REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 21 & 22 of 2018

GERISHON SIMIYU MUMBWANI.....1ST APPELLANT

CYRIS SIKUKU SIMIYU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal against the conviction and sentence of Hon. D.O. Onyango-SPM in Kimilili SPM criminal case number 1685 of 2013 delivered on 18.5.2018]

J U D G M E N T

The appellants Gerishom Simiyu and Cyrus Sikuku Simiyu hereinafter called 1st and 2nd accused/appellants respectively face charge of Gang defilement contrary to section 10 of the Sexual Offences Act No.3 of 2006.

The particulars of Count 1 for 1st appellant, Gerishon Simiyu Mumbwani is that on diverse dates between 27th day of December 2013 and 29th day of December 2013 at [Particulars withheld] Village within Bungoma County with Cyrus Sikuku Simiyu intentionally caused his penis to penetrate the vagina of LI a child aged 13 years.

For 2nd accused, Cyrus Sikuku the particulars are that that on diverse dates between 27th day of December 2013 and 29th day of December 2013 at [Particulars withheld] Village within Bungoma County with Cyrus Sikuku Simiyu intentionally caused his penis to penetrate the vagina of LI a child aged 13 years.

Each of the appellants was alternatively charged with the offence of indecent act contrary to section 11(1) of the same Act the particulars being that on the said date in the same area, the appellants willfully and intentionally caused their male genital organ (penis) to come into contact with the female genital organ (vagina) of **LI** a girl aged 13 years.

The prosecution called a total of 5 witnesses. Pw1 LI testified that she is now 15 years old and a student at [Particulars withheld] Girls in Form 2. She recalled that on 26th December 2013 she went to visit a friend WN. On 27th December she left the house of W to return home. On the way 1st appellant emerged from a house not so far and got hold of her and pulled her into the house and looked it from outside and left.

She testified that at around 4.00pm 1st Appellant came back in the evening in the company of 2nd the appellant. She testified that he came into the house with food and the 3 of them ate the food. The 1st appellant forcefully had sex with her. She recalled that on 27.12.13 the 2 nd appellant tried to have sex with her but she refused. On 29.12.2013 the 2nd appellant managed to forcefully have sex with her. She recalled on 27th and 28th December 2013 the 1st appellant had sex with her while 2nd appellant was watching and they threatened her with a panga and refused to let her go home.

She recalled that they forcefully removed her clothes and inner cloths like her pant and used condoms while defiling her. On 29.12.2013 she heard a knock on the door and they asked her to hide under the bed but she refused. She recalled that she managed to open the door when she heard they were policemen and the police picked her, 1st and 2nd Appellants. She testified that she slept in the office of the police as appellants were placed in cells and she was later escorted to Naitiri hospital and later on escorted to Mbakalu police station where she recorded a statement. On cross examination she testified that she did not get permission from her mother to visit Whitney and they were not in good terms and she testified she informed the police about the condom that was used.

PW2 PC Isaac Omaria based at Naitiri AP Camp recalled that on 29.12.2013 while at work, one **I** came to report at 11.45am that hisc daughter L had disappeared on26.12.2013 from their home. He recalled that the next day an informer told them that she knew where the complainant was and they went to house. He recalled that he found the girl in the company of two men that is 1st and 2nd accused and the girl was on bed while the accused persons were wearing only under pants. He arrested them and recovered a used condom inside the house.

PW3 Michael Okumarut clinical officer testified that he examined complainant on 30.12.2013. He testified she had come with history of having been defiled by 2 persons known to her on 28th and 29th December. He testified that hymen was abscent, epithelia cells were discovered in the urine and he filled P3 FORM of complainant and produced it in court.

PW4 PC Naboth Onyango. He recalled that on 29.12.2013 a lady came and reported that her daughter had disappeared. That on the same date at 11.30am he received a report that a girl had been locked up in certain house by young men. He recalled that on 30.12.2013 they went to the house and found the complainant with the two men. He testified they escorted them to the police station and recovered used condoms too.

PW5 PC Ben Keisara testified that he is based at Mbakalo Police Station and he is the investigating officer in the case. He recalled that on 30.12.2013 at 2.40am he was at the station with PW 2 and Pw4 when it was reported that 2 men had gang defiled L. He recorded statement of L and other witnesses. He recalled that he received used condoms and clothes of the complainant which were recovered from the house of the 2 suspects.

At the close of the prosecution case each appellant was placed on his defence. DW1 the 1st appellant opted to give sworn evidence and called one witness. He testified that on 29.12.2013 policemen passed by their house and later on at night they came into his house. He stated that they were 3 policemen and the complainant. He stated that they alleged that he had defiled the girl and it is not true. The police arrested him and escorted them to Niatiri AP Camp and the next morning they were escorted to Mbakalo Police station.

DW2 Simiyu Sikuku Cyrus testified that he is based in Nakuru. He recalled that on 29.12.2013 he had come home and arrived in Kitale at 9.00PM and at arrived at home at 10.00pm. He recalled that he saw people come to his homestead. They introduced themselves as policemen. He recalled that they alleged that they had found a girl whom they were looking for. He stated that the police asked for money from him and when he hesitated they also arrested him. He recalled that they went to Naitiri AP Camp. The next day they were escorted to Naitiri Hospital and then Mbakalo Police Station. They were later arraigned in court and testified that he did not see the girl they were accused of defiling.

DW3 Isaac Mahino testified that he is a bodaboda rider from Naitiri. He recalled that he knew the accused persons and 2nd accused was his customer. He testified that on 29.12.2013 he was at home when Cyrus 2nd accused called him to go and pick him from Kimilili and he did and took him to his home. He recalled that later on they were arrested. On cross examination he testified that he picked 2nd accused and did not know where he came from.

After hearing, the Learned Trial Magistrate found that the evidence adduced by the prosecution placed the appellant at the locus in quo and hence the offence of gang defilement was committed and found the appellants guilty and convicted them accordingly. He then sentenced the appellants to 20 years' imprisonment. Being dissatisfied with the conviction and sentence the appellant appeals to this court citing the following grounds: -

1. That, the trial magistrate erred in law and fact in failing to inform the appellant of the rights contained in section 200 of Criminal Procedure Code;

2. That, the learned magistrate erred in law and fact in convicting 1st appellant while no evidence of penetration was produced; That, the trial court failed to call informer who was crucial witness in this case to testify;

3. That learned magistrate erred in law and fact in failing to comply with the provisions on section 124 of the Evidence Act and failing to avail the appellant's sister to testify;

4. That the learned magistrate erred in law and fact in relying on suspicion as opposed to evidence while evidence of PW2 and PW3 demonstrated that they never found the accused at the scene; that the learned magistrate erred in law and fact by overlooking evidence of DW3;

5. That the learned magistrate erred in law and fact in failing to find that the offence was not proved beyond reasonable doubt;

6. That the learned magistrate erred in law and fact in failing to find that there were a lot of contradiction in the prosecution evidence;

7. That the learned magistrate erred in law and fact in failing to find that there was a lot of contradictions in the evidence of PW2 and PW4;

8. That the learned magistrate erred in law and fact in failing to consider the mitigation of the appellants.

The appellants equally filed written submissions through Mr. Ocharo Advocate in which they reiterated grounds of appeal. He further submitted that the evidence of the complainant in the 2nd proceedings was a deliberately improved version. They submitted that the matter was denovo the disadvantage of the accused persons hence breach of section of 200 of CPC relying on case authority in ***Abdi Adan Mohamed Vs Republic [2017] eKLR***. They submitted that evidence in 1st proceedings was in contradiction with evidence in 2nd proceedings hence appellants should set at liberty. They submitted that there was inconsistencies in evidence of complainant, PW2 and Pw4. They submitted that the prosecution failed to call crucial witness in the case and that the police witnesses testified that the witnesses told the court that clothes victim was wearing belonged to accused sisters and it was necessary for her to confirm it or not. The appellants relied on various case authorities that they submitted that the sentence handed down by trial magistrate was excessive and prayed that the appeal herein be allowed.

The prosecution opposed that appeal and submitted through state counsel Thuo. He submitted that there was no contradictions in the complainant's case. He submitted that the complainant testified consistently at the 1st and 2nd instances after direction under Section 200 of the CPC. He submitted that allegation that crucial witness was not called to testify is untenable and that evidence of PW1 was corroborated under section 124 of Evidence Act by the evidence of the medical expert. He submitted that age of complainant was established and documents produced contrary to paragraph 7 of the 1st Appellant's submissions. He submitted that the burden and standard of proof was discharged by the prosecution and prayed that the conviction and sentence be upheld.

I have considered the evidence adduced before the trial court. This is a first appellate court. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> ***i. 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. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***ii. 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; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

Having analyzed the appeal, evidence on record and parties respective

submissions, it is my finding that the main issue for determination is whether the offence of gang defilement against the appellants was properly established beyond reasonable doubt.

The offence with which the appellants were charged was gang defilement contrary to Section 10 of the ***Sexual Offences Act*** which states:

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

Under Section 10 of the ***Sexual Offences Act***, the ingredients of gang rape are: -

a) rape or defilement under the Act;

b) committed in association with others; or committed in the company of another or others

c) 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 section. It, therefore, matters not whether the offence was rape or defilement as long as the conditions under Section 10 are found to exist.

Three ingredients are key in order to prove the offence of defilement. These ingredients are so inextricably intertwined that the absence of one is fatal to the entire case. See ***Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013*** which set them out as follows**:**

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

In this case, there was overwhelming evidence both oral and documentary that the complainant was 13 years old hence a child under the ***Children Act.*** Accordingly, the offence ingredient would be that of defilement. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

In this case there is no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 13 years at the time of the offence. The prosecution produced the complainant birth certificate that indicated the complainant's age.

As regards the identity of the assailants, the first encounter between the complainant and the assailants was at Naitiri, complainant PW1 gave detailed account as to what transpired. She testified that she was with the 1st and 2nd accused persons from 27.12.2013 to 29.12.2013 both day and night. She testified that the accused persons she had seen the accused persons before at Naitiri.

It is also evidence on record that the appellants were found with PW1, this was by evidence of PW2 and PW4, further they recovered used condoms from the house where the 3 were found. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants.

As penetration, Section 2 of the ***Sexual Offences Act*** provides that: regards

> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person***

The complainant's evidence was that 1st accused had sex with her using a condom and that she tried to stop the 2nd accused from having sex with her but he overpowered her and he did cause his penis to penetrate her. The evidence of PW3 that on examination of PW1 her hymen was missing. I find that the evidence of PW3 corroborated evidence of PW1.

Both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant's genital organs with a male genital organ since there was infection in her genitalia. This was explained in the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held:-

> ***"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane…It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."***

It is therefore clear that there was penetration of the complainant's genital organ. As regards the sentence, the section states that a person convicted of such offence is liable to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life. In **S vs. Mchunu and another (AR24/11) [2012] ZAKZPHC 6,** Kwa Zulu Natal High Court held that:

> ***"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be.***

The trial magistrate sentenced the appellant to a 20 years' imprisonment considering age of a minor that she was only 13 years the sentence is within the law. I, therefore, find that the appellants were properly convicted in the evidence and the sentence not excessive in the circumstances.

In the premises I find the appeal herein is without merit and is hereby dismissed.

Dated, signed and Delivered at Bungoma this 25th day of November 2020.

……

S N RIECHI

JUDGE