REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 147 OF 2019

FRIDAH KANGAI………………………….………………APPELLANT

VERSUS

REPUBLIC……………………………..……………… RESPONDENT

(Appeal against the conviction and sentence passed in the PM's Court at Nkubu S.O case No.1 of 2017 delivered on 20th August 2019 by Hon.JIrura)

JUDGEMENT

1. The Appellant and one Kenneth Mwandiki were jointly charged with the offence of gang defilement contrary to Section 10 of the Sexual Offences Act No.3 of 2006 .

2. Upon taking the evidence of six prosecution witnesses and the sworn statement of the Appellant the trial Magistrate concluded that the Appellant was guilty of the offence of gang defilement and sentenced her to serve 10 years imprisonment .

3. Being aggrieved by the conviction and sentence the Appellant filed a petition of appeal against the conviction and sentence on the following grounds.

a. That the learned trial Magistrate erred in law and in fact by convicting the Appellant whereas the charge sheet was incurably defective thereby rendering the whole judgement a nullity

b. The learned trial Magistrate erred in both law and fact in failing to conduct a voir dire examination on PW1 thereby rendering the whole trial anullity.

c. The learned trial Magistrate erred both in law and in fact by convicting the Appellant whereas the essential elements or ingredients of the offence of gang rape against the Appellant were not proved beyond any reasonable ground to warrant the accused being convicted.

d. The learned trial Magistrate erred both in law and fact in not holding and finding that there were doubts in the prosecution's case which ought to have been resolved in favour of the Applicant therefore occasioning a miscarriage of justice.

e. The trial Magistrate erred both in law and fact in convicting the Appellant in view of uncorroborated evidence, hearsay, grave contradictions and inconsistencies in the evidence tendered by the Prosecution thereby occasioning a miscarriage of justice.

f. The judgement of the trial Magistrate is bad in law and unlawful as the particulars on the charge sheet did not support the evidence on records and the court's judgement on the same are fundamentally and materially at variance.

g. The learned trial Magistrate failed to consider the Appellants explanation in defence and dismissing it as unbelievable hence was biased against the Appellant.

h. The learned Magistrate erred both in law and fact by shifting the burden of proof to the Appellant where as it is trite that an accused person does not assume any burden to prove her innocence in a criminal case.

i. The judgement of the learned trial Magistrate is against the weight of evidence on record and is bad in law

j. In consideration of all the circumstances of the case the sentence meted out against the Appellant is manifestly harsh and excessive.

k. The Appellant prayed that the Appeal be allowed, conviction quashed and sentence set aside.

4. This appeal was canvassed by way of written submissions, the Respondents in their submissions said that the charge sheet was not defective and that the law does not require ***voir dire*** examination to be conducted where the child is above 14 years and relied on the case of **Kibangeny Vs Republic [1959] EA 92** at page 94 where Windham J A interalia held that a child of tender age in absence of special circumstances means any child of an age or apparent age of under 14 years.

5. In response to ground 3 of the appeal, the Respondent counsel submitted that the ingredients of the offence of gang rape as spelt out in Patrick Muthii Vs Republic [2018]eKLR included proof of rape or defilement and proof that the assailant was in association with another or other person in committing the offence of rape or defilment 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.The Respondent's counsel submitted that the ingredients of defilement had been proved as the complainant was a minor aged 15 years and the medical practitioner PW4 confirmed on examination that the broken hymen was suggestive of penetrative sexual intercourse.

6. On the issue of identity of assailants in the gang rape it was submitted that the Appellant who was an aunt to the complainant lured her to the location where the defilement took place by persons who are known to the Appellant and it is the Appellant's action and conduct that led to the defilement of the complainant.

7. Whether the Appellant had common intent with the assailants to defile the complainant, it was submitted that the Appellant went to the complainant and called her to accompany her and PW2 the mother of the complainant gave her permission.

8. That when the complainant accompanied the Appellant, she led her to meet two men who ended up defiling her. The Appellant was not happy when the complainant disclosed to accused one that she was 15 years and she reprimanded her and told her that she should have lied that she had cleared form four. It was also submitted that the Appellant was not bothered when the 1st Accused and his companion forcefully carried the complainant back to the lodging and defiled her.

9. The conduct of the Appellant led the Prosecution to conclude that having been in association with the assailants she had a common intention with them and she had planned to take the complainant from her home to the men who defiled her. The Respondents urged the court to dismiss the appeal and uphold the conviction and sentence as it was within the law.

10. The Appellants counsel on the other hand submitted that the Appellant was an aunt to the complainant and she was not in the room where the 1st Accused and the other suspect defiled the complainant and therefore could not have participated in the gang rape. They relied on the case of **DomnicOchiengOdoyo and Another Vs Republic 2015 eKLR** which spells out the ingredients of gang rape. It was submitted that although the complainant claimed that she had been hit on the head during the struggle with the assailants the Clinical Officer PW4 stated that she did not have any physical injuries.

11. The Appellant's Counsel submitted that the testimony of PW1 did not indicate that the Appellant told the complainant to take her to meet the 1st Accused or even to have sexual intercourse with the 1st accused and his friend. According to the Appellant's counsel PW1's evidence was full of contradictions and inconsistencies and that the trial court needed to treat the same with necessary circumspection.

12. The Appellant's counsel cast doubt on the character of the complainant doubting her truthfulness for reasons that she admitted she did not scream when struggling with the assailants, she did not tell the Appellant and her mother that she had been defiled. It is suggested that she ought to have screamed at the top her voice and broken windows in the room to attract the attention of the watchman when she was being forcefully defiled. It was submitted that the medical evidence was insufficient to prove the complainant was defiled and that the mere reason that her hymen was broken was not reason enough to find that she was defiled.The case of **Antony NjugunaWanjema Vs Republic [2014]eKLR** was relied upon to support this position. The Appellant's Counsel urged the court to find that the burden of proof was not discharged by the Prosecution as required by the law

13. On the issue of voir dire examination in ground number 2 the Appellant's counsel on the case of **J GK Vs Republic [2015]eKLR**where it was held that as along as a witness was below 18 years as in the present case she was a child and a ***voir dire*** examination was necessary.

14. The submission in respect to grounds 7 and 8 of the appeal were that the Appellant's defence was watertight and was not shaken by the Prosecution during cross examination. That she candidly and truthfully explained what transpired on the fateful day. That her testimony demonstrated that there was no common intention with the 1st Accused and his friend to have the complainant defiled. That it was erroneous for the trial court to frown upon the evidence of the Appellant as untruthful.

15. In regard to ground 10 of the appeal it was submitted that the sentence of 10 years' imprisonment was excessive andthat it was not guided by judicial authorities such as in the case of **EliudMuchonde Vs Republic [2019] eKLR** where it was held **"Under the current constitutional criminal justice dispensation minimum sentences are frowned upon as they take away judicial discretion."**

16. It is submitted that the Appellant is an aunt to the complainant, they live in the same compound and that the court should promote harmony in the family by reducing the sentence which she will serve within a short period and reunite with her family happily.

17. Having re-evaluated the evidence on record, for the prosecution and the defence as well as the judgement of the trial court as is mandated of the 1st appellate court, the issues for determination are whether;

a. The charge sheet was defective

b. The trial court ought to have conducted ***voir dire*** before taking the evidence of the complainant

c. Whether the evidence of the offence of gang rape were proved by the Prosecution against the Appellant beyond reasonable doubt.

d. Whether the evidence of the Prosecution was inconsistent and contradictory.

e. Whether in dismissing the Appellants explanation in defence as unbelievable the trial Magistrate was biased against the Appellant.

f. Whether the judgement of the trial Magistrate was against the weight of evidence on record

g. Whether the sentence meted out against the Appellant was manifestly harsh and excessive

18. The argument that the charge was defective for reason that the Appellant was not present in the room where the gang defilement occurred and could not have caused the 1st accused and his companion to defile the complainant is a wrong interpretation of the spirit and intent behind the enactment of Section 10 of the Sexual Offences Act No 3 of 2006 .The authority relied on by the Appellant clearly states that one of the elements of gang rape that the Appellant may not per se have committed the offence but with common intent was in company of another or others who committed the offence.

19. The fact that the Appellant did not inform the complainant that she was taking her to meet men and the fact that she did not ask her to have sexual intercourse with the said men does not exonerate her conduct. The Appellant sought the permission of the complainant's mother to accompany her to the Appellant's mother's place at the market but proceeded with the complainant to Nkubu where she met the 1st accused and his friend and after taking a ride in A1's car until late in the night she permitted A1 and his friend to defile her while she remained in the car.

20. From the evidence of PW2 the mother of the complainant while they had taken the complainant to hospital in the company of her husband and the Appellant, the Appellant called her accomplices on phone and told them that the case had become serious as the complainant had been taken to hospital. That the person the Appellant called cautioned her not to mention his name and subsequently the Appellant fled from home. She was arrested from Kiambogo by the police after about one month of hiding.

21. The trial Magistrate analysed the evidence of the prosecution and the defence and concluded that the Appellant who had secured the company of the complainant from PW2 allowed A1 and his friend to defile the complainant despite knowing her age and therefore the offence of gang defilement had been proved beyond reasonable doubt.

22. When the complainant was forcefully carried away from the vehicle by the two men, the Appellant remained in the vehicle and did not do anything an indication that she was acting with and had the common intention with the perpetrators to have the complainant defiled. The Appellant confirms that she was in the company of the complainant and that she was in company of the two perpetrators and she remained in the vehicle when the two perpetrators took the complainant back to the lodging room and defiled her. If she did not have a common intention with the perpetrators as a person in loco parentis to the complainant she could not have exposed her to the defilers and she had no reason to call A1 to tell him that the matter had become serious when the complainant was taken to hospital for treatment after the ordeal.

23. The finding by the trial Magistrate that the Appellant abetted the commission of the offence was therefore based on evidence on record and it was a proper and lawful conclusion.

24. The evidence that the Appellant claims was doubtful uncorroborated, hearsay, grave contradictions and inconsistent do not go to the root of the charge and are therefore not fatal. For instance, the claim that PW1's evidence contradicted that of PW5 who stated that PW1 was walking on her own in company of A1 and his friend contradicted PW1's claims that A1 and his friend carried her back to the lodging room as she struggled and tried to scream.PW5 confirms that he saw when a girl was being led into the lodging by the 1st Accused and his friend and PW1 says that when they left the room she did not see the person she had seen when being taken to the room. This court does not find any contradiction in the statement of PW1 and PW5 as they are in reference to two different occasions when PW1 was being led to the room upstairs and subsequently when she left the room where accused one and his friend had defiled her. The evidence of PW5 indicates that the complainant appeared as if she was being forced to go into the room as accused no 1 walked with her as the other man walked behind them.

25. The fact the PW4 said he did not observe any other physical injuries on the complainant, whereas the complainant said she was injured on the head while struggling with the assailants does not negate the fact that she was defiled and that contradiction cannot be fatal to the Prosecution's case.

26. It is not clear what truthfulness the Appellant required of the complainant when she is the one who lured her to where she was defiled and she explained that she did not tell her what transpired because she was fearing and it was late in the night in the company of the Appellant and 2 strange men. The complainant was able to inform her mother the following morning what had transpired and that is when the matter was reported to the police and she was escorted to hospital for treatment.

27. The complainant testified as PW1, the Appellant was represented by Muthomi Advocate whereas the 1st Accused was represented by Gitonga Advocate. Both Advocates cross examined the complainant exhaustively and the issue of her understanding of the meaning and importance of an oath and telling the truth in court did not arise obviously because she was of the age of 15 years and a form 2 student at Kithunguri Mixed Day School who testified in the Kiswahili Language. The issue of ***voir dire*** examination arising at his stage is therefore mala fide.

28. Section 19 of the Oaths and Statutory Declarations Act provides the manner in which the evidence of children of tender years should be taken, the court ought to establish that such a child understands the nature of an oath and evidence of such a child whether given on oath or not may be taken by the court provided the child is possessed of sufficient evidence to justify the reception of evidence tendered. Under the Children Act, a child of tender years means a child under the age of 10 years. The complainant herein was confirmed to be 15 years and there

was therefore no need to examine her intelligence or understanding of the meaning of an oath. The Appellant did not give any reason that would have made the court to doubt the capacity of the complainant whether mental or otherwise to tender evidence in court.

29. This court therefore finds that the Prosecution proved their evidence beyond reasonable doubt and the judgement of the learned trial Magistrate was based on the evidence on record.

30. In regard to the issue on whether the sentence meted out was excessive Section 10 of the Sexual Offences Act provides as follows;

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

31. The Appellant was sentenced to serve 10 years imprisonment instead of the minimum 15 years or the maximum life imprisonment. The trial Magistrate indicated that she had been guided by the case of **Jane Koita Vs Republic[2019] eKLR** and **Dennis Kibaara Vs Republic [2019] eKLR** to mete out the sentence. These two authorities guided the trial Magistrate to exercise her discretion in meting out a sentence less than the minimum provided for by the law based on the circumstances of the case and mitigation by the Appellant.

32. The Respondent's Counsel did not fault the trial Magistrate for passing a sentence that is below the minimum provided for and considering that the trial Magistrate had the opportunity to hear and see witnesses testify in court it would be wrong to interfere with the exercise of her discretion.

33. The appeal herein therefore lacks merit and the same is dismissed.

HON. ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED AT MERU VIA MICROSOFT TEAMS THIS 30th DAY OF JULY 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE