REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.27 OF 2018

(Appeal Originating from Nyahururu CM's Court Adult Cr.No.2834of 2014 by: Hon. A. Mukenga – R.M.)

PMN.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

This is an appeal arising from the decision of Hon. Mukenga (R.M.) in *Cr.Case No.2834/2014* dated 20/7/2016.

The appellant, PMN was charged with two others for the offence of gang defilement contrary to Section 10 of the Sexual Offences Act.

The particulars of the charge are that on 2/12/2014 within Laikipia County unlawfully and intentionally in association with Duncan Gitonga Wanjiru caused his penis to penetrate the vagina of LNM, a girl aged 15 years.

In the alternative, the appellant faced a charge of indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act.

He was found guilty and convicted of the main charge and sentenced to serve 15 years imprisonment.

Being aggrieved by the said conviction and sentence, he has filed this appeal through the firm of Waichungo Advocates. He raised the following grounds of appeal:

1. ***That the trial magistrate erred in finding that the appellant was 18 years at the time of commission of the offence;***

2. ***That the trial magistrate erred by sentencing the appellant to 15 years when he was a minor;***

3. ***That the court erred by convicting him on uncorroborated evidence of the complainant;***

4. ***That the trial magistrate erred by relying on the evidence of Dr. Karimi who did not physically examine the complainant;***

5. ***That the trial magistrate erred by believing the complainant's evidence.***

The appellant therefore prays that the court do quash the conviction, set aside the sentence and set him at liberty.

This is a first appeal and it is the duty of this court to examine and analyze all the evidence that was tendered before the trial court to establish whether indeed the offence was committed. This court has to however make some allowance because it did not see or hear the witnesses testify; a chance that the trial court had. I am guided by the decision in *Okeno v Republic (1972) EA 32*.

The prosecution called a total of five witnesses in support of their case. When called upon to defend himself, the appellant called a total of three witnesses.

PW1 LNC alias M who was then aged 16 years recalled that on 2/12/2014 about 6.30 p.m., her mother (PW2) sent her to Patrick's (the appellant) home to go and tell him to go to the shamba (farm) on 3/12/2014. She found accused with Duncan, Gideon and another man; that Duncan who was seated near the door pulled her into the house, then the appellant grabbed her and the other 3 left the house. She was left with Patrick who demanded sex with her; that he removed her pants and had sex with her; that Dan came and also demanded sex. The other three did not have sex with her; that Patrick had sex with her 3 times and left the house; that Duncan came and had sex with her and when on 2nd round, he said Gideon would also have; that PW2 arrived and found Duncan in the act and he ran away. Her mother also beat her and

took her to Nyahururu Police Station. They were sent to hospital. The next day, the mother got police to arrest the appellant and Duncan. PW1 said that she lived in the same plot with the appellant but they threatened her not to raise alarm.

PW2, EC is the mother of PW1. She sent PW1 on 2/12/2014 about 6.30 p.m. to tell Dan and Macharia that they would go to the farm next day and when she did not return after 30 minutes, PW2 went out to look for her. PW2 found the appellant at his door and asked for PW1 and he told her she was at Wambui's place. PW2 did not find PW1 at Wambui's place. She met the appellant but the door to his house was closed but the padlock was not locked and she opened it only to find Duncan on top of PW1; that Duncan had dropped his trouser to the knees. She beat him and he ran out. She also beat PW1 for not raising alarm but she claimed to have been threatened.

Dr. Karimi (PW3) examined the complainant on 3/12/2014 and found that she had bruises over the vaginal wall, hymen was missing though not fresh. There were scanty blood stains over vaginal entrance. High Vaginal swabs revealed that there were blood cells in keeping with the bruises over the vaginal wall. There were no spermatozoa seen. She was treated. PW3 formed the opinion that the complainant had recent forceful penetration within the past 24 hours, maximum.

PW4 Joseph Murage Waithaka, the Chief of Maina Village recalled having accompanied PW2 to the plot where they reside where PW2 showed him the house which was locked from outside. She got the key from another person who had the key and inside, found Dan and the appellant whom he knew very well. He called police to pick them up.

PW5 Sgt. Ann Mwikali received the complainant and her mother at the police station on 2/12/2014 and they made a report of defilement. She referred PW1 to hospital. He later found the two boys locked in a house by the chief and rearrested them.

In his defence, the appellant stated that he was a student at [Particulars Withheld] High School in Kiambu in Form Two; that he woke up at 5.30 a.m. on 3/12/2014, his former classmate visited him so that they could revise together. At 6.20 a.m. he went to buy milk and met the area chief at his gate. He found his friend had left, got the key from a neighbor. The chief searched his house but found nothing. The chief came back after 15 minutes with a tenant and locked him up there. After another 15 minutes, he brought Gideon to the appellant's house and later they were arrested and took them away with the care taker of the plot; that in 2010 – 11 the caretaker of the plot had had a relationship with PW2 which ended acrimoniously and that is the cause of the grudge between them.

Mr. Waichungo filed submissions which he highlighted. He submitted that there was no proof of penetration because the complainant did not state whether the appellant ever inserted his male organ into her female organ; that PW1 merely said that she had sex with the appellant; counsel sought reliance on the decision of *Peter Ngari v Republic Cr.A.231/2010 (Nakuru)* where the court held that rape is a legal term and the prosecution had an obligation to lead evidence to prove the same. In *Salim Hamisi Cr.A.1/2018*, the court held that sex is not synonymous with penetration.

It was also submitted that the Doctor was not the maker of the P3 and PRC forms and the appellant never gave his consent to have them produced in evidence. Counsel also submitted that though examined the same day, no spermatozoa was found. Counsel further submitted that the complainant admitted to having engaged in sexual acts before and there is doubt that she was defiled; that the appellant was not found in the act but at the gate of the plot.

Counsel also submitted that the complainant never sought help or raised alarm or attempted to rescue herself. Counsel urged that the appellant was not caught in the act.

As regards sentence, Mr. Waichungo submitted that the appellant was a minor at the time of arrest; that he was 17 years old and had to be remanded at police station; that the court obtained an age assessment but the relevant age was as at the time of arrest; that the appellant should be sentenced to the term already served and be released or be sentenced under Section 191 of the Children's Act.

Ms. Rugut, learned counsel for the State opposed the appeal.

On whether the offence was proved, counsel submitted that the Doctor's evidence demonstrated that there was penetration because there were bruises on the complainant's vagina which was evidence of recent forceful penetration. She urged that lack of spermatozoa is not evidence of lack of penetration as there may have been no ejaculation.

As to production of P3 form, Dr. Karimii examined the complainant and filled the P3 form and the appellant never objected to its production.

Ms. Rugut also submitted that in *DCK v Republic Cr.A.184/2009 (Nyeri)*, the court held that once an accused had attained age of majority, the court should sentence in any legal manner and that must be what the court did and the sentence should not be interfered with.

I have duly considered all the evidence on record, the grounds of appeal and the rival submissions of counsel.

Under Section 10 of the Sexual Offences Act, the ingredients of gang rape are; rape or defilement under the Sexual Offences Act; committed in association with others or committed in company of another or others who commit the offence of rape or defilement with a common intention.

It therefore means that an offence of defilement if committed with a common intention, notwithstanding the fact that the appellant did not take actual part is gang rape/defilement.

No doubt there is overwhelming evidence on record that PW1 was a minor at the time this offence was allegedly committed. PW1's birth certificate was produced in evidence. She was born on 27/5/1999. As of 3/12/2014, she was 15 years old and therefore a minor.

One of the ingredients to be proved in a charge of defilement is penetration. Penetration is defined in Section 2 of the Sexual Offences Act as *"the partial or complete insertion of the genital organs of one person into the genital organs of another person."*

In her testimony, PW1 said of Patrick the appellant, *"I was left with Patrick who said I must have sex with him. He removed my pants and had sex with me. Dan also came… Duncan also came in. He also had sex with me the first time."*

The complainant never told the court exactly what Patrick did to her and whether he inserted his genital organs into hers. PW1's description that she had sex with the appellant and another does not tell the court much. The word sex may be used to mean different acts which are different from what is defined in the Sexual Offences Act. I am guided by the decision *M. Salim Hamisi (Supra)* that sex is not synonymous with penetration:

> *"The evidence by PW1 in this regard is that she had sex with the appellant in a bush between the Madrassa and her home on two occasions. There was no specific evidence given by the said witness as to any penetration by the appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as whether defilement occurred or not."*

On her part, PW2 said that she found Duncan defiling PW1. She also stated that she found Duncan on top of her daughter. Again that does not disclose whether or not there was penetration. PW1 was examined by PW3 on 3/12/2014 which was soon after the alleged defilement. He did not trace any spermatozoa in the vaginal swab but found bruises on the vaginal entrance. The doctor found that there was vaginal penetration but could not tell what was used. He could only guess. Although there was evidence of penetration of PW1, there was no evidence as to what was used to penetrate her, was it penal penetration or by other means.

In the end, I come to the conclusion there was not proof of penetration of PW1 by the appellant's genital organ and I find that the offence of defilement was therefore not proved.

PW1 was alone when she was allegedly set upon by the appellant, and another in the appellant's house. PW1 was not a stranger to the appellant. PW2 who had sent PW1 to the appellant's house followed her and found Duncan on top of the complainant and had pulled his trousers to his knees. PW1 did not tell the court exactly what the appellant did or that he caused his genital organs to come in touch with her genital organs as pleaded in the particulars of the alternative charge. Again, I find that the evidence on record does not support the commission of the alternative charge.

In Sexual Offences, the prosecution must lead evidence that support the particulars of the charge and the court can also seek clarification as to what was meant by the term 'sex' which the court did not do in this case. It cannot be left for the court to presume or imagine what exactly took place.

In the end and for reasons stated above, I find that the trial court erred in finding the appellant guilty of the main charge of gang defilement nor is there any evidence to support the alternative charge. I find no need to consider the other grounds raised on appeal. The conviction is unfounded and it is hereby quashed and the sentence set aside. The appeal succeeds.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at *NYAHURURU* this *31st* day of *October,* 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – State Counsel

Ms. Wanjiru Muriithi – for appellant

Shihundu – court assistant

Appellant - present