REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 102 OF 2016 CONSOLIDATED WITH CRIMINAL APPEAL NO 101 OF 2016

NDORO SAMMY……..…… 1ST APPELLANT

NZOMBO BAKARI…….....….2ND APPELLANT

VERSUS

REPUBLIC…….. RESPONDENT

(Being an appeal arising from conviction and sentence in Senior Resident Magistrate's Court at Mombasa in criminal case no 842 of 2015 by Hon. I. Ruguru delivered on 22nd August 2016

JUDGMENT

1. **Ndoro Sammy** and **Nzombo Bakari** "the Appellants" were jointly charged with two counts of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The particulars for the 1st count were as follows. 1st and 2nd Appellants on the 4th day of May 2015 at Approved Area in [Particulars withheld] District within Mombasa County, in association intentionally and unlawfully caused your penis to penetrate the vagina of L.J a child aged 16 years and a child with mental disability. The particulars for the 2 nd count were as follows: 1st and 2nd Appellants on the 4th May 2015 at Approved Area in [particulars withheld] within Mombasa County, in association intentionally and unlawfully caused your penis to penetrate the anus of L.J a child aged 16 years and child with mental disability.

2. They also faced two alternative counts of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars for the 1st alternative count were as follows: Ndoro Sammy Athuman alias Kangwendo, Nzombo Bakari Kadenge alias Rajabo on the 4th May 2015 at Approved Area in [particulars withheld] district within Mombasa County, in association intentionally and unlawfully did an indecent act by touching the anus of L.J a child aged 16 years with your penis and a child with mental disability.

The particulars for the second alternative count were as follows; Ndoro Sammy Athuman alias KANGWENDO, Nzombo Bakari Kadenge alias Rajabo on the 4th May 2015 at Approved Area in [particulars withheld] district within Mombasa County, in association intentionally and unlawfully caused your penis to penetrate the anus of L.J a child aged 16 years and a child with mental disability.

The 1st appellant faced a 3rd count of committing an indecent act with a child contrary to section II(1) of the sexual offences Act NO 3 of 2006. The particulars were that the 1st appellant on the 4th May 2015 at Approved Area in [particulars withheld] district within Mombasa County, you intentionally and unlawfully did an indecent act by forcing your penis into the mouth of L.J child aged 16 years a child with mental disability.

3. The matter proceeded to full hearing and they were both convicted of the 1st count of gang rape and sentenced to 15 years imprisonment each.

4. The Appellants being aggrieved by the judgment filed this appeal against both the conviction and sentence citing the following common grounds.

> *(i) That the learned magistrate erred in law and in fact by convicting and sentencing them to serve 15 years imprisonment each on the charge of gang rape without considering that the complainant was not a witness of truthful integrity as the findings of the doctor shows that she was H.I.V positive they were not, a prove they did not commit the said offence.*
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> *(ii) That the learned magistrate erred in law and fact by convicting and sentencing them to serve 15 years imprisonment each on the charge of gang rape without considering that the prosecution case was out of an existing grudge between the mother of the complainant and them because of a piece of land they differed on.*
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> *(iii) That the learned magistrate erred in law and facts by convicting and sentencing them to serve 15 years imprisonment depending*

on single witness evidence which lacked corroboration.

(iv) That the learned magistrate erred in law and facts by convicting and sentencing them to serve 15 years imprisonment without putting into consideration their defence statements which watered down the prosecution case.

A summary of the prosecution case is that PW1 (L.J) the complainant told the court that on 4th May 2015 at about 8 p.m she was in their house alone as her mother had gone to church. Suddenly, the two Appellants came there and she knew none of them. Apparently, she was sleeping on the carpet, the lights were off and the door was not locked.

5. When the 1st Appellant entered he took her by her hand in the company of the 2nd Appellant and dragged her outside. They then took her to the 1st Appellant's one roomed house which was not very far from her home. At the 1st appellant's house they sat on the mattress and the lights were on. The 1st Appellant served them meat and also gave her sweets which she ate.

6. When they finished eating the Appellants pushed her against the wall and removed their trousers and boxers. They forcefully removed her trousers. The 2nd Appellant (rasta) inserted his penis in her anus while 1st Appellant inserted his penis in her vagina simultaneously and they did this to her while she was standing. Afterwards, the 1st Appellant then inserted his penis in her mouth and forced her to suck it, and she vomited.

7. After defiling her, the 1st Appellant took her underwear and wiped her vagina and anus then threw them inside a latrine. She told the court that she felt a lot of pain in her vagina, waist and other joints. She also tried to make some noise even though she was deaf and dumb. After they finished, the Appellants dressed up and she also dressed up and went directly to the police station to report.

8. At the Inuka Police Station, her report was taken and she was taken to hospital where she was treated and given medication. She however remained at the Police Station after being treated.

9. The following morning, she took the police to the house of the 1st Appellant and found the two Appellants standing next to the 1st Appellant's house. She then pointed them out to the police who in turn arrested them and took them to the police station.

11. After their arrest, a good Samaritan who has a family and was at the police station gave her a place to stay and that is where she stays. She mentioned that she had once ben defiled by a teacher who was never arrested.

12. Lastly, she stated that she did not want to tell her mother about this incident as her mother had a lot of stress.

13. On cross examination by the court, she indicated that the 2nd Appellant wore a condom before raping her through the anus but the 1st Appellant did not wear a condom.

14. **PW2 PC Batilca Valima** testified that on 5th May 2014, while at Inuka Police Station, Pw1 who is deaf and dumb came to the police station and explained something to her by sign language. They looked for a sign language interpreter who explained to them how theAppellants had defiled PW1. This witness confirmed that PW1 had reported the matter the night the defilement happened and had been given a note by the officer on duty and asked to report the following day. She then recorded her statement and he entered the report in the OB.

15**. PW3 Dr. Miffat Stiatry** based at the Coast General Hospital produced the P3 Form (EXB1) on behalf of Dr. Ibrahim who was away for further studies.

16. According to the P3 form (EXB1) Pw1 had been defiled through the anus and vagina. She did not have any physical injury and her hymen was not intact. She had hyperemic vulva, excessive whitish discharge, laceration on hymen. She also had a urinary tract infection and the test showed that she was **Hiv** positive. This was confirmed by the PRC Form (PEXB2)

17. Her age was assessed (PEXB.3) at 16 years at the time of the defilement. The 1st Appellant was tested and found to be **Hiv** –ve and PW3 explained that it was possible for a victim to be +ve and perpetrator -ve. He also stated that it is not a must to get infected if one has sexual relations with a **Hiv** +ve person.

18**. PW4 CPL Marini Ojwang** the investigating officer, recalled that on 4th May 2015, at 8:00p.m, he was at his home near the Police station when he heard PW1 screaming(mumbling). He knew PW1 was dumb because he had another matter pending in court relating to her.

19. On 5th May 2015, Pw1 was mumbling in a lot of pain. She had a note written 'come tomorrow morning'. The said note had been written by Corporal Munyasia who had been unable to communicate with her the previous night as she is dumb and deaf.

20. Upon PW1's arrival, he called for a sign language interpreter and through the interpreter, he learned that she had been defiled by two men. He then called PW2 who recorded her statement. They were not able to get PW1's mother then.

21. On 8th May 2016, Pw1 took them to the 1st Appellant's home which was about 200M from Pw1's home. On the way, she saw the Appellants seated by the road side and identified them. They immediately stopped their vehicle and the Appellants started running away.

22. Despite their running, they arrested the 2nd Appellant who had rasta hair and he was escorted to Inuka Police Station. The following day,

they returned to the place where they arrested the 2nd Appellant and managed to arrest the 1st Appellant whom they also escorted to Inuka Police Station.

23. While at the police station, Pw1 came and identified the 1st Appellant by pointing at him. Pw1's mother refused to testify in Court.

24. The 1st Appellant gave an unsworn statement of defence and called no witness. He told the court that on 14th February 2015, the 2nd Appellant visited him in his house and told him that there was a job vacancy in Ukunda. They set off to Ukunda and on reaching Approved school-Likoni, they were stopped by police officers who took them to the police station.

25. The following day, they were told that they had defiled PW1 and later brought to court and charged with the present case. He also confirmed that an **Hiv** test was done confirming that he was **Hiv** -ve but Pw1 was **Hiv**+ve. He therefore denied committing the offence.

26. The 2nd Appellant who gave an unworn defence said he went to 1st Appellant's house to call him to help him do some work. However, on reaching Shelly beach, they were arrested by police officers and taken to Inuka Police Station. He denied knowing the complainant and also confirmed that he was taken to hospital and an **Hiv** test was done which confirmed that he was **Hiv** -ve.

27. When the appeal came for hearing, the Appellants chose to rely wholly on their written submissions.

28. The Appellants submitted that no credible evidence of the complainant's age was adduced. They argued that the charge sheet was defective as it was not possible for the two Appellants to penetrate into the vagina of PW1 jointly and at the same time. On medical evidence, they submitted that it was not proved by the doctor that the complainant was really defiled.

29. They further argued that it was not possible for Pw1 to be defiled while she was standing beside the wall. Lastly it was the Appellants submission that the prosecution did not prove its case beyond reasonable doubt.

30. M/s Opiyo for the State opposed the appeal, and submitted that the age of the complainant was proved as per the age assessment examination(PEXB.3).

31. She further submitted that in as much as the complainant was **Hiv** +ve and the Appellants were **Hiv** -ve, PW3 explained the position and reasons for this. Counsel relied on **Eldoret Criminal Appeal No. 71 of 2011 Wellington Wanyonyi v Republic [2013]eKLR** and urged the court to find in favour of the prosecution.

32. On single witness evidence, she submitted that the complainant was clear on who had defiled her. She contended that the charge was in line with the definition of rape as Pw1's evidence was clear on this. She thus urged the court to dismiss the appeal.

33. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own independent conclusion. See **Okeno v Republic E.A. 32, Pandya v Republic [1957] E.A 336 and Kariuki Karanja v Republic [1986] KLR 190.**

34. I have duly considered the evidence on record, the grounds of appeal, the submissions by counsel and the cited authorities. The Appellants have raised a total of 4 grounds of appeal. Upon considering all I have stated above, I will narrow them to the following issues which are:-

(i) Whether the ingredients of gang rape were proved.

(ii) Whether the appellants were identified as the perpetrators.

(iii) Whether the prosecution case was proved to the required standard.

(iv) Whether the sentence imposed was harsh and excessive.

35. **Issue No (i)**

Whether the ingredients of gang rape were proved.

Section 10 of the Sexual Offences Act defines gang rape as:

> **"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."**

The ingredients to be proved therefore are:

(i) Penetration

(ii) Common intention

(iii) Identification of the perpetrators.

Before I deal with the ingredients I wish to address an issue raised by the Appellants.

36 The Appellants in their submissions have raised an issue about the charge of gang rape in both counts (i.e. counts 1&2). This issue was not addressed by the trial court nor by the State during the hearing of the Appeal. They submitted that it was not possible to have two men penetrate the vagina of a woman as stated in 1st count or the anus as stated in the 2nd count at the same time.

37. The charge sheet was not amended despite the evidence that was adduced by PW1. The Court of Appeal in the case of **Murunga v R [2008] KLR** in a similar scenario held thus:

> **"Two or more men cannot jointly and at the same time commit the offence of rape against one woman as each of men commits the act of rape individually. In such circumstances, it is therefore not proper to charge the offenders jointly. Each offender must be charged on separate count of rape."**

38. I find that the particulars as stated in the 1st and 2nd counts were ambiguous and should have been amended before the prosecution closed its case. Each Appellant should have been charged separately for the offence of gang rape as articulated in the **Murunga** case (supra). I also note that the trial court never made any finding on the 2nd count. I therefore quash the conviction in the 1st count and set aside the sentence. The 2nd count which was not addressed is also dismissed. The answer to Issue No. (i) is therefore in the negative.

Issue No (ii) & (iii)

> **(ii) Whether the appellants were identified as the perpetrators.**
>
> **(iii) Whether the prosecution case was proved to the required standard.**

39. On the alternative counts the evidence is sufficient. PW1 explained to the satisfaction of the court that the 1st and 2nd appellants had each touched her vagina and anus with his penis. In fact they penetrated her only that the charge for gang rape was not properly drafted. Once she left the 1st appellant's house she went straight to the Police station to report. She had been with the appellants long enough with lights on.

40. She next took police officers to the 1st appellant's house but she spotted the appellants before they reached the house. She pointed them out to the police, who arrested the 2nd appellant. The 1st appellant who escaped was arrested the next day.

41. The 1st appellant in his defence explained his arrest which he said was on 14th February 2015. The 2nd appellant also explained his arrest without mentioning any dates. The incident occurred on 4th May 2015. It's clear that the 1st appellant's alleged date of arrest is just a fabrication.

42. I find no reason that would have made PW1 lie against the appellants. The medical evidence vide the P3 (EXB1) confirms the evidence by PW1 of the sexual assault. The learned trial magistrate believed her and found her credible. (see section 124 of the Evidence Act).

43. The appellants raised an issue about their Hiv status and that of PW1. This was well explained by the doctor who said it was not an impossible circumstance. I also refer to the case of **Wellington Wanyonyi v Republic [2013] EKLR where** the Court of Appeal as per Onyango Otieno, Karanja, Koome JJA stated:

> **The appellant makes heavy weather of the finding by Linus that the complainant was HIV negative while Reuben another Clinical officer tested him and found him HIV positive then she would have been infected. In our considered view, nothing turns on those two findings by the clinical officers. First, it is not a must that where a HIV positive person has carnal knowledge of a HIV negative person then the HIV negative person must be infected, All we know is that whereas it is likely that such a scenario may ensue, it is not a must be several occasions when infection may not be a consequence of sexual intercourse between the two. Secondly, and in any case, there are cases of discordant couples. These are situations were one HIV positive person can live with another who is HIV negative person and yet no infection takes place. We thus do not attach any importance to that piece of medical evidence**."

44. I find the prosecution case proved on the alternative counts. The learned trial magistrate did not however address herself to the 3rd count which was a distinct offence. PW1 explained how the 1st appellant after defiling her through the vagina forced his penis into her mouth and ordering her to suck it and she vomited. This evidence was not challenged in cross examination or otherwise.

45. I find this charge on count 3 proved and I correct the omission by the learned trial magistrate by convicting the 1st appellant on the said count. As earlier found the 1st and 2nd counts were founded on a defective charge. The other counts have been sufficiently proved.

46. In Conclusion I find that the appeal partially succeeds and I do make the following orders.

47. (i) The conviction on the 1st count is quashed and sentence set aside

(ii) The charge under the 2nd count is dismissed

(iii) The 1st appellant is convicted on the alternative count to the 1st count and sentenced to ten(10) years imprisonment.

(iv) The 2nd appellant is convicted on the alternative count to the 2nd count and sentenced to ten (10) years imprisonment.

(v) The 1st appellant is convicted on the 3rd count and sentenced to ten (10) years imprisonment.

(vI) The 1st appellant's sentences will run concurrently.

(vii) All sentences run from the date the appellants were convicted by the lower court.

Orders accordingly.

Dated, signed and delivered this 26th day of October 2018 in open court at Mombasa.

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HEDWIG I. ONG'UDI

JUDGE