REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 47 OF 2016

ELVIS OMONDI ……………………………………………………………………… 1ST APPELLANT

JACKTON ONYANGO ……………………………………..……………………… 2ND APPELLANT

ISAIAH ODHIAMBO ………………………………...……………………………. 3RD APPELLANT

VERSUS

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

[Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu

(Hon. P. L. Shinyada SRM) dated the 26th September 2016 in Kisumu CMCSOC No. 3 of 2013]

JUDGMENT

The appellants were sentenced to fifteen years imprisonment for gang defilement of a child aged 12 years Contrary to Section 10 of the Sexual Offences Act. They were charged in separate counts for defiling the child **D R O** at [particulars withheld], Kisumu on 28th March 2013.

Being aggrieved they filed this appeal on grounds that crucial witnesses and exhibits were not produced to corroborate the evidence of PW3, that PW1 was coached, that her evidence was inconsistent, that the charge was defective and that the Trial Magistrate did not comply with Section 200(3) of the Criminal Procedure Code and further that the medical evidence was insufficient.

At the hearing of the appeal they purported to rely on amended grounds of appeal but as they had not sought the leave of this court the same shall be disregarded. They also had written submissions upon which they all relied. They also submitted orally.

The appeal was opposed with Prosecution Counsel Miss Chelangat submitting that the charge against them was proved to the standard required.

As expected of the first appellate court I have re-evaluated the evidence adduced during the trial so as to come to my own conclusion while bearing in mind that I did not have the benefit of observing the demeanour of the witnesses.

The record shows that on 4th February 2016 the Trial Magistrate who eventually heard, convicted and sentenced the appellants complied with Section 200 of the Criminal Procedure Code (see page 79 of 111 of the typed proceedings). That ground cannot therefore stand. The record also shows that the appellants were charged on separate counts on which date of arrest is 11th April 2013. The ground that the charge is defective and the submission that they were already in custody does not hold either.

It is however my finding that whereas there was sufficient evidence that the complainant was in fact

kidnapped and that during that period she was defiled, there was no evidence sufficient to convict the appellants for the offences of gang defilement. From her own evidence she was kidnapped by several people – at times she said they were four and at times many. One would understand her state of confusion given the ordeal she went through. It was also her evidence that when she was taken to [particulars withheld] she was unconscious and that when she became conscious she heard people telling her mother she was dead. In the same breadth she said those people had covered their faces. She also testified that her eyes were covered and when her legs and hands were tied she could not see the person who did it. Regarding the defilement she testified that she knew she was defiled because she felt somebody on top of her. She stated however that there were many people and she could not tell how many of them raped her. She kept repeating that her eyes were tied. It is therefore surprising that at one point she says they were not covered properly. The other surprising thing is that she refers to the 2nd and 3rd appellants as Oria and Ojode whereas those are not the names given to them in the charge sheet. This is crucial given the evidence that the 2nd and 3rd appellants were arrested when they went to the police station to demand the release of the 1st appellant. There is no other evidence to connect them to the offences they were charged with and more importantly the prosecution did not tender evidence to demonstrate nexus between them and the Oria and Ojode the complainant spoke about. It is doubtful that she could have identified her abductors with her eyes covered or with their faces covered as she alleges they were.

Section 124 of the Evidence Act provides that the court can convict on the evidence of a victim of a sexual offence alone provided it is satisfied she is telling the truth. In this case while the complainant may have told the truth she was herself not very sure of the identity of the perpetrators of this heinous crime. It was therefore encumbent upon the prosecution to adduce evidence to prove beyond reasonable doubt that the appellants were the perpetrators. The evidence of **PW5** (Clinical Officer) other than confirming the complainant was sexually assaulted does not shed light on who did it. I find this to be one of the cases where a forensic investigation should have been carried out. The complainant suffered defilement by her abductors for close to three weeks and as she was not sure who defiled her the prosecution should have taken the investigations more seriously. The evidence brought to court falls short of proving the case against the appellants beyond reasonable doubt. One would also wonder why the prosecution omitted to charge them with kidnapping.

The appeal has merit. It is allowed. The conviction is quashed and sentences are set aside and the appellants should be released forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered at Kisumu this 25th day of January 2018

E. N. MAINA

JUDGE