REPUBLIC OF KENYA

IIN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 85 OF 2014

ONESMUS KATIVOI KIMWELE...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the original conviction and sentence by Hon. I. Ruguru,

Senior Resident Magistrate, in Mombasa Principal Magistrate's Court

Criminal Case No. 1337 of 2013).

JUDGMENT

1. The appellant was convicted for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 28th day of May, 2013 at [Particulars Withheld] area in Changamwe District, within Mombasa County, in association with another not before the court intentionally and unlawfully caused his penis to penetrate the vagina of MM [name withheld] a child aged 15 years. He was sentenced to serve 15 years imprisonment.

2. The appellant was aggrieved by the said decision and filed a petition and grounds of appeal on 20th March, 2014. He amended the said grounds of appeal on 27th November, 2019, with leave of the court. His amended grounds of appeal are that the Trial Magistrate erred in law and fact in convicting him on the evidence of PW2 and the other witness without finding that PW3 who pointed him out as the offender was not present when PW2 was defiled. That he was not subjected to an identification parade despite the fact that he was charged with gang rape. The appellant also raised the ground that the evidence of PW2, PW3 and PW5 was contradictory as PW2 talked about an incident which happened in an incomplete building under construction, yet PW3 spoke of an incident which occurred at a bush near Jambo village. The appellant claimed that another contradiction was that PW2 spoke of an incident which occurred in an incomplete building under construction, yet PW3 spoke of PW2 having been taken to him by another man. He also challenged the sentence meted out to him for being the mandatory minimum sentence. He also raised the issue that his defence was not considered.

3. In his written submissions, the appellant stated that the evidence adduced by PW2 was at variance with that of the Investigating Officer, in that her evidence was that she met him when was going to school, yet PW5 said that PW2 reported that on her way to school she met a suspect who was not before court, who tricked her that he wanted to show her something. The appellant also stated that PW2 claimed that the said suspect took her to a bush near Jambo village and left her with the appellant. The appellant submitted that the Trial Magistrate failed to determine who between PW2 and PW5 was telling the truth.

4. The appellant stated that PW3 was the one who pointed him out, leading to his arrest. He contended that there was failure of justice as an identification parade was not held. He emphasized that an identification parade should have been held as PW2 claimed that the offence was committed by more than one man whom she did not know before the incident. The appellant stated that PW2 testified that he was identified by PW3 who indicated in court that she knew the appellant, Kativoi, as his worker and after she was requested to assist them, she took them to the place where he used to rest.

5. The appellant contended that PW2 could not have been defiled on 28th and 29th May, 2013 and 3rd June, 2013 without sustaining injuries in her private parts. He argued that the absence of a hymen in PW1's vagina could have been caused by any other object other than through defilement. The appellant stated that PW4 testified that PW2 had not received any treatment prior to being examined on 3rd June, 2013. The appellant further claimed that PW2 could not have been defiled as alleged. He submitted that his defence was not considered. He urged the court to allow his appeal.

6. Ms Mwangeka, Prosecution Counsel, filed her written submissions on 23rd January, 2020 on behalf of the Director of Public Prosecutions.

She opposed the appeal. She submitted that PW1 produced PW2's birth certificate which showed that PW2 was born on 7th June, 1998 hence she was 15 years old. As such, PW2's age was established by her mother (PW1).

7. On the issue of penetration, Ms Mwangeka indicated that PW2 testified that she was going to school when she was lured by the appellant who defiled her in a building under construction. That PW2 further testified that the appellant was with his friend during the time of the incident.

8. It was submitted that the PRC form which was filled a day after the incident, on 29th May, 2013 revealed that PW2's hymen was not intact and her clothes were blood stained. It was indicated that a P3 form filled on 3rd June, 2013 also established that PW2 had been defiled.

9. With regard to the issue of identification, the Prosecution Counsel submitted that when PW2 was narrating the ordeal, she was clear, coherent and consistent that it was the appellant who defiled her, when he was in the company of his friend. That in cross-examination, PW2 said that the appellant told her his name when he went to their house and that his friend told her that the appellant sells alcohol, a fact which was corroborated by PW3. Ms Mwangeka asserted that in a sexual offence, a court can convict on the evidence of a victim as there are usually no eye witnesses to such offences. She submitted that the Trial Court could convict the appellant only on the evidence of PW2 under the provisions of Section 124 of the Evidence Act.

10. On the issue of the contradictory evidence adduced by PW2 and PW5 as to the place where the offence occurred, the Prosecution Counsel was of the view that it did not go to the root of the prosecution case. She stated that PW2's evidence was clear and cogent. In addition, it was indicated that she narrated the place, date and time of the incident and that the same was corroborated by PW1. She relied on the case of **Charo Changawa Kalama v Republic** [2018] eKLR, where the court held that the act of rape and defilement is proved by way of evidence of the victim. She indicated that the contradiction was inconsequential.

11. The Prosecution Counsel supported the sentence of 15 years imprisonment imposed on the appellant and noted that PW2 had mental disability and the same was captured on the PRC and P3 forms. It was submitted that due PW2's mental impairment, it was important for her to be protected and be cared for, instead of being taken advantage of and being debased as happened in this case. She urged this court not to interfere with the discretion of the Trial Court on sentencing.

12. The appellant on 2nd May, 2020 filed a response to the DPP's submissions and reiterated that PW2's evidence was not corroborated and he should not have been convicted. He relied on the case of **Wanjala v Republic** [1944] 2 EACA 93. He also reiterated that an identification parade should have been held. He cited the case of **Peter Wekesa and Others v Republic** Nairobi Court of Appeal Criminal Appeal No. 44 of 1995 on the issue of mistaken identity which he claimed, happened in this case. He also stated that the contradictions in the prosecution case should have been resolved in his favour.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

13. The evidence adduced before the lower court by PW1 LMJ, who was PW2's mother, was that on 18th May, 2013, PW2, MM [name withheld], (PW2) who was living with her Aunt in [Particulars Withheld] was going to school in the morning when a man grabbed her and did bad manners to her. PW1 stated that she understood that to mean that PW2 had been *raped*. On receiving the said information, PW1 left Kajiado where she was staying for Mombasa. On reaching Mombasa, she found her co-wife with PW2. The latter had not received any assistance.

14. PW1 indicated that she reported the incident the following day to the Chief who advised her to go to Changamwe Police Station. They were referred to Coast Province General Hospital (CPGH). PW1 gave evidence that PW2 reported to the police that she was defiled by Onesmus Kativoi Kimwele. At CPGH, PW2 was examined and treated. The results were given to Sergeant Hellen of Changamwe Police Station.

15. PW1 testified that the appellant was arrested on 1st June, 2013 in her presence and that it was PW2 who pointed out the appellant to the police. PW1 indicated that PW2 was 15 years old as she was born on 7th June, 1998. She produced PW1's birth certificate in evidence.

16. It was PW1's testimony that PW2 told her that the appellant had lured her to an incomplete house on her way to school and had defiled her. That she did not go to school after the incident but went home. PW1 clarified that her co-wife was the person she was referring to as PW1's Aunt.

17. PW2 was MM [name withheld]. She was a minor and was taken through *voir dire* examination. The Trial Court noted that she appeared to be a retard and found it prudent to affirm her. It was PW2's evidence that on 28th May, 2013 in the morning as she was on her way to school, she met the appellant, whom she did not know before. He told her not to go to school as he wanted to take her to some place. She testified that he took her to a storey building which was under construction and told her that they would make love.

18. She explained that the appellant put *his thing which he urinates with in her place for urinating.* She stated that it happened after he forced her to lie on the ground and he lay on top of her and that before he put his urinating thing in hers, he removed her biker, panty and lifted up her skirt. He then removed his trousers and underwear. Her evidence was that he lay with his stomach facing hers and inserted it. She indicated that she could not scream as the appellant had slept on her stomach. She stated that after he finished, he gave her money so that she could not tell anyone but she refused to take it. He then ran away. PW2's evidence was that she put on her clothes and went to her grandmother's house which was near the house under construction. She indicated that she did not tell her grandmother as the man had told her not to tell anyone.

19. It was PW2's evidence that she took her grandmother's phone and called her mother (PW1) whom she informed of the incident. PW1 went to see her in school the following day. She said that her stomach and private parts were in pain. They went to Changamwe Police

Station and then to hospital where she was treated. She stated that she told the police that Kativoi had defiled her and she was present when he was arrested at a barber shop at Chaani. She indicated that he was identified by another person. She also stated that the appellant was with his friend when he defiled her.

20. PW3 was Andrew Ngusi Muthusi a Jua Kali Artisan who had employed the appellant. It was his evidence that on 1st June, 2013 at 7:00a.m., PW1, PW2, and a village elder went to his kiosk. He stated that he knew PW1 as his neighbour. They asked him if he knew a man by the name Kativoi and they requested him to assist in tracing him. PW3 stated that he took them to a place where the said person (appellant) used to rest at a barber shop. That they found him there. They escorted him to Changamwe Police Station. PW3 stated that the appellant was a mnazi distributor.

21. Dr. Ngone of CPGH testified as PW4. He filled the P3 form for PW2 who was alleged to have been defiled on 28th May, 2013. PW4 indicated that she was taken to CPGH on 29th May, 2013 and she was found to be mentally retarded. That she was examined and her hymen was found not to be intact. PW4 indicated that PW2 was taken to him on 3rd June, 2013 for filling of the P3 form. He assessed the degree of injury as maim. He produced the P3 and PRC forms in evidence.

22. PW5 was No. 75329 Sergeant Hellen Maloba of Changamwe Police Station. She was the Investigating Officer. She testified that she was assigned this case on 29th May, 2013. She interviewed PW2 who told her that on 28th May, 2013 as she was going to school she met a suspect who was not before the court who tricked her that he wanted to show her something. That he took her to the appellant in a bush near Jambo village and left her with him. PW5 further stated that the appellant ordered her to remove her bikers and underwear. PW5 indicated that PW2 communicated with her by way of gestures and she told her that the appellant removed his *"dudu"* and inserted it in her urinating organ.

23. The Investigating Officer stated that PW1 travelled from Kajiado to Mombasa and met PW2's teacher in school. When PW2 was called she narrated to them what had happened and thereafter they reported to the police station. PW4 also stated that the appellant was arrested on 1st of June, 2013 by the community policing and that she re-arrested him. On 3rd June, 2013 she took PW2 to CPGH for the filling of her P3 form and collection of her PRC form. She produced PW2's treatment notes and laboratory test results. PW3 stated that PW2 was retarded but she understood what she was communicating to her.

24. In his sworn defence, the appellant stated that on 1st June, 2013 he was at work when at 7:00a.m., the village elder called him. That as they were talking, a salon car stopped outside his barber shop and one of its occupants entered therein. The appellant stated that the said person requested for the owner of the barber shop. He indicated that he was the one. He was then arrested and put in the vehicle and taken to Changamwe Police Station. He denied knowing anything about the offence he was charged with.

ANALYSIS AND DETERMIANTION

25. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced at the lower court and come to its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact. In **Patrick & Another v Republic [2005] 2KLR 162**, the Court of Appeal held *inter alia* that:-

> ***"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. 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; it must make its own findings and draw its own conclusions."***

26. The issues for determination are:-

(i) If the appellant was positively identified by PW2;

(ii) If the contradictions on record weakened the case for the prosecution;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) If the sentence is harsh or excessive.

If the appellant was positively identified.

27. The evidence adduced by PW2 was that the appellant was a stranger to her prior to the 28th of May, 2013 when she met him in the morning, on her way to school. He told her not to go to school as he wanted to take her to some place. He took her to a building which was under construction and told her that they would make love. He proceeded to undress her, forced her to lie on the ground with her back next to the floor. He then defiled her as he lay on her stomach. From the description given by PW2, the defilement happened when she was facing the man who defiled her and she therefore had adequate time to identify him. The offence occurred in the morning when circumstances were favourable for positive identification. The person who defiled PW2 spoke to her and told her not to go to school. It is not difficult for this court to understand that PW2 was easily lured by the man who defiled her as she was mentally retarded. Dr. Ngone, the Investigating Officer and even the Trial Court noted the said fact. Once the man was through with defiling her, he offered her some money so that she could not tell anyone. She refused to take it and the appellant ran away.

28. The manner in which the events unfolded up to the time of defilement and the conversations they had after PW1 was defiled leaves this court in no doubt that PW2 was defiled by the appellant. This is compounded by the fact that the person who defiled her told her that his

name was Kativoi. She informed PW1 of the said name and mentioned it in her 1st report at the police station. Armed with the said information, the appellant was arrested on 1st June, 2013 when a village elder, PW2 and her mother went to PW3's kiosk and asked him if they knew a man by the name Kativoi. PW3 indicated that Kativoi (appellant) was his worker and he took them to where he was in a barber shop. The appellant was then taken to the police station.

29. The appellant argued that an identification parade should have been held as PW2 said that he was identified by another person. This court notes that from the evidence adduced by PW1 and from PW2's 1st report at Changamwe Police Station, she stated that she had been defiled by Kativoi. My understanding of the role played by PW3 was that of taking PW2, PW1 and the village elder to the barber shop and pointing out where Kativoi was. As at that time the identity of the person who defiled PW2 was known. It is my finding that failure to conduct an identification parade did not prejudice the appellant in any way.

30. In **Roria v Republic** [1967] EA 583 at page 584, the predecessor of the current Court of Appeal stated thus on the issue of identification –

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness……..That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."***

31. Another piece of evidence which might appear to be negligible but is not, is the fact that in cross-examination, PW2 said that the appellant's friend whom he was with, told PW2 that the appellant used to sell alcohol. The appellant's employer (PW3) also stated in court that the appellant was a mnazi distributor. It cannot therefore be a coincidence that PW1 was talking about the man by the name of Kativoi who defiled her being a mnazi seller and for PW3 to indicate that he had engaged the appellant as a manzi distributor. The link in the evidence leads irresistibly to the appellant as the man who defiled PW2. This court holds that the appellant was positively identified and therefore his ground of appeal on the basis of lack of proper identification has no merit.

If the contradiction on record weakened the prosecution case.

32. The appellant pointed out a contradiction in the evidence of PW2 and the Investigating Officer. He indicated that PW2 in her evidence stated that on her way to school, she met the appellant, whom she did not know. He told her not to go to school as he wanted to take her to some place. He took her to a storey building under construction and told her that they do something called making love. The appellant indicated that on the other hand, the Investigating Officer, PW5 stated as follows:-

> *"I interviewed the complainant. She told me that on 28th May, 2013 she was on her way to school. She met a suspect not before court and tricked her he wanted to show her something. He took her to the accused person before court at a bush near Jambo village. That the suspect left the complainant with the accused before court and left …."*

33. A reading of the foregoing 2 versions clearly indicates that they are contradictory. PW2's version of how the incident unfolded is similar to what she recounted to PW1 who stated thus-

> *"She told me that as she was going to school in the morning, a man grabbed her and did bad manners to her. I understood that to mean rape ….….., she told me that the accused had lured her to uncomplete (sic) house on her way to school and defiled her …."*

34. The narrative that PW2 told PW1 demonstrates that the version of how she ended up being defiled was similar to her testimony in court. It is therefore evident that the Investigating Officer is the one who brought about the element of contradiction in the prosecution case by saying that PW1 was defiled in a bush near Jambo village.

35. On the issue of contradictions, in **Philip Nzaka Watu v Republic** [eKLR], the Court of Appeal held thus-

> ***"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide if inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

36. This court has considered the contradiction which was raised by the appellant and its finding is that it does not go to the root of the case which is whether or not PW2 was defiled by the appellant.

If the prosecution proved its case beyond reasonable doubt.

37. An analysis of the evidence adduced demonstrates that PW2 was a minor as her mother (PW1) adduced evidence to that effect and produced PW2's birth certificate which confirmed that she was born on 7th June, 1998. PW2's age was therefore established.

38. Medical evidence adduced by PW4 through PRC and P3 forms established that PW2's hymen was not intact. The foregoing therefore corroborated the fact that she had been defiled.

39. The appellant's defence was considered by the Trial Court and I have also considered the same. It does not in any way dislodge the evidence which was adduced by the prosecution against him. This court holds that the prosecution proved its case beyond reasonable doubt. I therefore uphold the appellant's conviction for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act. In her

evidence, PW1 stated that the appellant was with his friend, who told her that the appellant sells alcohol.

40. The provisions of Section 10 of the Sexual Offence Act state thus:-

> "***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 fifteen years (sic) but which may be enhanced to imprisonment for life."** (emphasis added).

41. The appellant's friend was not said by PW2 to have committed the actual offence of defiling her. The evidence however reveals that the appellant and his friend had a common intention. Section 21 of the Penal Code states as follows on the doctrine of common intention:-

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

42. What constitutes common intention was articulated by the Court of Appeal in the case of **Njoroge v Republic** [1983] KLR 197 as follows:-

> ***"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 cause 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 one of them to disassociate himself from the assault."*** (emphasis added).

43. In this case the appellant's friend was never arrested. The appellant was however charged with the offence of gang defilement as he was in the company of his friend when the offence was committed. It is the finding of this court that the said offence was proved beyond reasonable doubt.

Whether the sentence is harsh or excessive.

44. The appellant was sentenced to 15 years imprisonment. That is the minimum sentence under the provisions of Section 10 of the Sexual Offences Act. The Trial Court could have sentenced the appellant to a longer sentence in prison but it exercised its discretion and meted out the minimum sentence. The Trial Court and the Investigating Officer noted that PW2 who was the victim of the offence was retarded. Medical evidence in the form of PRC and P3 forms indicate that she was mentally retarded.

45. When an offence is committed against a person whose mental faculties are not fully developed, it aggravates the circumstances surrounding the case as it demonstrates that the offender took advantage of the mental incapacity of the victim to perpetrate the offence. In such a situation, a court must take the said factor into consideration when sentencing the appellant. It is this court's finding that in the above circumstances the sentence of 15 years imprisonment which was imposed on the appellant cannot be regarded as being either harsh or excessive. I uphold the said sentence.

46. In accordance with the provisions of Section 333(2) of the Criminal Procedure Code, the appellant's sentence shall run from the 3rd June, 2013, being the date he was charged before the Trial Court. The appeal is hereby dismissed. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **30th** day of **June, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi for the DPP

Mr. Oliver Musundi - Court Assistant.