REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NOS. 161 & 192 OF 2019

ABDAALA MUTETHIA.....1ST APPELLANT

STANLEY NKUNJA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence in Tigania SO 1 of 2018

made on 10/9/2019 by Hon. G. Sogomo PM)

JUDGMENT

1. **Abdalla Mutethia** and **Stanley Nkunja Alias Msanii (the appellants)**, were arraigned before the Principal Magistrate's Court, Tigania with various counts. In count I, they were charged with the offence of gang rape contrary to ***section 10 of the Sexual Offences Act No. 3 of 2006***.

2. The particulars of the offence were that; on diverse dates between 2nd and 28th of December, 2017 at [Particulars withheld] village, Thau Location in Tigania West sub-county, within Meru County, in association with others not before court, the appellants intentionally and unlawfully caused their penis to penetrate the vagina of IK a child aged 13 years.

3. In the alternative charge, they were charged with committing an indecent act with a child contrary to ***section 11 (1) of the Sexual Offences Act No. 3 of 2006.***

4. It was alleged that on diverse dates between 2nd and 28th of December, 2017 at [Particulars withheld] village, Thau sub – location, Thau Location, in Tigania West sub-county, within Meru County, in association with others not before court, the appellants intentionally touched the vagina of IK a child aged 13 years with their penis.

5. In count II, the appellants were charged with benefiting from child prostitution contrary to ***section 15 (a) of the Sexual Offences Act No. 3 of 2006***. It was alleged that on the aforesaid dates and place, the appellants jointly and knowingly permitted IK a child aged 13 years to remain in the house of the 1st appellant and be sexually abused by different persons of the purpose for earning money.

6. Count III was deprivation of liberty contrary to ***section 18 (1) as read with Section 20 of the Children Act No. 8 of 2001.*** It was alleged that on diverse dates in the period and place aforesaid, the appellants jointly willfully deprived IK a child aged 13 years of her liberty by locking her in a house.

7. Count IV was abduction with intent to confine contrary to ***section 259 of the Penal Code*** whereby it was alleged that during the period and place aforesaid, jointly with intent to cause IK to be secretly and wrongfully confined, the appellants abducted the said IK a child aged 13 years.

8. The appellants denied the charges but after trial, they were acquitted on count III and discharged on the alternative count. They were however convicted on counts I, II and IV and sentenced to imprisonment for fifteen (15) years on count I, ten (10) years on count II and seven (7) years with hard labor on count IV. The sentences were to run concurrently.

9. Being aggrieved by their conviction and sentence, the appellants preferred this appeal based on thirteen grounds which may be summarized into two (2), *viz;* ***that the trial court erred in convicting them on uncorroborated and inconsistent evidence and that the case***

was not proved to the required standard.

10. In their submissions, the appellants contended that the trial court relied on inconsistent evidence which raised doubt in the prosecution case. That the prosecution did not prove its case to the required standard. They further submitted that the mandatory sentence against them does not conform with the tenets of a fair trial under ***Article 25 (c) of the Constitution.***

11. They relied, *inter alia*, on **Dankerai Ramkishan Pandya v. R EACA [1957], Gedion Majau Gitire Alias Kombo v. R Meru Cr. App. No. 131 of 2018 (UR), P.K.W v Republic [2012] eKLR** and **Denis Kinyua v Republic [2017] eKLR** in support of their submissions.

12. The prosecution submitted that it had proved beyond reasonable doubt all the ingredients of gang defilement and the other offences. That the conviction was merited and the sentence was reasonable considering the suffering occasioned to the victim. The cases of **Francis Matonda Ogeto v R [2019] eKLR**, **Joseph Kieti Seet v R [2014] eKLR** and **Lucia Kasisa Mulinge v R [2018] Eklr**, were relied on to support those submissions.

13. This being a first appeal, this Court it is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own independent findings and conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See **Okeno vs. Republic [1972] E.A 32.**

14. **Pw1** was the complainant. She testified that she was a standard 5 pupil aged 13 years old. That on 2/12/2017 at about 5.00 pm, she was headed to draw water when she was confronted by the appellants. They held her at knife point, blindfolded her, put her on a motor cycle and rode off with her to the house belonging to the 1st appellant.

15. They locked her in there for a month. The house was near T Secondary School next to Pentecostal Church. They raped her severally and, during that period, would also bring other men to rape her in exchange for money. The area chief came to her rescue and took her to Ngundune Police Station. She was thereafter taken to Miathene Hospital.

16. **Pw2 Geoffrey Muthomi,** a clinician at Miathene Sub County Hospital produced the P3 form for **Pw1** aged 13 years. Upon examination, her hymen was torn. No spermatozoa was seen and upon urinalysis, the epithelial cells were seen. He concluded that she had been defiled.

17. **PW3 JK,** mother of **Pw1**, recalled that on 2/12/2017 at about 5.00 pm, she returned home from work but did not find her daughter. The following day she reported to the local chief and police. About two (2) weeks later, one Judy called and informed her that **Pw1** was being held captive next to PCEA Church in Thau. With the assistance of the police at Kinoria Administration Police Camp, they went to the homestead and found **Pw1** inside the house of the 1st appellant.

18. One man fled through the window but the 1st appellant was found lying on the floor next to **Pw1**. She was naked at the time. The police arrested the appellant and escorted him together with **Pw1** to the police station.

19. **Pw4 No. 1955054531 Corporal Qunche Ali Said** of Kailitheria Administration Police Camp testified that on 28/12/2017, he was at the camp when **Pw3** came and informed them that **Pw1** had disappeared from home for about a month. Along the way, as they searched for her, they came across her and arrested her. She took them to the house she had been living in. The owner of the house who was the 1st appellant was not in so they began searching for him and found him at a nearby farm.

20. **Pw5 No 105965 PC Kasyoka Mwelu** of Tigania Police Station stated that from the Police file, **Pw1** was found in the house of the 1st appellant with the 2nd appellant. **Pw3** reported the incident on 28/12/2017 and with the assistance of **Pw4,** the suspects were arrested. The victim was rescued and escorted by police to the local hospital. She was 13 years old.

21. The appellants gave sworn testimonies. **Abdalla Mutethia (Dw1)** stated that he knew nothing about the case. That **Pw3** was a fellow green grocer whom he had differed with the previous year. In his view, the case was a fabrication as **Pw3** had vowed to fix him due to the rivalry. That his brother, the 2nd appellant was arrested when he came to court to hear his case.

22. **Stephen Nkunja (Dw2)** testified that he knew nothing about the case. That the charges had been fabricated against him when he attended court to listen to his brother's case.

23. This Court would combine all the grounds and consider them together. These are that the case was not proved to the required standard and that the evidence was uncorroborated and inconsistent.

24. The prosecution bears the burden of proving the appellants' guilt. ***Section 124 of the Evidence Act*** provides that the evidence of an alleged victim alone in sexual offences can be enough if the court is satisfied that the alleged victim is telling the truth.

25. On count I, the appellants were charged with gang rape contrary to ***Section 10 of the Sexual Offences Act*****.** In **Francis Matonda Ogeto v Republic [2019] Eklr,** the court held: -

> ***"Under section 10 of the*** *Sexual Offences Act****, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist."***

26. In this regard, all that is required to prove the offence of gang rape is that the act of rape or defilement is committed in association with someone else.

27. The evidence on record is that the complainant was 13 years at the time of the incident. She was therefore a child under ***the Children Act***. In this regard, the ingredient of the offence would be defilement. The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant. See the case of **Dominic Kibet Mwareng v Republic [2013] eKLR.**

28. With regard to age of the complainant, this can be proved by either medical evidence or other cogent evidence. This will include age assessment report, P3 form, birth certificate, clinic immunization card or positive testimony of the victim, parent or guardian of the victim. See. **Joseph Kieti Seet v Republic [2014] Eklr.**

29. In this case, the complainant told the court that she was 13 years old. This was corroborated by her mother (**Pw3**) as well as **Pw2** who examined her and produced the P3 form. The trial court which had the opportunity of seeing her did not doubt her age. Accordingly, I am satisfied that the age of the complainant was proved to the required standard.

30. As regards penetration, ***section 2(1) of the Sexual Offences Act*** defines penetration to mean *partial or complete insertion of the genital organs of a person into the genital organ of another person.*

31. The complainant told the court that she was raped severally by both appellants and other men brought to the subject house during the period in question. Upon examination, **Pw2** told the court that the complainant's hymen was torn. There was no spermatozoa seen and the epithelial cells were seen upon urinalysis. There were no other injuries that were noted. It was not alleged that the hymen was freshly torn.

32. The complainant was a 13 year old child. The prosecution evidence was that between 2nd and 28th December, 2017, the appellants and other men severally had sexual intercourse with the complainant. The appellants have questioned that if that was the case, there could have been other injuries or even a pregnancy.

33. The Court of Appeal in the case of **P.K.W v Republic [2012] eKLR** stated as follows: -

> ***"Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769."***

34. From the foregoing, absence of hymen *per se* is not prove of penetration. There has to be other corroborative evidence. In the present case, the corroborative evidence is that of **Pw2.**

35. What is of concern to this Court is the inconsistencies in the evidence of the prosecution. The complainant told the Court that it was a friend of the 1st appellant who informed her mother about her ordeal and thereby led to her rescue by the chief. She did not name that person. That chief was also not called to testify.

36. According to **Pw3,** she made a report of the disappearance of the complainant to the area chief and police on the material day. It is not clear which police station the report was made.

37. According to **Pw4** and **Pw5,** the arresting and investigation officer, respectively **Pw3** made her report on 28/12/2017. The Charge sheet shows that the report was entered as OB No. 44/28/12/2017. It is therefore clear that **Pw3** reported the matter to the police on 28/12/2017.

38. **Pw3** testified that she received a call from a lady called Judy who informed her of the complainant's location. That the said Judy had heard the complainant crying the whole night. According to the complainant, the entire period she was locked up in the subject house, her mouth was shut with a tape. How then could the said Judy hear the complainant crying? How did Judy know that it was **Pw3's** daughter crying without having seen her? There was no explanation that was given why the said Judy was not called as a witness.

39. **Pw3's** evidence was that, when she went with the police to the house in question, the man in the house heard them approach and fled through the window. The police gave chase but they could not catch him. When the police kicked down the door open, the 1st appellant was lying next to the complainant on the floor and she was naked.

40. Firstly, neither **Pw3** nor **Pw4** told the Court how many police officers accompanied **Pw3** to go search or rescue the complainant. It is incredible that the police gave chase to the man who had disappeared through the window then came back to break open the door and find the 1st appellant waiting for them in the house.

41. Secondly, the versions of **Pw3 and Pw4** on how the 1st appellant was arrested differ. It was not clear if he was arrested in the house with the complainant or in a nearby farm according to **Pw4,** they met the complainant on the way and she took them to the 1st appellant's house where they found her clothes. **Pw3** stated that the complainant was found in the house naked.

42. If the complainant was on the road, what clothing was she wearing as her clothes were allegedly found in the 1st appellant's house? Further, the complainant alleged that her clothes were full of blood, why didn't **Pw4** recover them and produce them in Court?

43. As regards the 2nd appellant, save for the testimony of the complainant, none implicated him. He was only arrested while attending Court on 13/8/2017 when the complainant was stepped down.

44. The defence of the appellants was that the case was but a fabrication. This Court tends to agree with that assertion considering the glaring inconsistencies leave pointed out above. The said inconsistencies serious doubts in the prosecution case which can only be resolved in favour of the appellants. This was a poorly investigated case, if at all there was any investigation. It was unsafe to convict the appellants on the evidence on record in view of the inconsistencies noted.

45. With the collapse of the first count the other counts cannot stand as they were all dependant on proof of count 1.

46. Accordingly, I am satisfied that the appeal is meritorious and I allow the same. The conviction is hereby quashed and the sentence set aside. The appellants are to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MERU THIS 12TH DAY OF AUGUST, 2020.

A. MABEYA

JUDGE