



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CRIMINAL APPEAL NO. 91 OF 2014
JAMES KIHARA WANGONDU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Appeal against the Conviction and Sentence in Nyeri CMCRC (S.O) no. 35 of 2012 Hon J Wambilyanga SRM)

JUDGMENT

On the 28th February 2013, the appellant and two others were found guilty of the offence of gang defilement c/s 10 of the Sexual Offences Act no. 3 of 2006. The appellant was sentenced to 15 years' imprisonment, while his co accused who were minors were committed to borstal for three years.

The appellant was aggrieved by the conviction and sentence. He is challenging the same on the following grounds of appeal.

1. The honorable trial magistrate erred in law in fact in convicting me based on section 124 Cap 80 laws of Kenya yet the evidence of PW1 was cast in doubt
2. the honorable trial magistrate erred in law convicting me yet medical evidence did not prove defilement
3. The honorable trial magistrate fell into error in proceeding to conviction and sentence yet disregarded the prosecution did not produce PW1's close as exhibits
4. The honorable trial magistrate erred in law in ministering selective sentences in disregard that the charge was not selective
5. the honorable trial magistrate erred in law in dismissing my defence without giving cogent reasons as per the requirement of the law

the appellant was not represented by counsel. The state was represented by Ms. Jebet state counsel.

The particulars of the charge were that on the 5th day of August 2012, at [particulars withheld] area, Nyeri District within Central province, the appellant in association with the two minors, caused his penis to penetrate the anus of MN a child aged 13 years.

The case for the prosecution was that on 5th of August 2012 the complainant was coming from church

about noon. He met the appellant and the other two at a shop, where they told him that someone was calling them.

He followed them. The path they followed was bushy and within a certain forest. It is while they were in the bush that J held his arms and told him to lie down. M went looking for leaves on which they forced him to lie on his stomach. They removed his trousers and pants. J removed his pants and defile him 'through his buttocks'. J was armed with a knife and threatened to stab him if he screamed. The other two stood by. After J, M took his turn, then Kihara. When they finished they told him they would give him money the following day but if he told anyone they would stab him.

They left the forest about 7:00pm and went home. He was in pain, and felt more pain when he went for a long call.

The following day he went to school. They were waiting for him at the gate. They took him to the same forest and did the same to him and gave him sweets. That evening he reported to his mother.

His mother CN said he told her he was defiled by three boys namely JM, M W and Kihara Wangui. The following day she reported to the police at Muruguru and was advised to take her child to hospital. On her way to PGH Nyeri she reported at Nyeri Police Station where they were issued with a referral letter. After treatment a P3 form was issued by the police and completed by the doctor.

PW3 no. 92452 PC Brenda Achieng Okwach received the report at the police station, interviewed the complainant, who named his the three as the defilers. She arranged for their arrest by the Aps at Murungaru. She sent the complainant to hospital for treatment and completion of the P3.

Dr. Sarah Wambui PW4 produced the P3 on behalf of Dr. Murimi.

The significant findings were that he had taken several baths and long calls before the examination. On examination he was anxious. He had healing excoriation marks on the buttocks. There were no visible marks on the anus, and the anal sphincter tone was normal.

Upon considering the evidence, the trial magistrate put the three on their defence.

In his defence the appellant denied the offence, saying that it was all lies. He could not recall where he was on the 5th August 2012, but could recall the details of his arrest on the 27th of August 2012.

In its judgment the trial court found that the prosecution had proved its case beyond a reasonable doubt. It relied on s.124 of the Evidence Act with regard to the complainant's testimony, and found that the complainant was defiled by the three accused persons.

As a first appellate court I have a duty to consider and re -evaluate the evidence placed before the trial magistrate and draw my own conclusions always bearing in mind that I did not see or hear the witnesses testify in the first place. This principle of law was stated by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya v. R., [1957] E.A. 336**) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Ruwala v. R., [1957] E.A. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters v. Sunday Post, [1958] E.A. 424**.

Analysis and Determination

The appellant submitted that the complainant's testimony on how it happened, looked at together with the medical evidence, was not capable of belief to warrant the application of section 124 of the Evidence Act. The complainant alleged to have been defiled by the three on 5th August 2012 from around noon to 7:00pm when they left the forest for home, and the following day they took him at the school gate.

He submitted that he was not a pupil at the complainant's school and that his presence there would have raised concerns. That the other accused persons denied having been with him even on the material date.

The state's response was that complainant gave clear description of what happened, detailing each of the accused person's role in the crime committed against him. The counsel conceded that the medical evidence did not show clearly that there was penetration. However, that the complainant's testimony was believed by the trial court.

He also submitted that the sentence meted to his co accused was illegal as the Sexual Offences Act did not recognize child offenders and therefore his co accused ought to have been sentenced to 15 years' imprisonment as well.

The state's position was that this was a legal sentence as the co accused were minors.

He also submitted that the trial magistrate dismissed his defence unreasonably as there was nothing extraordinary about his not remembering where he was on the 5th of August 2012.

The state's response was that the trial court found the defence did not challenge the case for the prosecution.

I have considered the evidence on record and the submissions by each party.

The prosecution was required to prove, beyond a reasonable doubt that the appellant in association with his co-accused gang defiled the complainant.

The offence is set out under section 10 of the Sexual Offences Act;

Gang rape

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.

In my view the grounds of appeal can be collapsed to one issue for determination; whether the prosecution proved the charge as against the appellant beyond a reasonable doubt to warrant the conviction and sentence that was meted to him. The ingredients of the charge are;

1. Defilement, which is defined which is proved by evidence of penetration, defined as the partial or complete insertion of the genital organ of a person into the genital organ of a child, in this case, the anus.
2. The offenders and their association in the commission of the offence
3. The age of the victim

Starting with the issue of age, the appellant was very angry with the court for dealing differently with his co accused accusing the trial court of selective leniency. He correctly submitted that offence of defilement will arise when the act defined is committed against a person below the age of 18 years and the age of the victim determines the sentence meted out to the person against whom a finding of guilt is made.

However, it is not correct that the Act does not recognize the age of an offender, and the trial magistrate acted within the law in dealing with him differently from the co accused. Age assessment was done and the appellant was found to be above 18 and his co accused to be minors.

Section 2 of the Sexual Offences Act points out that in the Act;

“**child**” has the meaning assigned thereto in the Children Act (Cap. 141);

In my view any child who finds herself or himself in the purview of the Sexual Offences Act, is still entitled to the protections provided for in the Children’s Act. The requirement to act in the best interests of the child, whether as the victim of the offender is not only statutory but Constitutional.

The Children Act recognizes both the victim and the offender as children in need of care and protection as provided for under section 119 of the Act. The victim under section 119 (n) as a child who has been sexually abused or is likely to be exposed to sexual abused and exploitation including prostitution and pornography; The offender or both of them under section 119(q) as children who are exposed to any circumstances likely to interfere with their physical, mental and social development, taking into consideration the fact that the criminal justice system is not tailored to deal with children, and going through it leaves a lasting effect on a child.

Part XIII of the Children Act provides for child offenders.

While, as in this case the appellant was tried together with the minors, and the case was not within the jurisdiction of the Children Court as provided for under section **184(1)(b)**, the protections for the child offenders were not taken away.

Section **189** of the Children Act prohibits the use of the terms conviction and sentence with regard to children. Where the court finds that the charge is proved against a child, it can only make a finding of guilt. For the adult the court will convict. And when the court will be sentencing the adult convicted of an offence, the same court will be making an order under section 191 of the Children Act.

When it comes to punishment imprisonment is strictly forbidden under section **190** which states clearly that No child shall be ordered to imprisonment or to be placed in a detention camp. It is section **191** that provides for the methods of dealing with child offenders and committal to a borstal institution is provided for under section 191(1) (g).

Having settled that issue I now turn to the question whether the prosecution proved defilement. The trial court’s view was that the complainant gave a very vivid description of what took place and described the role of each of the three accused persons.

That evidence is that he was defiled by the three boys in turns for hours on the 1st day and they repeated it the following day. Nevertheless, the medical evidence did not bear witness to these allegations. The examination was done on 15th August 2012 nine days’ day after the second incident. The doctor found healing scratch marks on the complainant’s buttocks which she said could have been caused by nails. The complainant’s anus was normal. The anal sphincter muscle tone was normal. As to whether there was any discharge around the anus, the report states, “*not indicated*”. The P3 is so silent on what mattered for this case that it leaves questions as to whether the complainant was actually physically examined.

Where it requests for medical history (Section A) this what was written.

“Clothes not brought to hospital”

‘Patient reported to have been sodomised by 3 persons well known to him (JM, DM and Kihara). He thereafter took several baths and had long call several times after the incident. He reported that the victims(*sic*) accosted him when leaving school and sodomised him threatening him with death if he doesn’t co- operate.

There is no mention of the 1st incident where he was called while coming from church. It also contradicts his testimony that the 2nd incident happened while he was going to school. None of the accused persons was DM and neither the complainant nor the I.O mentioned this person in their evidence.

Upon examining the P3, I found it was blank where it requires examination of other parts of the body, the head and thorax, abdomen, upper and lower limbs, and give information on the approximate of injuries, treatment prior to examination etc. There was also no explanation why it took so long to have the P3 completed though the report was made three days after the last alleged incident of gang defilement. Neither was there any about the initial medical notes.

The P3 requires the section specific to sexual assault (C) be completed after the above section (A and B). That was not done.

Sadly, even though the complainant may have been defiled, clearly the medical evidence as placed before the trial court did not support the serious allegations he made of gang defilement by three boys, for hours, and on two occasions.

In addition, there was the issue of clothes that the complainant was wearing on the days he said he was gang defiled. Those ought to have been taken to the police and the hospital. They could have had tell-tale signs of what had happened.

Hence, just as conceded by the state in their submissions, there was no sufficient evidence placed before the trial magistrate that the appellant did penetrate the anus of the complainant with his genital organ.

I found that this case was not properly investigated with the I.O choosing to rely on the most basic evidence, of witness statements and an inconclusive P3. The complainant testified that the 3rd accused had cut a lot of leaves on which the three ordered, and made him to lie on. The police never visited the scene. The complainant also said the second incident happened in the same forest. Again the scene was never visited. In addition, the complainant said that he was taken from the school gate and taken to the forest. No investigations were carried out at the school with the teachers / class mates. There is a big gap in the evidence here. There were no details. What happened the second time? Who did what? How long were they in the forest? Did they come back to school? Did he attend school that day? If they were late, did any teacher/student notice?

There was also the strange name of DM in the doctor's notes who not charged.

This evidence would have gone into the credibility of the evidence of the complainant.

Section 124 of the Evidence Act provides;

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. (emphasis added)

The trial court's reason for believing the complainant and relying on section 124 was the description the complainant gave of the incident. However, that description is not borne out by the evidence in its totality.

Having considered and re-evaluated all the evidence placed before the trial court, considered the

submissions, the law and the facts, I find that the evidence place before the trial court fell short of proving the charge on gang defilement as brought against the appellant.

The appeal succeeds. The conviction against the appellant is quashed. The sentence imposed is set aside. He is at liberty unless otherwise legally held.

Dated, Delivered and Signed in open court at Nyeri this 19th day of September 2017

Teresia Matheka

Judge

In the presence of;

Appellant

Ms. Jebet for state

Court Assistant Harriet.