REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 31 OF 2016

NMG..... 1ST APPELLANT

SAMUEL NJUGUNA..... 2ND APPELLANT

VERSUS

REPUBLIC..... STATE

(Being an appeal from the Judgment of Honourable M.K.N. Maroro - Principal Magistrate, delivered on 25th February, 2016 in Nakuru Chief Magistrate's Adult Court Criminal Case No. 7 of 2014)

JUDGMENT

1. The two Appellants were arraigned before the Nakuru Chief Magistrate's Court charged with gang defilement contrary to section 10 of the Sexual Offences Act. The particulars in the charge sheet alleged that at 0530 hours on the 3rd day of April, 2014, the two Appellants intentionally and unlawfully gang-defiled AM, a child aged 15 years in Njoro district within Nakuru County.

2. The Appellants also faced an alternative charge of committing an indecent act with a child contrary to section 6(a) of the Sexual Offences Act. The particulars of the victim, time and place were the same as that of the main charge. It would appear that this alternative charge was defective since it did not particularize the critical elements under section 6(a) of the Sexual Offences Act, namely, compelling, inducing or causing another person to engage in an indecent act. It would seem that the more appropriate offence in the circumstances would have been the offence defined under section 11 of the Sexual Offences Act.

3. In any event, the Appellants denied both the main and the alternative charges prompting a fully-fledged trial in which the Prosecution called four witnesses. The Learned Trial Magistrate ruled that the Prosecution had established a prima facie case and each of the Appellants gave sworn testimony on their own behalf and then called one witness. At the conclusion of the case, the Learned Trial Magistrate convicted the Appellants of the main offence charged under section 10 of the Sexual Offences Act. She proceeded to sentence them to imprisonment for fifteen years each for that offence. It would appear that the Learned Trial Magistrate also, in error, convicted both Appellants of the alternative charge (which she described in the last paragraph of the judgment as the second count). She convicted the Appellants under section 11(a) of the Sexual Offences Act (which was, of course, not the section under which they had been charged). For this "second count", the Learned Trial Magistrate sentenced both Appellants to serve ten years in prison.

4. The Appellants are dissatisfied with both the conviction and sentence and have appealed to this Court. Paraphrased, the grounds of appeal listed by their then lawyer are that:

a. That the sentence was harsh;

b. That the Trial Magistrate erred in law and fact when he failed to consider medical report on record;

c. That the Trial Magistrate erred in law and fact by failing to consider that the contradictory evidence by the Prosecution entitled the Appellants to an acquittal;

d. That the Trial Magistrate erred in law and fact in failing to consider the Appellant's defence.

5. As a first appellate Court, the Court has the duty to re-evaluate the all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R***

[1972] EA 32 and ***Kariuki Karanja v R [1986] KLR 190***.

6. The evidence that emerged from the trial was as follows.

7. The Complainant testified as PW1. She testified under oath after *voir dire* in which the Learned Trial Magistrate confirmed that she had a knowing understanding of the meaning of oath. She testified that she was 15 years old and that she was a student at [particulars withheld] Secondary School. She told the Court that she usually walks to school very early in the morning and that on 03/04/2014, she left her home at 5:00am in the morning as usual. She said she was alone. After walking for about one kilometres, she said, two boys emerged from the bush. While it was dark, she said she could make out who the two boys were since she knew them: they were the two Appellants. The Appellants are, she said, her neighbours at home.

8. The Complainant testified that the 1st Appellant held her, lifted her off the ground and dropped her down. Then, she said, the 2nd Appellant held her mouth to prevent her from screaming. The 1st Appellant then removed her skirt by "folding it up"; pulled down her panties and bikers but without removing them completely. The Complainant said that the 1st Appellant then proceeded to pull down his trousers and underwear halfway; lay on top of her; inserted his penis into her vagina and raped her. She said that she felt pain but could not scream because the 2nd Appellant had covered her mouth. When the 1st Appellant was done, he dressed up and ran away. The Complainant said that she stood up, dressed up and went back home to tell her mother what had happened.

9. The Complainant says that she told her mother "the people who raped" her. She also said that she insisted that she needed to go to School to ask for permission to be away because it was exam time. Later, she said, her mother went to school and together they went to Ndeffo Police Post and then to the hospital where she was examined.

10. Upon the request of the Appellants' advocate who was not present when the Complainant first testified, she was recalled for cross-examination. When recalled, the Complainant seemed to suggest at first that she knew the 1st Appellant very well but not the 2nd Appellant. However, she said that the 2nd Appellant would go to their home and "want to defile her." This probably meant that the 2nd Appellant had attempted to seduce her before. She said that he done this by going to her home and knocking on the door.

11. The Complainant's mother, JNN, testified as PW2. She said on 03/04/2014, her daughter left home at around 5:25am as usual to go to school. However, JNN testified, the Complainant returned only a short while later. JNN said that the Complainant told her that she had been defiled by "M and Njuguna"; that it was the 1st Appellant who had defiled her and the 2nd Appellant held her mouth. JNN said that she told the Complainant not to go to school but the Complainant insisted on doing so because they had exams. JNN further testified that she went to the school later on and after telling the Headmaster what had happened, he accompanied her and the Complainant to Ndeffo Police Post where they made a report and recorded statements. Thereafter, JNN said, some Police Officers accompanied them to the Hospital where the Complainant was examined and told to return on 08/04/2014 since there was a blackout on that day and some tests could not be performed. They returned and picked up the results on that day. All the results for infections and pregnancy were negative.

12. At the Njoro Health Centre, the Complainant and her mother found Everlyne Sarigat, a Clinical Officer. She examined the Complainant and ordered some tests. She filled a P3 Form and produced it as evidence. She testified as PW3. She testified that she found nothing abnormal or physical injuries when she did physical examination of the Complainant. She only noted an old perforated hymen and white discharge from the vagina. All the tests were normal and there was no detection of infection or spermatozoa.

13. The final witness was the Investigating Officer, PC Richard Kirui. PC Kirui testified that the Complainant and her mother reported to Ndeffo Police Station accompanied by the Headmaster of [particulars withheld] Secondary School on 03/04/2014 that the Complainant had been defiled while on her way to school. PC Joseph Kosgei recorded the incident on the OB and informed the OCS who, in turn, delegated the case to PC Kirui. PC Kirui escorted the Complainant and her mother to Njoro Health Centre and then recorded statements the following day. PC Kirui said that he visited the scene and found that it was just besides the road. In cross-examination, PC Kirui said that the scene was about 300 metres from the Complainant's home.

14. Put on their defence, each of the Appellants gave a sworn statement. They both denied gang-defiling the Complainant on 03/04/2014 or at all. The 1st Appellant said that the Complainant used to walk to school with his sister (who testified as DW3) and that even on the day of the alleged incident they walked together

and that the Complainant never complained that she had been raped. He said that the later in the evening, the Complainant went to their home "but did not find [his] father at home" implying that the Complainant was looking for the 1st Appellant's father. He denied engaging in the act and stated that under Kikuyu customs, he would not do any such act with the 2nd Appellant who is his uncle.

15. The 2nd Appellant equally denied that he was in any way involved. He admitted that he was in the 1st Appellant's homestead in the morning of 03/04/2014 but that he was sleeping. While he lives in Nairobi, he said, he had come for the funeral of the 1st Appellant's mother and then he extended his stay so that he could till his piece of land which he owns in the area. He said that in the morning of 03/04/2014, he heard the mother to the Complainant calling Elizabeth (DW3) to go to school with her daughter.

16. EW testified as DW3. She is a sister to the 1st Appellant and was a friend to the Complainant. He testified that she usually walked to school with the Complainant; and that on 03/04/2014 the Complainant was taken to her home by her mother so that they could walk to school together. She said that the Complainant seemed okay. They walked together to the stage but there was a matatu strike. While DW3 decided to wait for a matatu, the Complainant walked to school. She said that she was surprised when her brother and uncle were arrested because she had not heard about the rape allegations before.

17. The Learned Trial Magistrate believed the narrative given by the Complainant and her mother and proceeded to convict. On the crucial question of identification, the Learned Trial Magistrate reasoned as follows:

> *Issue No. 2 as to who defiled her from the testimony of the minor, (sic) PW2 it is clear that the minor in her evidence was clear as to who was her defilers (sic). She knew the two Accused Persons and in her testimony stated that the 2nd Accused Person had at one time wanted to defile her. She identified the two by their names and her evidence was substantially overwhelming. In as much as the minor PW1 did not state that the 2nd Accused defiled her he was an accomplice who did assist the 1st Accused in committing the said crime.*

18. For the Prosecution to obtain a guilty verdict in this case, it needed to prove the following four elements:

a. That the Complainant was a minor;

b. Penetration as defined by section 2 of the Sexual offences act;

c. Penetration by more than one assailant who are acting in concert or with a common intention to carry out the act of penetration;

d. Positive identification of the persons who caused the penetration; and

19. The age of the victim was not an issue at all in the trial. Both the Complainant and her mother testified that the Complainant was born on 18/08/1998 – and a birth certificate was produced attesting to this fact. She was, therefore, 15 years old at the time of the alleged incident.

20. On penetration, the medical evidence produced was inconclusive. The Clinical Officer testified that upon examination, she did not find any physical features consistent with sexual activity on 03/04/2014. However, that does not necessarily mean that there had been no penetration on that day. While there were no tears, bruises or lacerations in the genitalia of the Complainant and while there was not spermatozoa seen, it is possible that there was penetration. Given the oral testimony of the Complainant and her reporting of the incident on 03/04/2014, I would conclude that she had, indeed, been defiled on 03/04/2014.

21. The critical question, though, is who defiled the Complainant on that day. According to the Complainant's narrative, the assault happened at 5:30am in the morning. She said that there was moonlight and that it was bright enough for her to recognize her two assailants. While this was evidence of identification by recognition, the evidence tendered raised a number of issues which seen together raise some reasonable doubts whether the two Appellants committed the acts they are accused of:

a. First, it is noteworthy that the Complainant gives scant details about what happened especially considering that there were two people involved. For example, while she says that the 1st Appellant held her and dropped her then forcefully penetrated her after removing her skirt, biker and panties, there is little information about what the 2nd Appellant was doing during this time. The Complainant says that the 2nd Appellant initially held her mouth to prevent her from screaming. Did he continue holding her mouth throughout the assault as she lay on the ground? Then, the Complainant says that when he was done with the act, the 1st Appellant dressed up and ran away. She does not say what happened to the 2nd Appellant. Did he also run away with the 1st Appellant?

b. Second, given that the Complainant said in her testimony that she was very sure who her attackers were, it does not appear that she made the first report naming the two Appellants as her assailants. To be sure, the Complainant, her mother; and PC Kirui seemed to remember her naming her assailants – but three pieces of evidence seem to belie this:

One, the first report was not presented as evidence. On appeal, upon the application of the Appellants, the first report was produced with the order of the Court. The first report does not indicate that the Complainant gave the identity or description of the assailants. The report states that the Complainant "*met two boys who rapped (sic) her and pulled her into bush starts (sic) raping. The other boy use his hands to close the mouth (sic)….*"

As the Appellants point out, if the Complainant had, in fact, identified her two assailants to the Police, then they would been recorded in the first Report.

Two, if the two assailants were identified and so recorded, and they were, in fact, neighbours, they would have been arrested on the same day. It is not clear why the arrests were not made on the day the report was made.

Three, the conduct of the Complainant and her mother subsequent to the alleged assault raises doubt whether the Complainant was sure that the Appellants were, in fact, the assailants. Immediately after the alleged assault, the Complainant and her mother went to the home of the two Appellants to ask the sister of the 1st Appellant to accompany the Complainant to school. This seems quite odd.

It would appear that it is more likely that the realization of who the Appellant thought had assaulted her came later – which would explain both her conduct and the missing names in the first report.

c. Third, the P3 Form talks of one assailant known to the Complainant but does not mention the name.

d. Fourth, there is the troubling fact that the Complainant's clothes were not soiled – yet she said that she was defiled on the ground and her uniform got "dirty". Moreover, PW4 (the IO) testified that it had rained heavily on that day. Both the Complainant and her mother were categorical that she did not change her clothes or take a shower and instead insisted on going to school. This means that the Complainant was in the exact same clothes when she reported to the Police and when she was examined at the Health Centre.

Yet, both the IO and PW3 confirmed that the clothes were not soiled.

22. From reading the account in this case, it would appear that this was a child who was, indeed, sexually assaulted by someone. A lot more investigations needed to be conducted to uncover what had in fact happened. The behaviour of this child seemed to confirm that she had been sexually assaulted – but there needed to be thorough investigations – including the use of pyscho-social support to unravel the truth of what had happened to her. The account she gave to her mother and the Police, it would seem, needed to be expertly and compassionately interrogated so as to lead towards solid evidence against the perpetrators. Sadly, this did not happen. As far as the very high standards of criminal prosecution are concerned, the evidence here was not sufficiently water-tight to sustain a conviction.

23. However, unfortunately, all in all, the evidence on record raises reasonable doubts about the credibility of the Prosecution case.

While medical evidence seems to be categorical that the Complainant was, in fact, sodomized, there are gaps in the Prosecution narrative whether it was, in fact, the Appellant who defiled the Complainant. There are too many inconsistencies and contradictions in the Prosecution narrative to sustain the conviction to such a serious charge.

24. **In the circumstances of this case, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody**.

25. Orders accordingly.

Dated and delivered at Nakuru this 25th day of June, 2020

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by Video-conference facility pursuant to the various Directives by the Honourable Chief Justice asking Courts to consider use of technology to deliver judgments and rulings where expedient due to the Corona Virus Pandemic. This resulted in Administrative Directives dated 01/04/2020 by the Presiding Judge, Nakuru Law Courts authorizing the delivery of judgment by video-conferencing. This avoided the need for the participants to be in the same Court room for the delivery of the judgment. The Appellant attended by video-conference from Prison while the Prosecutor, Mr. Alex Chigiti, and the Court Assistant were in attendance by video-conference set up at the Court's Boardroom. Representatives of the media were able to access the proceedings by watching at the Court's Boardroom. Accordingly, the proceedings met the constitutional requirement of public hearing.