Appellant - Faith Naanyu Mungu

3. 1st Appellant - Samuel Eyanai - Appellant in person at Naivasha Maximum Prison

2nd Appellant - Faith Naanyu Mungu - present at Nakuru Women's prison

4. Court Assistant – Quinter Ogutu