



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 31 OF 2020

FREDRICK WANYONYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. Lubia N. Mercyline RM

delivered on 21st May 2020 in Kitale CM Cr. Case No. 81 of 2019)

JUDGMENT

The Appellant, **FREDRICK WANYONYI**, was charged, with the offence of **gang defilement** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offence were that on 2nd April 2019 at [particulars withheld] area within Trans Nzoia County, in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of DD a child aged seventeen (17) years. In the alternative charge, the Appellant was charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 2nd April, 2019 at [particulars withheld] area within Trans Nzoia County, the Appellant unlawfully and intentionally caused contact between his genital organ namely penis and the genital organ of a minor namely DD a child aged seventeen (17) years.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the main charge. He was sentenced to serve fifteen (15) years imprisonment.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court failed to acknowledge that the evidence of identification was not properly evaluated and was therefore unsatisfactory. He faulted the trial court for failing to find that the medical evidence by PW4 was at variance with PW1's evidence and further that the pant and dress mentioned by PW1 and PW4 were not produced in court hence there was no proof of penetration. He faulted the prosecution for failing to call essential witnesses to testify by virtue of **Section 146** and **150** of the **Criminal Procedure Code**. He was further aggrieved that the trial court failed to consider his defence in arriving at its decision.

During the hearing of the Appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Mr. Ndiritu for the State opposed the appeal. He filed written submissions. He made submissions to the effect that the prosecution had established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. He set out the ingredients required to establish a charge of defilement as age, penetration and identity. In that regard he cited the case of **Daniel Wambugu Maina vs. Republic [2018] eKLR**. On the same note, he urged the court to apply **Section 124** of the **Evidence Act** as regards corroboration in sexual offences.

As regards the complainant's age, it was submitted that the complainant testified that she was seventeen (17) years old at that time. Her guardian had estimated her age to be fifteen (15) years. PW6 examined her and estimated her age to be seventeen (17) years. She produced an age assessment report which was marked as Prosecution Exhibit No. 3.

The Learned Prosecutor cited the case of **Mwalango Chichoro V. Republic Mombasa C. Appeal No. 24 of 2015(Ur)** where the Court of Appeal held that:

“The question of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or, medical evidence.”

On the question of proof of age, the Learned Prosecutor was of the view that documentary evidence such as an age assessment report, birth certificate and baptism card were not the only ways to prove the age of the victim in a defilement case. The testimony of a child supported by the mother who bore her would be sufficient. In that regard, the case of **Richard Wahome Chege vs. Republic Criminal Appeal No 61 of 2014** was cited. It was urged that the age of the complainant was well established and hence the ground that age was not proved must fail.

On penetration, it was submitted that the complainant testified that on the material date, while she was walking home, she met with three boys on the road who took her to their house and held her legs and head. When she tried to scream, they held her mouth. She testified that a suspect, who is not in court, sexually assaulted her before the Appellant did the same.

It was submitted that PW4 who examined the complainant established that she had a freshly broken hymen with cuts on the labial and perineal walls which was oozing blood. On laboratory examination, there was blood and epithelial cells in the urine. It was concluded that there was evidence of sexual assault with penetration established. The Prosecution stated that PW3 had also testified that on the material night, the complainant did not sleep at their home. He cited the case of **M.K vs. Republic Criminal Appeal No 87 of 2015** where the court held that anal penetration of the child was established by medical evidence there was no need to avail witnesses to prove the same. He therefore submitted that penetration was established to the required standard of proof.

As regards identity of the perpetrator, the Learned Prosecutor maintained that the complainant was able to identify the Appellant's face when he switched on his phone. She also testified that she knew him prior to the sexual assault as Kevin. He took the view that the complainant had identified the Appellant and the question was whether she was able to recognize him. He asserted that they had spent a considerable amount of time together and were in close proximity. The complainant had a chance to properly recognize the Appellant. It was therefore urged that the victim knew the Appellant and was able to positively identify him.

On the allegation that the prosecution's evidence was riddled with inconsistencies and discrepancies, it was submitted that the Appellant's conviction was sound as all the ingredients of the offence were proved. This court was urged to consider the case of **Twehangane Alfred V. Uganda Criminal Appeal No 139 of 2001** where the court noted that it is not every contradiction that has credibility implication on the evidence adduced. The court will ignore minor contradictions unless the court is of the view that it points to deliberate untruthfulness or if it affects the main substance of the prosecution case.

In the premises therefore, the Learned Prosecutor urged the court to dismiss the Appellant's appeal on conviction and sentence as the Prosecution had established its case to the required standard of proof.

The facts of the case according to the prosecution are as follows: On the material day of 2nd April, 2019, the complainant in company of her sister, also a minor and her friend Sharon attended a funeral. At about 8.00 p.m., on their way home, they met three boys who kidnapped her and took her to one of the boy's house. One held her legs while the other held her hands and the third one held her head. She tried to scream but they held her mouth. She testified that on reaching their house, one of the boys left. Two remained. One of the boys lit a torch on his phone. She pointed to the Appellant as the one who lit the torch. They laid her on the bed. One removed her underwear, while the other sat on a chair. She identified the one who removed her pant as Kevin. The boys then sexually assaulted her in turns. It was her evidence that while one boy was raping her, the other was seated on a chair. When she tried to scream, the Appellant muffled her mouth while at the same time choking her on the neck. When the other boy was done, the Appellant took his turn. The other boy went outside and did not come back. When she attempted to escape, the Appellant overpowered her. When he was done, she told him she wanted to go home but he refused and told her to wait until morning. He let her go at about 5.00 a.m.

The complainant testified that she did not know the Appellant before the incident. She had seen him for the first time the day he sexually assaulted her. She said that when she left the house, she was weak and dizzy. She was bleeding from her vagina. She met her sister and told her what had befallen her. They took a motor cycle to Matisi Police Post. They reported to the police what had happened. She was taken by a police officer to Kitale County Referral Hospital where she was medically examined and treated. The following day she took her grandmother to the scene of crime to show her where it happened.

PW2, P.C Woman Ray Orao, testified that on 3rd April 2019, the complainant, a seventeen (17) year old class 5 pupil at [particulars withheld] Primary School presented herself at the Police Station alleging to have been gang raped. She testified that the complainant was bleeding profusely. She rushed her to Kitale County Referral Hospital where she was medically examined. She later took the complainant to Amka where she was attended to before she escorted her home. She visited the scene of crime and established that the house belonged Fredrick Wanyonyi. He lived there with two other men. Later on 7th April 2019, they raided the house. They found the Appellant asleep. They then took him to the complainant's house where the complainant identified him before they booked him and charged him with the present offence.

PW3, Priscilla Wekesa, the complainant's grandmother and guardian stated that on 2nd April 2019, she was at home with her grandchildren B and S both minors. At about 4.00 p.m., she went to a fellowship. She returned home at 7.00 p.m. and did not find the grandchildren. She only found a young child by the name Susan who told her that the two had gone to the funeral. The two girls B and S did not come back. In the morning she went about with her house chores thinking that the girls were scared to come home. At about noon, the complainant came with a Police officer who narrated to her what had befallen the complainant.

PW4, John Koima, a clinical officer at Kitale County Referral Hospital produced treatment notes and the P3 form of the complainant. The clinician testified that when the victim presented herself, she had a blood stained brown dress and a freshly broken hymen, cuts on the labia and perineal walls which was oozing blood. She was put on medication to prevent HIV infection and pregnancy, antibiotic and painkillers. The clinician concluded that there was sexual assault with penetration.

PW5, Pharis Silali adduced evidence on the age of the complainant. Upon medical examination, she established that the complainant was approximately seventeen (17) years of age.

The Appellant was placed on his defence. He stated that he was a student at St. [particulars withheld] High School. At that time, he was at home because had been sent away for lack of school fees. He testified that he lived with his in-laws, who together with the church, paid his school fees. He was sent to withdraw money from an MPESA shop and before he could withdraw the money, two Police officers arrested him claiming that he had hit the police with stones. At night, he was arrested with two others who were later released after their parents paid for their release. He testified that the victim claimed to have been raped by Kevin but he was Fredrick. On cross examination, he stated that the victim stated that she could identify her assailants. He stated that he saw the complainant for the first time in court.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (**See Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence which established the Appellant's guilt on the charge preferred against him to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. **Gang defilement** is committed when a person commits defilement 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. In a case of defilement, the onus is on the prosecution to establish that there was penetration; that the victim of the sexual assault was a child and finally, the identity of the perpetrator.

In the present appeal, proof of penetration was established by medical evidence. The complainant stated that the Appellant sexually assaulted her. She was examined at Kitale County Referral Hospital on 3rd April 2019. PW4, the clinical officer who examined the complainant, stated that the complainant had a freshly broken hymen, cuts on the labial and perennial walls which was oozing blood. On laboratory examination, there was blood and epithelial cells in the urine. HIV, VDRL, pregnancy and Hepatitis tests came out negative. He put the complainant on medication to prevent HIV infection and pregnancy and prescribed antibiotics and painkillers. He concluded that there was evidence of sexual assault with penetration.

The medical evidence corroborated the element of penetration as narrated by the complainant. The prosecution therefore did establish penetration to the required standard of proof beyond any reasonable doubt.

The second issue for determination is whether the prosecution established that the victim was a minor. The complainant testified that she was seventeen (17) years old at the time of the sexual assault. PW3, the complainant's grandmother, estimated her age to be fifteen (15) years. Upon medical examination by PW5, she was found to be approximately seventeen (17) years old. The age assessment report was produced into evidence and forms part of the court record. The Appellant did not adduce any evidence to the contrary. The court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act**. The prosecution therefore established the age of the complainant to the required standard of proof.

The third issue is the identity of the perpetrator. The Appellant submitted that the complainant testified that she did not know him prior to the day of the incident. He asserted that an identification parade ought to have been conducted after his arrest. It was therefore his contention that the evidence of identification was not proved by the prosecution to the required standard of proof beyond any reasonable doubt. The prosecution's case on the other hand was that the Appellant's identification was by recognition. Hence, there was no need for an identification parade to be conducted.

This court has re-evaluated the evidence of identification as presented by the prosecution. In her testimony, the complainant testified that the Appellant lit a torch in his phone and that she could clearly see him when he lit the torch. Although she saw the Appellant for the first time, she spent the entire night with the Appellant; the other assailants having left. She also knew one of the assailants by name and identified him as Kevin. The complainant in her evidence confirmed that she only knew Kevin by name and he was the Appellant. She stated that she had been informed by her neighbour that the Appellant was called Kevin.

The investigating officer named the other assailant not before court as Calvin and confirmed that he was still at large. He testified that upon arresting the Appellant, the investigation officer escorted him to the complainant's home where the complainant positively identified him. The complainant indicated that she had not met the Appellant prior to the material night of the incident.

It should be noted that the complainant was the only identifying witness in this case. Evidence of a single identifying witness must be examined carefully to ensure that it is watertight before a conviction is founded on it. In the case of **Kiilu & another V. Republic [2005] 1 KLR 174** it was held that:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

This Court has a duty to weigh the evidence of the complainant who is the only identifying witness with greatest care and to satisfy itself that in all circumstances, it is safe to convict on such evidence. The Appellant was not known to the complainant prior to the occurrence of the sexual assault.

Although the Police did not mount an Identification Parade before the Appellant was exposed to the complainant after his arrest, on re-evaluation of the evidence adduced, this court has no doubt that the complainant positively identified the Appellant. The Appellant and the complainant were in close proximity for more than eight (8) hours from 8.00 p.m. when the complainant was kidnapped to 5.00 p.m. when

she was released by the Appellant. Immediately upon her release, the complainant reported the incident to the Police. She was taken to hospital and was treated. On the very morning, she led the Police to the house she had been detained and sexually assaulted hours earlier.

The complainant's testimony regarding the circumstances in which she interacted with the Appellant and his two accomplices was lucid, cogent and truthful. She narrated the sequence of events as they occurred. She explained the role each of her assailants played. She had a conversation with the Appellant when she pleaded her case to be released to go home. The Appellant sexually assaulted her more than once. This court has no doubt that the complainant positively identified the Appellant. The fact that she led the Police and her grandmother to the Appellant's house a few hours after the sexual assault is further proof that the Appellant was positively identified. Although it is trite law that the onus is upon the prosecution to establish its case to the required standard of proof beyond any reasonable doubt, under **Section 111** of the **Evidence Act**, the Appellant was required to at least give an explanation rebutting the evidence adduced by the complainant to the effect that she spent the night in his house. Failure by the Appellant to provide such explanation, which was uniquely within his knowledge, rendered the testimony adduced against him in regard to the venue of the sexual assault uncontroverted.

In the premises therefore, this court, on re-evaluation of the evidence adduced before the trial court reaches the same conclusion as the trial court; the Appellant was positively identified by the complainant. The circumstances favouring positive identification were present. The Appellant was in close proximity with the complainant during the entire period and made no attempt to disguise himself. The sexual assault occurred in his house. He did not controvert the complainant's evidence that she had been detained in his house the entire night. The credibility of the complainant's testimony is further enhanced by the fact that she made a report to the Police a few hours after her release and escorted the Police to the Appellant's house on the same day. This court does not therefore agree with the thrust of the Appellant's case which is to the effect that he was not positively identified.

For the above reasons, the Appellant's appeal lacks merit. It is hereby dismissed both on conviction and sentence. The conviction and sentence of the trial court is hereby upheld.

It is so ordered.

DATED AT KITALE THIS 26TH DAY OF JULY 2021

L KIMARU

JUDGE