REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 41 OF 2019

DENNIS ORINA MBOGO.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa (Mr.) – RM Nyamira dated and delivered on the 25th day of October 2019 in the original Nyamira Chief Magistrate's Court Sexual Offence Case No. 58 of 2019}

JUDGEMENT

The appellant was convicted and sentenced to ten (10) years imprisonment for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act. He has appealed against the conviction and sentence on the following grounds: -

> **"1. THAT the learned trial magistrate erred in law and fact in convicting the Appellant against the weight of evidence.**
>
> **2. THAT the learned trial magistrate erred in law and fact in failing to appreciate the basic element of common intention.**
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> **3. THAT the learned trial magistrate erred in law and fact in failing to take into account the Appellant's defence.**
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> **4. THAT the learned trial magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt.**
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> **5. THAT the learned trial magistrate erred in law and fact in holding that the Appellant was in company of the assailant.**
>
> **6. THAT the learned trial magistrate erred in law by convicting the Appellant on a defective charge."**

The appeal which is vehemently opposed was canvassed by way of written submissions.

It is evident from the testimony of the complainant who at the time was eight years old that the appellant did not physically defile her. Her testimony was that she was pulled into the bush by one Jared who tore off her clothes and then defiled her. Her evidence that she was defiled was corroborated by the testimonies of her mother as well as Dr. Ben Machungo (Pw4) who examined her on 25th June 2019. This doctor testified that the complainant's genitalia was bruised, that she had vaginal bleeding and that there was presence of spermatozoa all of which attest to penetration. The complainant's age was proved through a birth certificate. That the complainant is a child and that she was defiled are therefore not in dispute. The only issue in contention is whether the appellant should have been found guilty and convicted when he himself did not defile the complainant.

As the first appellate court I have reconsidered and evaluated the evidence in the court below while keeping in mind that I did not see or hear the witnesses. I am satisfied from the evidence that the appellant was present at the scene during the commission of the offence. The complainant and her sister (Pw2) had gone to the river at 5pm meaning it was still during broad daylight. They both knew the appellant and Jared well as indeed it was affirmed by the appellant in his defence that he used to work close to their home. Their mother (Pw3) also testified to the satisfaction of this court that as she was going to the scene upon being notified by Pw2 of what had happened she met the appellant who escorted her to where the complainant was. His alibi that he was in Kilgoris on that day cannot therefore be true in the light of the very cogent evidence of these three witnesses. The offence of gang rape is defined as follows: -

Section 10 of the Sexual Offences Act

> **"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 than fifteen years but which may be enhanced to imprisonment for life."

Gang defilement is therefore committed firstly when a person defiles a child in association with another person (s). It also occurs where any person who with common intention is in the company of another(s) who commit the offence. Having found that the presence of the appellant at the scene of the offence, although he himself did not physically defile the complainant, was proved beyond reasonable doubt, the **only issue for determination is whether he had a common intention with the perpetrator of the offence (Jared).**

Relying on the definition of common intention in **Section 21 of the Penal Code,** Counsel for the appellant submitted that there had to be a form of connection which in its prosecution must be in conjunction with one another with a probable consequence of the common purpose. He submitted that there is no iota of evidence to bring the appellant and the perpetrator in the formation of a common intention and neither was the offence committed in conjunction with one another. He submitted that the mere presence of the appellant at the scene cannot be taken to mean there was a common intention. However, it is clear from the evidence of the complainant and her sister (Pw2) that the appellant and Jared were together right from the time the said Jared took away the complainant's jerican to the time he dragged her into the bush, tore her clothes and penetrated her. He was there right through to the end of her ordeal. He did not leave until she was defiled and she became unconscious. In the case of **Eunice Musenya Ndui v Republic [2011] eKLR** the court cited with approval the West African case of **Adekule v The State SC 66/1989** where it was stated:-

"Common intention may be inferred from circumstances disclosed in the evidence and need not be by express agreement but a presumption of a common intention should not be too readily applied……."

In **Wanjiru d/o Wanerio v Republic 22 EACA 421**, also cited by Counsel for the appellant, the court stated: -

"Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with."

In the case of **Njoroge v Republic [1983] KLR,** the Court of Appeal deciding on the same issue stated: -

"If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common assault of the assembly….

Their common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."

From the above cases common intention can be inferred from one's acts of commission as well as omission and it need not be premeditated. The fact that the appellant had gone to the river with Jared and that he was present when Jared accosted the complainant and was in tow when Jared dragged the complainant into the bush and watched him tear off her clothes and defile her are all acts from which common intention can be inferred. Moreover, his standing there and watching the complainant being defiled until she lost consciousness without doing anything is proof that he did not disassociate himself from the defilement. The ingredients of the offence were in my view therefore proved beyond reasonable doubt and the offence having been committed in broad daylight and the prevailing circumstances having been favourable for a positive identification/recognition, I am satisfied that the charge against him was proved beyond reasonable doubt. The sentence meted against him was also reasonable and just given the brutal manner in which the offence was committed. In the upshot I find no merit in this appeal and the same is dismissed in its entirety.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE

This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines on combating the Covid-19 pandemic, the Advocates for the parties having consented.