



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 86 OF 2013

ROBERT KIPLANGAT KOSGEY.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon B. Ochieng

Ag Senior Principal Magistrate dated 2nd August 2013 in Principal Magistrate's Court Kilgoris)

JUDGMENT

1. The appellant **Robert Kosgei Kiplangat alias Jabazi** (Robert) and **Peter Kipkoech Rotich alias Stima** (Peter) were charged with gang defilement contrary to section 10 of the Sexual Offences Act. The particulars of the offence are, on the 15th day of November 2011 at [particulars withheld] in Transmara East District within Narok County in association both intentionally caused their penis to penetrate the vagina of NCL a girl aged 13 years. Robert and Peter also faced an alternative charge of committing an indecent act with child contrary to section 11(1) of the Sexual Offences Act No. 3 of the Penal Code. The particulars of the offence are. On the 14th day of November 2011 at [particulars withheld] in Transmara East District within Narok County, intentionally touched the vagina of NCL a child aged 13 years with their penis. Peter is at large after being released on a cash bail of Kshs. 200,000/- pending appeal, a warrant of arrest is still in force. Each was sentenced to 20 years imprisonment. The appellant's appeal is against the conviction and sentence.

2. The appellant's grounds of appeal are as follows; that he was not supplied with witnesses statements hence he was not given a fair trial in contravention to Article 50 of the Constitution and that the prosecution failed to prove their case beyond reasonable doubt.

3. As the first appellant court I am duty bound to reevaluate the evidence, bearing in mind that I did not see nor hear the witness and render a decision (**see KARIUKI KARANJA – V- REPUBLIC [1986] KLR 190.**I will now proceed to consider the evidence adduced at the trial.

4. **PW1**, NC, a minor 13 years old, the complainant, testified that on the 15/11/2011 she was going to her father's home. She was with her brother AKR. On their way they met two people Sitima and Jabazi. They appeared drunk. She jumped into the river and slid and fell into the water Jabazi the appellant held her. He asked her if she knew him. She told him that she did. Stimia chased her brother away. She asked the appellant what she had done. He told her that he was going to kill her without doing anything to her. The appellant thereafter removed her clothes and defiled her. He removed her inner pant and after he finished Sitima also did the same. One held her as the other defiled her. She tried to scream but they held her mouth. There was blood in her inner pant and petticoat. She saw blood in her sexual organ. She felt pain in her thighs. She could not walk. It was her first time to have sex. Her brothers JN and EK went to rescue her. The 2 ran away. They went to the village elder and reported the incident. By then it was 10pm. They went home and she slept. The appellant and Stima were arrested and taken to their home and later taken to Chengena then to Soita base. They came to Kilgoris and went to hospital. She was treated. The appellant and Stima were persons she knew before. They stay in the same village and are her neighbours.

5. **PW2, JKN testified** that on the 15/11/2011at 7.00pm his brother **A** told him that his sister had been defiled by two young people and that the 2 appeared drunk. He asked **E** to accompany him. They had a torch. They met Yegon who accompanied them. **A** led them to the place. They found his sister down with the 2 accused persons. One held her mouth and the other was raping her. The 2 saw them and ran away. She was injured. She cried a lot. He saw them well using his torch. They are their village mates. Her sister gave them the names of the two Jabazi and Stima. They went to the village and then the chief took them to look for the 2. Stima was arrested by neighbours, he led them to the appellant. They found the appellant asleep at a neighbours. PW1 identified them. They took PW1 to hospital. The 2 were arrested.

6. **PW3 AKR**, a minor 15 years testified that on the 15/11/ 2011 he was with PW1, his cousin. When they reached Sabet she wanted to jump into the river. He was behind her. Her shoe remained and she went for it. He jumped to the other side and met Robert and Peter. Peter walked along with him. Peter had a nut rungu. Peter warned him not to do or say anything. He wanted to know why PW1 remained behind. Peter told him not to worry. Peter went back. He remained where he was. Robert approached him, he saw what appeared to be sword raised by Robert in a position to attack him. He took off running. He met **J** and **E** and told them what was happening. He led them to where he had left the girl. They did not find her. It was 9pm. They used torches to search for her, they split into two. They found the girl with **E**. She told them

how the 2 had defiled her. They reported the matter to the village elder. Later he learnt the 2 had been arrested. He knew Peter and Robert.

7. **PW4** Joseph Langat testified that on the 15/11/2012 he found the complainant and Okwala home they had been sent for fees. He asked to go to school. The next day he got a call that the complainant had been defiled. She mentioned the Robert and another. Both stay within the area.

8. During cross-examination he stated that PW1 was his daughter she was born about 1996, he did not witness the defilement.

9. **PW5** Shadrack Kiplangat Kirui, an assistant chief of Mogondo testified that on the 15/11/2011 at 10.00pm he was informed that a girl had been raped. He arrested Peter and Robert. They were taken to Soit Patrol Base and were later taken by the police. The 2 are from the sub-location. He saw the girl she was bleeding and was weak. They recovered her clothes which were torn and had blood.

10. **PW6** No. 65947 PC Joseph Mulinge the investigating officer recalled on the 16/11/2011, he went to Soit Patrol Base where he met the complainant and the 2 accused's persons. He was informed by PW1 that the 2 had defiled her. On the 17/11/2011 PW1 was examined and her age was assessed. He retained the biker she had been wearing it was soaked with blood. He recorded their statements.

11. **PW7** Robert Mutula a senior medical officer attached to Logorian testified that on the 17/11/2011 he examined PW1. She had bruises and hyperemic labia minora. Her head was bruised and her hymen had tears with blood clot. She was anxious and looked frightened. Her urine had pus cells. The high vaginal swab indicated yeast cells and pus cells. He made a report of forceful penetration and trauma.

12. During cross-examination he stated that PW1 had been treated by a clinical officer in Transmara before he examined her. The hymen was freshly broken. He did not examine the accused persons.

13. **PW8** Doctor Julius Munyendo filled PW1's age assessment report on the 4/12/2011. After the examination he concluded PW1 was 14 years of age.

14. The appellant gave a sworn statement when put on his defence. He stated that he is Kiplangat Koskei. On the 15/11/2011 he was arrested. He does not know anything about this case. He never did it. He never knew the girl before. He was attacked at the time of his arrest and taken to Soit Patrol Base.

15. The appellant's co-accused Robert too gave a sworn statement. He stated that He is not called Peter Kipkoech Rotich. That his names are Kiprono Rotich Collins. He has no alias name Stima. That on the material day he was visiting his friend Paul San at Koisakat. He was there up to 7.30pm. On his way home he met the chief and many people. He was arrested by the chief and the 5 persons. He was not taken to hospital for examination.

16. **DW3** Nehemiah Cheruiyot Koskei testified he knows Robert. That on the 15.11.2011 he was with Robert, they had lunch, went back to the shamba and later had a bath. They ate supper and went to sleep. People arrested Robert. They did not explain. He does not know why Robert was charged.

17. In his written submission the appellant Robert submits that the prosecution did not prove their case beyond reasonable doubt. That he was not facilitated with the documents and statements to facilitate preparation of his case hence he was not accorded a fair trial in contravention to Article 50 of the Constitution. That the trial magistrate erred in law in not affording him an opportunity to be represented by an advocate. That there was massive contradiction in the prosecution evidence. that the trial magistrate erred in law and fact by not considering the state of appellant at the time of his arrest that it was the prosecution evidence that he was drunk and was not in a state of mind to comprehend what was going on. That no samples were taken from him for testing.

18. Mr. Otieno for the State in response submitted that; the appellant was identified by the complainant as one of the two people who defiled her. She was with PW3 who saw the appellant with his colleague, PW3 left the 2 with the complainant. That PW2 also saw the appellant and his co-accused with the complainant. Identification of the appellant was proper. PW7's evidence confirmed there was defilement. That the appellant had ample time to get a lawyer to represent him and that during the hearings he confirmed that he was ready to proceed. That his appeal against the conviction and sentence should be dismissed

19. The offence of gang defilement is provided for under **Section 10** of the **Sexual Offences Act, 2006** 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 than fifteen years but which may be enhanced to imprisonment for life.*

20. What the prosecution must prove in a case of gang defilement is that it was committed in association with two or more persons. The ingredients of defilement as per the Sexual Offences Act are set out in **Section 8** of the **Sexual Offences Act, 2006 (the Act)**;

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

21. Before I consider whether the prosecution did prove its case beyond reasonable doubt, I will consider the issue raised by the appellant that he was not given a fair hearing. The appellant was arraigned in court on the 17/11/2011. After his plea was taken he was offered bond/cash bail. The trial began on the 25.11.2011. Sometime during the trial in April 2012, the 2nd accused engaged a lawyer. The appellant never informed the court that he too wished to engage a lawyer. He opted to proceed without a lawyer I do not find that his rights were infringed. The 2nd issue he raises is that he was not given any statements and documents. I have carefully perused the court record and I note that the

appellant fully participated in the proceedings, he was able to cross examine each witnesses and I note that he followed the proceedings all through. His submission that he was not accorded a fair hearing has not merit.

22. The next issue is whether the prosecution proved its case. The evidence adduced shows that the complainant was 14 years old. PW8 who examined PW1 confirmed she was 14 years old. The next issue is whether there was penetration. PW1 gave clear evidence on how she met with the appellant and one Peter his co- accused. The appellant held her removed her clothes and defiled her. He removed her inner pant. Her evidence was that after Robert finished Peter who had returned after chasing away PW3 too defiled her. Her evidence was that she saw blood from her sexual organ and felt pain in her thighs. PW1's evidence on how they met the appellant and Peter was further corroborated by PW3 who with her and also PW2 who joined the team who went in search of PW1. PW3 left PW1 with the appellant and Peter and on returning they found her defiled. PW2 testified that as they approached the area he had a torch and he saw one of the persons holding PW1's mouth and another raping her. PW1 was able to identify the two as Jabazi and Stima, the appellant and his co-accused. There is also the evidence of PW7 the medical officer who examined PW1 his examination revealed that PW1 had bruises and hyperenic labia minora, her hymen was torn and there was blood clot, the vagina had a smelling discharge. The high vagina swab indicated yeast cell and pus cells. He made a report of forceful penetration and trauma. This evidence further corroborates PW1's evidence. Her evidence was sufficiently corroborated by the evidence of PW2, PW3 and PW7. PW1's evidence is clear on how she was defiled by two person, this brings the case within the provisions of **Section 10** of the **Act**.

23. As to the issue of identification. PW1's evidence was that her assailants were persons known to her. The incident happened in the early evening. They talked to her. This was a case of recognition. In **Anjononi & Others vs. Republic [1980] KLR 59** the Court of Appeal held that evidence of recognition of a suspect is more assuring and reliable than identification of a stranger, however it must be examined carefully to avoid miscarriage of justice due to mistaken identify. PW1 not only recognised her assailants but was able to name her assailants to those who went to rescue her. It was early evening and she was able to see them. Further she spent time with them and their close proximity leaves no doubt in my mind that appellant was properly identified by PW1. PW3 who was with her was able to identify the appellant and his co-accused.

24. The appellant in his defence stated that he was merely arrested from his house and he did not do it. In considering his defence the trial court observed that the appellant gave a defence of alibi, however he was satisfied that the prosecution had proved its case. The appellant never raised a defence of being drunk. It was the evidence of PW1 that the 2 appeared drunk. **Section 13(1)** of the **Penal Code** provides as follows as concerns the defence of intoxication;

“13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such commission.

3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account in determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”

As already stated the appellant did not raise a defence of intoxication. He cannot find refuge in any of the provisions of section 13 (2) of the Penal Code. The evidence of PW1 clearly shows that the appellant and his co-accused knew what they were doing. There is no law that the appellant too had to undergo a medical examination. The defence raised by the appellant put against the strong evidence of the prosecution witnesses cannot stand. I find that there was no contradiction in the evidence of the prosecution witnesses. The evidence adduced was consistent and clear on the events of the material day. I affirm the conviction.

25. The evidence adduced proves that the appellant and his co-caused acted together with a common intention and defiled PW1a minor aged 14 years. They were so brutal to her. The minimum sentence for the offence of gang defilement is 15 years which can be enhanced to life. In my view the sentence of 20 years is adequate in the circumstances of this case. I therefore affirm the conviction and sentence. The appeal has no merit and it is dismissed.

Dated signed and delivered at Kisii this 23rd day of April 2019.

R.E. OUGO

JUDGE

In the presence of;

Appellant Present

Mr. Muhindi Counsel for the Prosecution office of DPP

Rael Court clerk.