REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. E010 OF 2020

SIMON KANAI KARURI.....APPELLANT

VERSUS

REBUPLIC.....RESPONDENT

(Being an Appeal from the conviction and judgment of the Principal Magistrate Court at Karatina by Honourable A. Mwangi, in Sexual Offence Case No. 1 of 2014 on 11th November 2020).

JUDGEMENT

Brief Facts

1. The appellant was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 7th January 2014 at [Particulars Withheld] Estate in Mathira East sub-county in Nyeri County with common intention accompanied another person he intentionally caused his penis to penetrate the vagina of TGN [full name withheld], a child of 5 years. He was convicted and sentenced to fifteen (15) years imprisonment.

2. Being aggrieved by the judgement of the trial court, the appellant lodged the instant appeal citing seven (7) grounds of appeal which are summarised as follows:-

a. The learned trial magistrate erred in fact and in law by failing to exhaustively analyse all the evidence adduced in trial and failing to appreciate the ingredients necessary to establish the offence thus arriving at the wrong conclusion;

b. The learned trial magistrate erred in law and in fact by finding that the prosecution discharged its burden of proof and failing to consider the appellant's defence;

c. The learned trial magistrate erred in law and in fact in misdirecting itself on the failure by the prosecution to summon all the necessary witnesses to enable the court arrive at the right conclusion;

d. The learned trial magistrate erred in failing to address itself on the discretionary sentencing policy.

3. By consent the parties agreed to dispose of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the trial court failed to address itself on very pertinent issues such as how common intention was to be inferred other than by proving that there was *mens rea* by the appellant and/or with his accomplices. It is the appellant's case that from the testimony of PW3, defilement was a premeditated scheme by the appellant. From this, the trial court ought to have drawn its conclusion that the appellant, his wife and son were accomplices who had a common intention to carry out the offence and they had pre-arranged and planned where to meet and isolate the complainant. The appellant states that this would amount to crediting a five year old, K, with a criminal mind while below the age of criminal liability. Further, the trial court would have to conclude that the appellant had deliberately and knowingly recruited the defiler and that together they pounced at the right time to find PW2 at the opportune time waiting for them.

5. The appellant further submits that the trial court ought to have made a finding as to why the Investigating Officer failed to interview and record the statements of K, his mother and V. Further, the court ought to have drawn an adverse inference by the respondent failing to call Lucy Muchangi as a witness. The appellant relies on the cases of **Bukenya vs Uganda [1972] EA 549** and **Fabre vs Arenale** to support his contention. Owing to the central nature of their evidence, the appellant submits that failure to summon them ought to have invited the court

to draw an inference. Instead, the court dismissed the issue by stating that the evidence was of little value as it had not been subjected to cross-examination.

6. The appellant relies on the cases of **Richard Chalo Mole vs R (2010) eKLR** and **Joseph Ndungu Kagiri vs Republic (2016) eKLR** and submits that the trial court disallowed a trial *de novo* pursuant to **Section 200 of the Criminal Procedure Code.**

7. The appellant further submitted that there were discrepancies in the evidence of PW1, PW2 and PW3 on the dates that their statements were recorded which went to the credibility of their testimonies in court.

8. The appellant contends that the trial court did not seriously analyse the defence. From the tone and tenor of the judgment, the appellant submits that the trial court shifted the burden of proof to the appellant.

9. The appellant contends that the prosecution did not sufficiently prove the ingredients of the offence of gang rape as the evidence does not point at any intention on his part let alone a common intention. As such, the appellant submits that the respondent did not prove its case against the accused and thus the court ought to quash the conviction, set aside the sentence and acquit him of the charges.

Respondent's Submissions

10. It is the respondent's case that it has established the ingredients of the offence of gang rape. The respondent proved the element of penetration through PW2's testimony which was corroborated by PW1. Further, the respondent produced medical evidence by producing the P3 Form and PRC Form as exhibit 2(a) and (b). On the element of age, PW2 testified in court that she was a minor and further, the respondent produced a birth certificate as exhibit 1 to prove that PW2 was a minor. On the element of identification of the offender, PW2 told the court that the "boy" who defiled her was not present in court and pointed out that the appellant never defiled her. The appellant is an uncle to PW2 and the identification of the appellant is one who was in the company of another when he defiled PW2. The respondent made out its case that the appellant aided in committing the offence by delivering PW2 to the defiler. Furthermore, the Government Analyst, PW7's evidence exonerated the appellant and none of the blood samples provided by the appellant marched the DNA profiles on the analysed items.

11. The respondent proceeded to analyse the evidence of the prosecution witnesses and came to the conclusion that common intention was not proved. It was further submitted that the conviction was unsafe.

12. The respondent further submitted that there was material contradiction in the evidence of PW2 who gave different versions of what happened immediately after the incident on the various days she testified and was cross-examined by the defence.

13. The respondent further submits PW2, PW3 and PW4 gave different accounts of how the appellant was connected to the incident. These contradictions create doubt in establishing the appellant's involvement in the entire incident. Further, it cannot be said with certainty how the appellant could have formed a common intention with an unknown person who was never identified by the victim. As such, the respondent contends that the appellant was arrested and charged on the mere suspicion that he may know the real defiler. The respondent thus states that the conviction was unsafe and conceeds to the entire appeal.

Issues for determination

14. The appellant has cited 7 grounds of appeal which can be compressed into three main issues:-

a. Whether the ingredients of the offence of gang rape were proved beyond reasonable doubt;

b. Whether the appellant's defence was considered;

c. Whether the sentence was excessive and harsh.

The Law

15. This being a first appeal, this court is guided by the principles set out in the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal stated:-

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.**

16. Similarly in the case of **Okeno vs Republic [1972] EA 32** where the Court of Appeal set out the duties of the appellate court 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 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]EA 424." This was also set out in the case of **Kiilu & Another vs Republic [2005] KLR 174.**

17. In line with the foregoing, this court in determining this appeal is to satisfy itself that the ingridients of the count of gang rape and those of committing rape in view of a child were proved as so required by law; beyond reasonable doubt.

Whether the ingredients of the offence of gang rape were proved beyond reasonable doubt;

18. The offence of gang rape is provided for under **Section 10 of the Sexual Offences Act** which 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 for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

19. The key ingridients of the offence of gang rape under **section 10 of the Act** include:-

a. Proof of rape or defilement;

b. Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

Proof of Defilement

Penetration

20. 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.

21. Dr. Nderitu testified as PW8 and produced the P3 Form and the Post Rape Care Form (PRC Form) in evidence. According to the P3 Form, PW2 was examined and was found to have sustained a vaginal tear and vaginal bleeding indicating sexual penetration.

22. Notably, the key evidence relied on by the courts in a defilement matter, in order to prove penetration is the complainant's testimony, which is usually corroborated by the medical report presented by the medical officer. According to PW2, a boy took her to a house with a lot of jackets and he removed her clothes, slapped her, laid her on the jacket and did "tabia mbaya" on her. She further testified that the boy took his "thing for susu" and put on my "thing for susu".

23. I have analysed PW2's evidence and hold the opinion that it is corroborated by the medical evidence produced by PW8 to the extent that the medical evidence confirmed that there was penetration of the genital organs of PW2. I thus hold the opinion that the prosecution proved the element of penetration.

Age of the complainant

24. PW1 testified that the minor was born on 3rd January 2009 and produced the original birth certificate to support her contention. This fact was confirmed by PW2 who testified that she was seven (7) years old at the time of testifying and that at the time of the offence she was 5 years old.

25. I have perused the evidence of PW2 and noted that she gave two versions of what transpired especially following the incident. This concerns where she met the accused and his son. Firstly, she said she met him outside the house of the defiler and that he was accompanied by his son K. The second version is that PW2 met the accused in a minor road. He put her on a motorbike and took her to a major road.

26. At the time the victim gave evidence, she was a child of tender years. Her age was established as five (5) years during the commission of the offence through her birth certificate. She testified in court two years later at the age of seven (7) years. Her testimonies and cross-examination took two occasions. The dates were on 1/03/2016 and on 8/09/2016. In my view the lapse of time between that took a period of four and a half (4½) years could have occasioned some memory loss that led to some discrepancies in description of the incident and the chain of events. The trauma that the victim had suffered having been defiled and gone through a three hour medical surgery to repair her damaged reproductive parts was quite an ordeal by itself that affected the child psychologically and destabilised her mental faculties.

27. The trial magistrate addressed the discrepancies very ably in her judgment and reached a finding that they were negligible in light of the clear and cogent evidence. She relied on the Court of Appeal case of **Jumaa Malunga Lugo vs Republic (2019) eKLR** which had similar facts. The court in regard to minor contradictions held:-

We do not agree that there were material contradictions that would have occasioned any miscarriage of justice. Not every contradiction is prejudicial to the accused's case.

28. In my considered view, the contradictions in the evidence of the child witness were minor and not capable of leading to the evidence being rejected. Neither do the said contradictions affect the prosecution's case.

29. The other ground of appeal leads to the issue for determination as to whether common intention was proved. The accused was convicted of gang rape of defilement in association with an unidentified boy who was not arrested or charged in court.

30. Section 21 of the Penal Code provides:-

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

31. PW2 testified that the accused who is her uncle was with her and his son K as the two minors left school. The accused handed over PW2 to a boy to take the minor to her mother as he took his son home. The unidentified boy took the girl through a thicket to a house where he defiled her. The evidence was that after the commission of the offence, and the minor was being escorted by the boy, the accused and his minor son were outside the said house. The accused put the minor onto a motorbike and rode to the main road where he dropped her off.

32. The girl was said to have been bleeding from her private parts and blood strolling down her legs and that her clothes were soiled. The question is why the accused being the uncle of the minor left her on the road in that helpless state instead of taking her to her home.

33. The defence of the accused is that he did not meet the minor until the time he found her on the road surrounded by a crowd and learnt she had been defiled. He called her father PW3 who came in a short while and took his daughter to hospital. The accused went on to state that he was framed by PW3, his elder brother and father to the minor due to a grudge emanating from family land disputes. The accused called one witness who did not witness the events of the material day. He talked at length about the long standing land disputes between the accused and his elder brother.

34. PW3 confirmed in his evidence that it was the accused who called him on phone informing him of the plight of the victim. He went to the scene and organised to take the victim to hospital.

35. The question is whether the respondent proved common intention. In its submissions, the respondent submitted that the element of the offence was not proved in that the defiler was never identified and that he was not connected with the accused in a manner that common intention would be formed. The appellant's submissions carried a similar argument.

36. The evidence of PW2 was that she did not know the boy who took her to a house and defiled her. Her parents PW1 and PW3 did not witness the incident and neither did any other prosecution witnesses. Unfortunately, the investigation officer did not identify or arrest the said suspect in the course of his investigations. The offender remained unknown.

37. The evidence of PW2 connected the accused with an unknown person. PW2 did not place the accused at the scene of the crime. There was no evidence adduced to the effect that the accused handed over the victim to the said unknown person with a view of having her defiled. PW2 said that the accused told her that the boy would take her to her mother. As such, there is no evidence on record to prove that the accused formed any criminal intent to defile PW2 or to commit the offence with the unknown person.

38. The burden of proof in a criminal case is beyond reasonable doubt. In this case, the prosecution failed to adduce any evidence to connect the said defiler with the accused and as such, the offence of gang rape whose main element is common intention was not proved. The trial magistrate convicted the accused of the offence on the singular evidence of PW2 that it is the accused who handed her over to the unknown boy who later defiled her. In my considered view, this evidence falls far short of the standard of proof required in criminal cases. I am in agreement with the respondent that the conviction was unsafe and not based on cogent evidence and I so find.

39. It is my finding that this appeal is merited. Consequently, I hereby quash the conviction and set aside the sentence. The appellant is hereby set at liberty unless otherwise lawfully held.

40. The appeal is hereby allowed.

41. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF DECEMBER, 2021

F. MUCHEMI

JUDGE

Judgement delivered through videolink this 16th day of December, 2021.