



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CRIMINAL APPEAL NO. 26 OF 2018**

(Appeal originating from Nyahururu Adult CM’S Court Cr. No. 2834 of 2014

by Hon. A. Mukenga-R.M.)

**GIDEON GACHICHI GACHICHIE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant herein was charged together with others with the offence of gang defilement contrary to **Section 10 of the Sexual Offences Act No. 3 of 2006** particulars being that on the 2<sup>nd</sup> day of December 2014 within Laikipia County, the Appellant unlawfully and intentionally in association with others caused his penis to penetrate the vagina of LNM, a girl aged 15 years.

2. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal based on 11 grounds of appeal, summarized as:  
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**a. That the trial magistrate erred in both law and fact in failing to find that the prosecution evidence did not prove that the Appellant caused his genital organ to penetrate the complainant’s genital organ and was not to the required standard of proof.**

**b. That there were glaring inconsistencies and material contradictions that could not sustain the charge facing the Appellant.**

3. That the sentence meted was harsh under the circumstances.

4. The prosecution called a total of five witnesses in support of their case.

**5. PW1 the complainant**, testified that on 2/2/2014, her mother (PW2) sent her to Patrick’s home to go tell him that they will go to the shamba on 3/2/2014. She found Patrick with Duncan, the Appellant and another young man. That Duncan grabbed her and pulled her to the house and the other three left the house. Patrick said she must have sex with him and he removed her pants and had sex with her. Patrick had sex with her 3 times before he left the house.

6. It was her testimony that Dan also came and had sex with her for the first time. That as he was going for the 2<sup>nd</sup> round, he said that once through the Appellant will also have sex with her. That her mother came in at that time and found Duncan in the act, she beat him and then he ran away. That together with her mother and other neighbors they went to Nyahururu Police Station where she was told to go to the hospital. That the mother called the chief who came with the police who arrested them.

7. Upon cross examination by the Appellant, PW1 reiterated that the Appellant left Patrick having sex with her together with Duncan. That he came back with Dan and said he will also have sex with her. PW1 stated that the Appellant did not have sex with her.

**8. PW2, EC**, PW1’s mother testified that on the material day she sent PW1 to tell Dan and Macharia that they will go to the shamba the next day. That after she did not come back after 30 mins, she decided to go look for her. That she found Macharia at his door and asked him if she has seen PW1 but he responded that she was at Wambui’s place. PW2 did not find PW1 at Wambui’s place and on returning she met Macharia and found his house closed but the padlock was not locked. That she opened the door and found Duncan on top of PW1. She beat him up and he ran way.

9. On cross examination by the Appellant, PW2 stated that the chief said that the Appellant should also be arrested because he was part of the plan as he had locked them in the house from outside so that nobody knows they are inside.

**10. PW3 Dr. Joseph Karimi Kinyua**, examined the complainant on 3/12/2014 and found that she had bruises over the vaginal wall, hymen was missing though not fresh. There were scanty blood stains over the vaginal entrance. High vaginal swabs revealed that there were blood cells in keeping with the bruises over the vaginal wall. There were no spermatozoa seen. She was treated. PW3 formed the opinion that the complainant had recent forceful penetration within the past 24 hours, maximum.

**11. PW4 Joseph Murage Waithaka**, the Chief of Maina Location recalled that on 3/12/2014, PW2 reported to him that her daughter had been defiled by three young men who live in the same plot as her. He accompanied PW2 to the plot where she showed him the house which two of the young men had been locked in by the neighbor. He called the person who had locked the house but he told him that the young men had instructed him not to open. He identified the Appellant as the one who had locked the door.

12. It was PW4'S testimony that he took the key from him and opened the door where he found two young men known to him. He identified them as Dan and Macharia. He then called the Police Station and reported the incident.

13. Upon cross examination, PW4 stated that PW2 said that two boys had defiled the girl and that he did not know whether the Appellant had a spare key to the 1<sup>st</sup> and 2<sup>nd</sup> accused person. Further, on re-examination, PW4 testified that PW2 told him that the Appellant had the key. That the Appellant gave him the key to the house.

**14. PW5, Sgt. Anne Mwikali** received the complainant and her mother at the Police Station on 2/12/2014 and she made a report for defilement. She referred PW1 to the hospital. She later found the two boys locked in a house by the Chief and rearrested them.

15. During defence hearing, the Appellant gave unsworn evidence and did not call any witnesses. In his defence, he testified that on 3/12/2014 he was at home when the Chief and 1<sup>st</sup> Accused, DW1 knocked on his door asking for his spare key. That he gave the key to them and then the chief ordered them to follow him to Macharia's house where he locked them in. That they were then arrested and taken to the police station where he was then charged together with the two other accused persons.

16. The parties agreed to canvass appeal via submissions but only appellant filed the same.

#### **APPELLANT'S SUBMISSIONS**

17. The Appellant's counsel invited the court consider the co-accused's' appeal i.e. *Nyahururu High Court Criminal Appeal No. 25 & 27 of 2018* which have already been determined and the both Appellants I the aforementioned matters acquitted.

18. Counsel contended the Appellant was only facing a charge of gang defilement unlike his co-accused and urged the court to relook into evidence adduced before the lower court and the judgements acquitting the co-accused ad proceed to find that the appeal has merits and acquit him forthwith.

#### **ANALYSIS AND DETERMINATION**

19. Having analyzed and evaluated afresh all the evidence adduced before the lower court, I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses as was held in *Okeno vs. Republic [1972] EA 32* where it was stated that;

**“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTILAL M RUWALA V R, [1957] EA 57). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness.”**

20. Likewise, in *Kiilu & Another vs. Republic [2005]1 KLR 174*, the Court of Appeal stated thus:

**“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

**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 findings and 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.”**

21. Therefore, this Court in determining this appeal ought to satisfy itself that the ingredients of the offence of gang rape under **Section 10 of the Sexual Offences Act** were proved and as so required in law; beyond any reasonable doubt. The fundamental issue for determination in the present appeal is: -

**Whether the prosecution proved the ingredients for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act beyond reasonable doubt?**

22. Section 10 of the Sexual Offences Act provides that: -

**“Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other 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 than fifteen years but which may be enhanced to imprisonment for life.”**

23. The same Act defines “gang” as:

**“means two or more persons”**

24. Consequently, for the Prosecution to obtain a guilty verdict under the aforementioned section for the offence of gang defilement/ rape, it needs to prove the following elements

**a. Commission of defilement or rape;**

**b. Penetration as defined by Section 2 of the Sexual Offences Act without consent thereof;**

**c. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape**

**d. Positive identification of the perpetrator.**

25. *Section 8 (1) of Sexual Offences Act* states that;

**“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement...”**  
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26. It has been held in several decisions that to prove the offence of defilement the following ingredients have to be established: -

- **Proof of the age of the Complainant**
- **Proof of penetration**
- **Proof that the Appellant was the perpetrator of the offence**

27. PW1’s birth certificate produced in evidence indicated that she was born on 27/55/1999 therefore she was 15 years i.e. a minor by the time the offence occurred. Additionally, both PW1 and PW2 confirmed that the Appellant was well known to them.

28. *Section 2 of the Act* defines ‘penetration’ as:

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

29. This position was fortified in the case of Mark Oiruri Mose vs R [2013] eKLR when 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.”**

30. In demonstrating this ingredient, PW1 (concerning the Appellant) testified that she found Patrick with Duncan, the Appellant and another young man in the house. That Duncan grabbed her and pulled her to the house and the other three left the house including the Appellant. That after she had sex with Patrick and as Duncan was going for the 2<sup>nd</sup> round of sex, he said that once he was done the Appellant will also have sex with her.

31. Upon cross examination by the Appellant, PW1 reiterated that the Appellant left Patrick having sex with her together with Duncan. That he came back with Dan and said he will also have sex with her. PW1 stated that the Appellant did not have sex with her.

32. It is clear for the evidence that he Appellant did not cause partial or complete insertion of his genital organs into PW1’s genital organ. By PW1’s own admission, she confirmed that the Appellant did not penetrate her genital organ.

33. However, in Adam Daktari Konoye v Republic [2019] eKLR it was stated that:

**“In view of the above provisions of law, my understanding of the offence of gang rape is that it is committed by more than one assailant who act in association with a common intention and not all of them carry out the actual rape or defilement.”**

34. The Appellant is said to have locked in PW1 and his co-accused who had ‘sex’ with her in the house so that they couldn’t be found.

However, from my perusal of the trial court proceedings, it is my opinion that there are grave inconsistencies as to the prosecution's account of how the Appellant was involved in the alleged gang defilement. They did not prove beyond reasonable doubt that the Appellant was indeed involved and the circumstances under which he was arrested for this offence are also unclear.

35. PW2 stated that the chief said that the Appellant should also be arrested because he was part of the plan as he had locked them in the house from outside so that nobody knows they are inside. Nevertheless, the chief testified that he found 2 young men already locked in by a neighbor. The account on who or how the door was locked is also very inconsistent and its nexus towards the alleged offence even more conflicting. **PW5**, testified that she later found the two boys locked in a house by the Chief and rearrested them.

36. The evidence on how the Appellant came to be arrested and linked to this offence is very irregular and below the standard of proof required. It is my considered view that the prosecution's evidence and both PW1's and PW2's account against the Appellant was wanting and raises doubt as to the Appellant's participation in the alleged offence.

37. Furthermore, I have taken into account the judgements in both *Nyahururu High Court Criminal Appeal No. 25 & 27 of 2018* which relate to the Appellant's co-accused' and the court in both appeals on the question of penetration, found that there was no proof of the same and at the end the appellate courts in both appeals concluded that the trial court erred in finding them guilty of gang defilement.

38. In the premises therefore, this court, on re-evaluation of the evidence adduced before the trial court reaches a different conclusion as the trial court; the trial court erred in fact and law in finding the Appellant guilty of the offence of gang defilement contrary to **Section 10 of the Sexual Offences Act**.

**i. The upshot of all this is that the Appeal meritorious and is hereby allowed, is that the conviction is quashed and the sentence set aside.**

**ii. The Appellant is to be set at liberty unless otherwise lawfully held.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

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**CHARLES KARIUKI**

**JUDGE**