REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NUMBER 94 OF 2016

ANTONY NDERITU KUYU..APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was jointly charged with another for the offence of gang defilement contrary to section 10 of the Sexual Offences Act number 3 of 2006.It was alleged that on the 4th day of January 2015 at around 2 PM within Muthinga area in Nyeri County, in association Joseph Mwiruri Muriithi, intentionally and unlawfully caused his penis to penetrate the vagina of INW a child aged 13 years.

In the alternative he was charged with the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act number 3 of 2006.

It was alleged that for the day of January 2015 at around 2 PM at the same place, intentionally touched the maintainer of INW a child aged 13 years with his penis.

In the span of 2 years that the matter was court, it was heard by 3 magistrates, the HON. S. NGUNGI PM, PW1 TO PW6, HON ORIMBA PM, PW7 AND PW8, HON P. MUTUA PM, recalled PW7 AND PW8, heard the defence wrote and delivered the judgment. The appellant was not represented.

The complainant who was the PW1 gave unsworn evidence.

Her evidence was that on the material date at about 2:00pm she was on her way to a place called Muthinga when she found the appellant and another seated near a bridge, where she was passing. The two grabbed her by her hands and took her to the nearby maize plantation. Apparently there were some children passing by and upon seeing them the other ran away leaving the appellant who now dragged the complainant into the maize plantation, removed her trousers and pants and touched her vagina repeatedly. She was screaming and crying. Some people came and arrested the appellant and began to beat him.

On the same date at 4:00pm no 45323 PW7 CPL Leonard Wamalwa was at Muthinga Police Patrol base when the complainant was brought by five people, one of who was PW3 JOHN MWANGI the chairman of Nyumba Kumi who also brought in the two suspects the appellant and one Muiruri. He reported that the *victim was found in the maize plantation with the suspects*. The victim could not talk. He re-arrested the suspects, placed them in cells and accompanied the victim to hospital. She was examined and it was confirmed that she had been defiled.

Later the complainant told him that she was on her way to Othaya when two men grabbed her, dragged her into a maize plantation, *where the appellant defiled her*. She also told him that there were two boys swimming nearby who saw what transpired. He recorded the statements of the two boys. He recorded the statements of complainant and her mother and other witnesses. He visited the scene and drew a sketch plan.

During his testimony he told the court that the two boys, J M PW4 and E PW5 who had allegedly witnessed the incident became hostile witnesses during the hearing. He proceeded to produce their statements Ex 4(a) and 4(c). He also produced a sketch pan as Ex 3. He marked the complainant's pant as MFI 7.

J M testified as PW4. At the material time he was 16 years old and a form 1 student at school in Nyeri. He was swimming at Gura bridge with his brother E and T and J when he saw the appellant and Muiruri seated next to the bridge. He and his brothers swam for about 30 minutes. Then one MAINA came and told them to go home which they did. The said MAINA led them to place where they found two motorcycles and some people. The appellant and Muiruri were on one of them. He and his brother E were told to board the other one. They were taken to the police station where they were interrogated.

PW5 E K was 13 years old at the material time. He testified on oath. He told the court he did see the appellant and the co accused at the bridge but they then left. He denied stating in his statement that he had had seen them take the complainant into the maize plantation.

PW3 JOHN MWANGI KABUE told the court that he was the Chairman of Nyumba Kumi. He was rang at 2:00pm on 4th January 2016 on his phone by one MAINA who told him that two men had been spotted taking a girl into the maize plantation. He was given the names Antony and Muiruri. That Antony had been caught but Muiruri had escaped. He knew a Muiruri who was his neighbour. He went straight to his home, found him outside the house, 'arrested' him and took him to the maize plantation where they found the appellant and some villagers who informed him that some children had called them and told them that Antony and Muiruri had taken a child into the maize plantation. He did not find the complainant at the scene.

PW6 SIMON KIRIMI MUTEGI testified that on the 4th January 2015, some children, M and E went and told him and one MAINA that a girl had been taken into the maize plantation. They went there and found the men, Tony Nderitu and Muiruri. They found Antony with the girl. The two were just seated. They interrogated them. Antony told them that the girl was with a man who had wanted to defile her. He identified that other man as Muiruri. The girl told them that Antony had taken her into the maize plantation. She told them that nothing had been done to her. They told the girl to go home. MAINA called PW3. He came and they went to interrogate Muiruri who disclosed that he had been with the girl.

PW8 DR. GOR GORDY from NYERI REFERRAL HOSPITAL testified on behalf of his colleague DR. KARANJA and produced the P3 on his behalf. He said the P3 was for INW aged 13 years' old who complained of having been taken into a maize plantation and defiled in turns by two men known to her, Antony and another whom she could not remember. She screamed and people came to her rescue.

On examination her hymen was freshly broken and bleeding, there was whitish discharge in her stool, there was a vaginal swab for spermatozoa. The Dr. concluded it was defilement and filled the P3 on the 6th January 2015.

On cross examination he said her clothes were dirt, her external genitalia was normal and the hymen could be broken by other means other than penetration, but the doctor confirmed full penetration. He said there was bloody white discharge.

PW2 was the victim's mother. Her testimony was that on the material day she took her daughter to her grandmother's home in Karima and returned to Mweiga. Later that day at midnight she received a call from one MWANGI, a member of Nyumba Kumi to the effect that her daughter had been defiled. The following day she went back and together with the police officer took her to PGH where she was examined. She identified the P3 in court and produced her daughters certificate of birth showing that she was born on the 13th February 2001.

The appellant was put on his defence and he gave sworn statement of defence.

He told the court that on the material day he was not anywhere near the alleged scene of crime as he had gone to Kutus to deliver cabbages for one Stephen Nigari. That this case was a frame up by one K the husband of his ex-wife, and on the date he was arrested that, the said Kahiu confronted him while in the company of PW2 who testified as the mother of the complainant. He denied having committed the offence. He denied any knowledge of the victim na testified that those who said he was at the bridge at the material time lied.

In his judgement delivered on the 9th December 2016, the last trial magistrate acquitted both accused persons of the offence of gang rape, acquitted the second accused of the alternative charge of Indecent act with a child, and found the appellant herein guilty of the alternative charge of indecent act with a child c/s 11(1) of the Sexual Offences Act and sentenced him to 10 years' imprisonment.

Aggrieved by the magistrate's findings, the appellant filed five ground of appeal. That the trial magistrate erred in both law and fact;

1. in failing to critically evaluate the evidence of PW1, PW4, PW5, PW6 which was inconsistent and contradictory

2. convicting and sentencing the appellant without due regard that a crucial witnesses called MAINA called PW 3 was not availed in court to testify which was contrary to the law

3. by convicting and sentencing the appellant yet he rejected the sworn defence of the appellant without cogent reasons for doing so, which had exonerated the appellant from the alleged offence

4. by convicting and sentencing the appellant by basing his findings on the evidence of the PW7 who was the investigating officer in this case, despite having done shoddy investigations

5. while convicting and sentencing the appellant and failing to note that the leading prosecutor had special interest in the case

Filed with these were his written submissions on which the he relied on during the hearing of the appeal.

Ms. Jebet appeared for the state and opposed the appeal through oral submissions. She submitted that the appellant was placed at the scene by the complainant and witnesses. That the witnesses turned hostile and their statements were produced as evidence by the prosecution. That the court relied on s. 124 of the evidence Act in accepting the complainant's evidence.

I have carefully considered the evidence on record, the submissions by the appellant and the state and the judgment by the' trial' magistrate.

It is important to point out that when such a matter where the evidence garnered from the observation of the witnesses especially the complainant is crucial, the trial by numerous judicial officers results in the loss of that evidence. This is because, the judicial officer who wrote the judgment never heard, saw the complainant.

The magistrate relied heavily on the evidence of the other witnesses in as far as the connection of the appellant with the offence. That both

accused persons were at the scene, 2nd accused ran away, 1st accused repeatedly touched the victim's vagina, and that he was arrested at the scene.

It is clearly evident from the record that the only alleged eye witnesses to the alleged dragging of the complainant into the maize plantation by the appellant and another, denied it during the hearing. It is noteworthy that the prosecution did not attempt to have them declared hostile witnesses neither did they seek to cross examine them. The evidence they gave on oath was unchallenged by the prosecution. In fact, the prosecution adopted a procedure unknown to the law of evidence: producing the two statements of PW4 and PW5 without first putting the statements the makers. By failing to do so, the prosecution lost the opportunity to establish that the two witnesses had indeed turned hostile, or that they were recanting what they had recorded at the station with ulterior motives. There is nothing on record to that effect, except the feeble attempt by the I.O the produce the statements.

Hence the testimony of the two witnesses that they did not see the appellant and the said Muiruri do anything stands as it is being not tested on oath.

It is also noteworthy that the testimony of PW3 is all hearsay. He was told by MAINA- which MAINA was never called to testify as to how he learnt that two persons by the names Antony and Muiruri had taken a girl into the maize plantation.

He does not state how he even knew that the Muiruri name he had allegedly been given by Maina was that of his neighbour but for some reason he went straight his neighbour's house and arrested him

At the scene he found some **unnamed villagers.** They told him about some **un named children** who told them that the appellant and Muiruri had taken a girl into the maize plantation. Now this is the chairman of Nyumba Kumi. Why would the key people- Maina, the villagers and the Children not come to court to testify?

According to PW6 it is PW4 and 5 who told them about the appellant and the girl.

He said that when he went to the scene he found the complainant seated with the appellant. How likely is that yet the complainant had told the court that her screams had brought villagers to her rescue? Secondly, that the appellant pointed an accusing finger at Muiruri. Most importantly this witness told the court that upon interrogating the girl at the scene she told them that **nothing had been done to her.** On cross examination by the second accused he also changed his story and said that it was the girl who had implicated him**.**

The issue then is whether on the evidence on record, the conviction is sustainable.

The complainant was 13years old at the time of the alleged offence. She dropped out of school at class 5. This is what she stated;

> *'I met Antony and Muiruri sited (sic) near there. …Both pulled me by my hands and took me to a maize plantation. Muiruri saw some children pass by and he ran away. Antony was left. He held me by my neck and I started screaming. I was seated. People gathered and found him. Antony was arrested as well as Muiruri. I was taken to hospital and treated. At the maize plantation, Antony removed my pants and trousers.* ***He touched my vagina repeatedly****. I screamed and I started crying. Some two boys came. They were by the river. They saw him taking me and they went and called other people who came. One arrested Antony and started beating him. I wouldn't know from where Muiruri was arrested.* ***Antony did not do any other thing apart from touching me with his hand.***

<u>Placing the appellant at the scene</u>

The complainant testified of some children and two boys who were at the river. She states that one of her assailants saw children and ran away. These children are un named. PW3 the Nyumba Kumi chairman who arrested the two and even collected evidence from the scene never identified the children who allegedly caused Muiruri to run away. Neither did the I.O, who said he visited the scene, trace them to corroborate this piece of evidence as it was crucial in placing the appellant and his co accused at the scene. They would remember seeing two men dragging a girl into the maize plantation and one of the men running away.

The complainant also stated that two boys responded to her screams and went to where Antony was touching her vagina, and then called villagers. These two PW4 and PW5 denied doing so. According to the I.O they became hostile witnesses. He produced their witness statements, without any basis having been laid for the same; they were never put to the witnesses in cross examination, the same cannot be relied upon as the makers are already unreliable witnesses. In addition, the Maina who called PW3 did not testify. Hence the evidence that some people saw the appellant and another drag the complainant into the maize plantation and called for help is not substantiated as it remains hearsay.

According to the case for the prosecution the two persons who arrived at the scene first were PW3 and PW6.

According to PW6 he and another arrived first after having been called by PW4 and PW5. They found both the appellant and his co accused at the scene. The appellant was seated with the complainant.

According to PW3 when they got to the scene the complainant was not there. He just found Antony – the appellant and some villagers. He went and arrested the appellant's co -accused form his home. The complainant was not at the scene by the time he got there. He called for her before escorting the two accused persons to the police station.

The report made to the police was that the two were found with a girl inside the maize plantation.

Was there defilement or indecent act with the compliant?

This where it begins to get doubtful as to whether the appellant or his co accused did anything to the complainant in the manner it is alleged as the evidence is a varied as the number of witnesses. Every evidence given by all the witnesses went towards proving that the complainant was defiled.

Starting with alleged defilement. Was there penetration? Was it by hand or penis? Was it by one or both the appellant and his co accused in turns?

What about indecent act? Was it by hand or penis? Did it end up in penetration? Did anything happen?

There is nothing in the complainant's testimony about penetration. There is no mention of the genital organs of the appellant anywhere in her testimony of that the appellant removed his clothes. Her testimony is that the appellant touched her with his hand. The charge sheet on the 1st count speaks of defilement, that the appellant ***'caused his penis to penetrate the vagina of INW'***. The alternative charge speaks of the appellant ***'having touched the vagina of INW with his penis'***. Neither of these statements of the charge is supported by the testimony of the complainant.

Nowhere in the complainant's testimony did she mention anything to do with ***penetration*** of her genital organ by both the accused persons or the appellant with anything; not his penis nor his hand.

The police said that she was defiled her in turns by the two. To the first persons to get in touch with her at the scene she said nothing had been done to her. This is unsettling considering the allegation that they had been called in response to her screams for help.

The PRC form indicates it was filled on 4th Jan 2015 where the complainant reported that she was dragged by ***two perpetrators to the maize plantation where they removed her clothes and one of them defiled her but villagers rescued her***. A whitish discharge was seen in her outer genitalia and vagina, but her hymen was freshly broken and bleeding. Despite being forcefully dragged to the maize plantation she had no physical injuries. The form also indicated that her clothes were dirty, she was barefoot as her shoes were left in the plantation.

According to the same form, the panty was taken as exhibit together with HVS swabs to be taken to Government Chemist, and the HVS report, and handed to a police officer by the name PC Cynthia Muema. It is noteworthy that no report was produced from the government Chemist, and no HVS report as well. A panty was marked by the police officer who testified, PW7. He said **'this is the pant the victim was wearing MFI 7'.** It was not identified by the complainant. Nor was anything said about it in evidence to connect it with the offence, the appellant of the complainant. It was not produced as evidence.

The general medical history given in the P3 issued on 5th January 2015 and filled on 6th January 2015, was that

> *"She was sexually assaulted by two young men known to her in a maize plantation. She was dragged to the maize* ***plantation by the assailants who raped her in turns. She shouted and people rescued her".***

The doctor who examined her on 6th January 2015 noted a freshly broken hymen, normal external genitalia, and both a bloody discharge and a whitish discharge. There are no results of laboratory reports as to what could have been the cause of the discharge. The P3 indicates that a High Vaginal Swab was done but the results are not recorded.

The question is then, at what point did the alleged touching by hand by the appellant turn into defilement and in turns by the appellant and his co accused?

Was there another suspect?

It was alluded that there was another person who was with the girl and wanted to defile her. Why was Maina not availed to testify yet he was the person central to the arrest of the appellant and his co accused? It is possible that his testimony would have been adverse to the case for the prosecution? That is not farfetched as the prosecution did not have any explanation for failure to testify.

The appellant faced a very serious offence with the minimum sentence of 15 years' imprisonment but worse still, there was a case of suspected gang defilement of a 13-year-old girl who deserved the best in terms of case investigations. Before the court was this conglomeration of pieces of evidence as outlined herein above. The onus remains with the prosecution to prove its case beyond a reasonable doubt. Can these stand the test of proof beyond a reasonable doubt?

It was submitted by the state that the trial magistrate who wrote and delivered the Judgment relied on s. 124 of the Evidence Act, Cap 80 which speaks in the following terms;

> *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

He did not say so. He does not make any reference to that express provision but states that the complainant's testimony stands because she said in court that the appellant removed her trouser and pant and touched her vagina. He could not have. This is because 1st the prosecution did not establish whether indeed anything was done to the complainant in terms of s. 10 and 11 of the Sexual Offences Act. 2nd, the prosecution tendered other evidence together with that of the complainant to support the charge, the magistrate had no opportunity to observe the child to assess her truthfulness, and could only rely on what was written and whether it was consistent. Hence the complainant's evidence was not the 'only evidence' available. Even if it was it did not speak to either the main charge nor the alternative.

I have considered the defence of the appellant. He raised an alibi which the trial magistrate considered and rejected after weighing it against the evidence by the prosecution witnesses. He relied on the evidence of PW4 and PW6 to place the appellant at the scene. PW4 stated that he ***'did not see Antony and Muiruri or anything at the bridge'.*** PW5 said he saw **'Antony and Muiruri sitting at the bridge. They left'.** He denied saying that he saw them take the complainant into the maize plantation. These were minors. They are witnesses who turned hostile according to the I.O. their evidence cannot form the basis for a conviction. It would need corroboration. And it renders that of PW6 hearsay. And is inconsistent with that of PW3 and PW6 with regard to whether the two were at the scene or not.

All these inconsistencies create doubt as to whether the offence were committed as alleged and whether they were committed by the appellant and his co accused. There are gaps in the case for the prosecution and all these render the conviction unsafe.

Taking into consideration the seriousness of sexual offences, more is expected from both the investigation officers and prosecution counsel. Investigations, prosecution. One should not just wait for the application of s.124 of the Evidence Act. It is not a cure all, but a great safety net in clear cases. In my humble view, this was not one of them.

This is another case that demonstrates the harm done by delay in finalising sexual offence matters. This was a Children's case by virtue of the fact that the victim was a child. In addition to having been exposed to sexual violence, she was also in need of care and protection as she was not going to school. The court concentrated its efforts on the criminal side of the case and failed, I dare say, in not exercising its powers under s. 4, 114 and 119(1) (g) and (n). of the Children Act to take care of the welfare of the child victim.

This is a duty that every court that handles a children matter is mandated to do; *ensure the survival and best interests of the child by securing her welfare;*

It was imperative on the court to have a P&C file on the victim so as to secure her welfare.

Be that as it may, this case was both poorly investigated and prosecuted, and suffered the fate of delay in determination, going through three judicial officers.

The upshot of it is that after reevaluating the evidence, I find that the conviction is not sustainable. The same is quashed, the sentence is set aside and the appellant is to be set free unless otherwise legally held.

Dated, delivered and signed at Nyeri this 29th May 2018

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant Atelu

Appellant

Magoma for state