REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO. 21 OF 2015

BETWEEN

PETER WEKESA CHILISWA……APPELLANT

AND

REPUBLIC…….RESPONDENT

(***Being an appeal from the judgment of M.L.Nabibya, Ag SRM in Butali PM's Criminal Case No. 624 of 2012 dated 9th day of December, 2013)***

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon M.L. Nabibya Ag Srm in Butali Principal Magistrate's Court, Criminal Case No. 624 of 2012. In the said case, the appellant was charged with gang defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006, the particulars being that on the 8th day of September, 2012 in Kakamega North District within Western Province in association with another not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of R D, a child aged 10 years.

2. The appellant denied the charge, but after a full trial, he was found guilty as charged, convicted and sentenced to 15 years' imprisonment

The appeal

3. Being dissatisfied with the whole of the judgment of the learned trial Magistrate the appellant filed this appeal based on 11 grounds. He therefore prays that the appeal be allowed, conviction quashed and sentence, set aside so that he is set at liberty.

The Duty of this Court

4. This is a first appeal and as such this court is under a duty to reconsider and evaluate the evidence afresh with a view of reaching its own conclusions in the matter, only remembering that it has not had opportunity of seeing or hearing the witnesses who gave evidence during the trial. It has however been pointed out that even with the above caution, "On a first appeal from a conviction by a Judge or Magistrate sitting without jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision. It has the duty to rehear the case and reconsider the witnesses before the Judge or Magistrate with such other material as it may have decided to

admit. The appellate court must then make up its own mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made by the Judge or Magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen." See Pandya – Vrs – Republic (1957) E.A 336 at P 337. I fully agree with the above stated legal position on the duty of a first appellate Court.

The Submissions.

5. At the hearing of this appeal the State conceded the appeal on the ground that Section 10 of the Sexual Offences Act No. 3 of 2006 provides only for gang rape and not gang defilement. Mr. Oroni who appeared for the State submitted that for the offence of gang rape to succeed, the victim must be over 18 years of age, and that in the circumstances of this case where the victim is said to have been 10 years old, the offence of gang defilement could not have possibly been committed.

6. Section 10 of the Sexual Offences Act No 3 of 2006 defines gang rape as follows;

> "10 Any person who commits the offence or rape or defilement under this Act in association with another of others or any persons who, with common intention, is in 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."

7. I will now proceed to analyze the evidence with a view to determining whether the argument by Mr. Oroni for the State in conceding this appeal is valid. As I do so, I will bear in mind the fact that the definition of the term "gang rape" under Section 2 of the Sexual Offence Act is assigned the meaning assigned to it under Section 10 of the Act which includes both rape and defilement perpetrated by any person in association with another or others having a common intention to commit the offence.

The Prosecution Case

8. The complainant in this case R D, who testified as PW1 under oath stated that on 08.09.2012 at about 6.00am her mother sent her to buy milk. On her way to where she was going, she met 2 men who held her without talking to her and took her to the bush. One of the men called Peter removed her short and defiled her while the other whom she referred to as Wanyama held her mouth tightly. Peter removed his clothes and inserted his penis into her vagina, ejaculating thrice before he stood up. Then as Wanyama was now preparing to defile her, some people appeared on the scene and the two men left.

9. PW1 stated further that she could not scream because Wanyama had tied her mouth and nose tightly with a piece of cloth. When the good Samaritans came by, they took PW1 back home to her parents who took her to Webuye Hospital for treatment. The matter was later reported to police who issued PW1 with a P3 form. She later recorded her statement. PW1 was able to identify the initial treatment notes from Webuye District Hospital PMFI – 1, The P3 form

10. During cross examination, PW1 told the court that Peter the appellant herein was her neighbour, and that on the morning in question, the appellant was dressed in black gumboots, trouser and a red muffin. Pw1 denied attending a funeral memorial service on 07.09.2012.

11. PW2, Abel Kenyatta testified that at about 6.00am on 8/09/2012, while he and others were on their way to do manual work, he saw the appellant who was wearing gumboots, running away. He said he also saw PW1 who was lying on the ground and a man he could not identify was also running away.

12. When cross examined by appellant, PW2 denied being with PW1 at the memorial service. He also

denied a suggestion that he and others were the ones who defiled PW1.

13. PW3 D S was PW1's father. He stated that on the material day at about 6.00am, he received a report from his wife about what had befallen PW1. He had just reported from duty. He took PW1 to Webuye District Hospital where she was examined and treated. PW3 told the court that PW1 was 10 years old as per the baptism card.

14. Number 221801 CPL Henry Mose testified as PW4. He is the one who arrested the appellant after a report of the incident was made to Kabras Police Station. After the arrest, PW4 handed the appellant to Kabras Police Station.

15. PW5 was Antony Otieno, a Clinical Officer working at Webuye District Hospital at the material time. He is the one who examined and treated PW1. He described PW1 as sick looking. On vaginal examination, PW1 had a whitish vaginal discharge, the hymen was broken and she had lacerations on the vaginal walls. PW5 stated that on conducting high vaginal swab, under wet preparation, spermatozoa were seen with epithelial cells. PW5 produced the treatment notes as P Exhibit 1 while the P3 form was produced as P Exhibit 3.

16. During cross examination, PW5 stated that the lacerations found on PW1's vaginal walls were an indication that the hymen was broken on the same day. He also testified that he could not rule out the condition of candidiasis.

17. The last witness for the state, PW6 was number 884412 CPL Margaret Kwamboka of Kabras Police Station at the time. She stated that she was the investigating officer and did establish that Pw1 was about 10 years old. She was also the one who issued the P3 form to PW1 and recorded her statement. During cross examination. PW6 admitted she did not visit the scene of crime but instead relied on the report, statement and treatment notes to charge the appellant. She also admitted that she did not take the appellant for any medical tests though PW5 had made a recommendation for the same.

The defence case

18. At the close of the prosecution case, the appellant was put on his defence. The appellant gave sworn testimony and called two witnesses. He testified that on 07/09/2012, he attended his brother Zachariah's memorial service until about 10.00pm when he went home after a scuffle with one James Luchisoi over a land dispute. He said he saw PW1 at the memorial services, accompanied by her brother and sister. The appellant also stated that on 08/09/2012, between 5.00am and 6.00am he was a sleep in his house. He then went to work at about 8.00am together with Gilbert Khalumi. He denied committing the offence. He denied trying to resolve the issue with PW1's father, PW3.

19. During cross examination, the appellant testified that he was arrested while at Malava Boys where he had gone to ask PW3 about the allegations being made against him.

20. DW2 was David Wakukha. He supported the appellant's evidence that on the night of 07/09/2012, the two of them were at the memorial service for Luchisio Luninjiro. DW3 was Esther Peter who told the court that the appellant who was her husband woke up at 6.00am and then left for work at 8.00am. She also stated that the appellant attended the memorial service on the night of 07/09/2012 until about 10.30 pm.

Analysis and Determination

21. From the evidence and the submissions the issue that arises for determination is whether this appeal should be allowed on the basis of the provisions of Section 10 of the Sexual Offence Act No. 3 of 2006. I have already set out the working of the said section. During the hearing of the appeal Mr. Onsando, Counsel for the appellant submitted on grounds 2, 3, and 6 which are to the effect;-

> "2. THAT the trial court erred both in law and fact in convicting me on a defective charge sheet

(sic)

3. THAT the trial court did not consider that the age of Pw1 was not ascertained

6. THAT the evidence on record was uncorroborated fabricated and malicious and was meant to implicate me with this crime."(sic)

Ground 2 whether the charge sheet is defective

22. It is to be noted that this is the ground upon which the state conceded the appeal. That the charge sheet was defective. Mr. Onsando, Counsel for the appellant submitted that the charge sheet was defective because Section 10 of the Sexual Offence Act under which the appellant was charged refers to gang rape when the charge sheet alleges that the appellant committed the offence of gang defilement. I have already set out the provisions of this Section elsewhere in this judgment. It is true that the marginal note of the Section refers to "Gang Rape" as the offence of the Section. The body of the Section specifies that any person who commits the offence of rape or defilement under this Act in association with another or others ……..is guilty of an offence termed gang rape……" It is my considered view, therefore, that the charge sheet as drawn complies with the law as to the nature of the offence, the place and time of commission of the offence and the particulars of both the offender and the victim. It is my considered view therefore that ground 2 of the appeal has no merit and the same is dismissed. Accordingly, the concession of the appeal by the respondent cannot be sustained and is thus rejected.

Ground 3 – whether the age of the complainant was proved

23. Mr. Onsando, learned Counsel for the appellant submitted that there was no documentary proof of the age of the complainant. He also submitted that even the clinical officer who filled the P3 form upon examination and treatment of the complainant did not indicate in the appropriate section the age of the complainant. It was counsel's submission that failure to give or prove the age of the complainant was fatal to the prosecution case.

24. The respondent did not make any submission on this issue, after conceding the appeal on the basis of ground 2 of the appeal. The key to this issue, in my humble view lies in the wording of Section 10 of the Sexual Offences Act, which does not make any mention of the age of the victim. What am I saying? What I am saying is that age is not a factor in gang rape. I am fortified in this view by the fact that the sentence prescribed for the offence of gang rape is "fifteen years but which may be enhanced to imprisonment for life." It is clear that the punishment prescribed for the offence of defilement per se is very strict and the same depends on the age of the victim. So, in the instant case, if the evidence on the age of the victim shows that she was 10 years of age, this court would have the power upon request by the respondent to appropriately enhance the sentence of fifteen years to one of life imprisonment.

25. To go back to the issue of the age of the complainant, this is what is on record. She stated to the court in part of her evidence in chief. " I am R D. I go to (withheld) Primary School in standard 4. I am 10 years old." When R.D was recalled and cross examined by M/S Omar for the appellant, she stated, "I school at (withheld) primary school in standard 4. I am 10 years old." R D's father who testified as PW3 stated thus concerning the age of the complainant "she was treated for 5 days and the doctor confirmed that she was defiled. My daughter is 10 years old, I have the baptism card for the child…….. baptism card from Holy Spirit Church of East African dated 30.05.2002 – PMFI 3)" Although the Baptismal card does not appear to have been produced as an exhibit PW3, the father of the complainant confirmed to the court that she was 10 years. In this regard, I have no reason to doubt the finding by the learned trial Magistrate that the complainant was 10 years old and that the same was proved by her father who testified as PW3. PW3 did not guess the age of his child, he stated it in a very straight forward way as 10 years. Further the P3 form dated 08/09/2012 clearly gives the complainant's age as 10 years and in his evidence, PW5 Antony Otieno, the Clinical Officer at Webuye District Hospital stated as much in his evidence in chief.

26. For the above reasons, I find and hold that ground 3 of the appeal has no merit and the same is hereby dismissed.

Ground 6 – whether the evidence on record was uncorroborated, fabricated and malicious and meant to implicate the appellant in the crime

27. Mr. Onsando submitted that there was inconsistency between the testimonies of PW1 and PW3 as regards the name of the appellant. That whereas PW1 gave the appellant's name as Peter, PW3 did not give the appellant's name. Counsel further submitted that PW1 never gave the appellant's name to PW3 and that PW3 merely acted on suspicion to connect the appellant to the commission of the offence. It was also Counsel's view that even the evidence of defilement was not watertight. Mr Oroni for the respondent did not make any submission on this point.

28. What Mr. Onsando has raised under this ground touches on the identification of the appellant. The complainant told the court the following concerning her assailants and the time of the attack;-

> " I recall on 8/9/2012 at 6.00am. I had been sent to purchase milk by my mother. I met 2 people (men) on the way, they did not greet but held me. Both took me to the bush, one defiled me while the other was standing, he was checking whether people were coming. Peter removed my skirt, he is before court and defiled me. Wanyama held my mouth and made sure it was shut. Peter removed my underpants, he equally removed his clothes and penis, he inserted his penis in my vagina. He ejaculated thrice in my vagina. He stood as Wanyama was preparing to defile me, they heard people coming and they left."

During cross examination by M/S Omar for the appellant, The complainant stated in part;-

> "The accused, Peter held my hands and the other who is not before court removed my clothes. Wanyama, who also held my mouth. Peter slept on me while the other person remained standing. The said Peter is the person who defiled me. The process took about 4 minutes but was interrupted when the other guy(wanyama) was about to begin defiling me……..Peter was wearing a black coat, with a jeans trouser. I am related to him, he is an uncle……."

PW3 also told the court the following when he was cross examined by M/S Omar;-

> "I saw S together with R. They told me (Abel) said he saw the suspects. He said they were Peter Chiliswa and Wanyama Samuel. S equally said that he identified them."

29. PW2 Abel Kenyatta also testified that he identified the appellant at the scene where he found the complainant lying on the ground and the appellant who was wearing gumboots running away.

30. All the above evidence goes to show that the identity of the appellant was not in doubt. The trial Court was satisfied with the evidence on identification and this court is also of the same view. The evidence of the complainant was corroborated by that of PW2. I do not find any fabrication or malice in the evidence against the appellant. I also find that the appellant's defence did not displace the overwhelming prosecution case against him. Even the evidence of the complainant alone would have sufficed as long as the trial court believed she was a truthful witness. And the trial Court believed so.

Additional Issue – whether the offence of gang rape was proved

31. Under Section 10 of the Sexual Offence Act, the offence of gang rape is proved if;-

> a) The offence is committed in association with another or others
>
> b) The persons who commit the offence are in company with another or others and have a common intention to commit the offence.

32. In the instant case, there is no doubt that the appellant was in the company of one Wanyama Samuel who was never arrested and the two acted in carhoots and had common intention to commit the offence. The complainant stated clearly that while the appellant defiled her, Wanyama kept watch and also covered her mouth and gagged it with a stocking to make sure that it was shut. If it was not for the appearance of PW2 and another at the scene, Wanyama would also have had his turn at defiling the complainant.

33. The final point to consider is whether there was evidence of defilement. PW5 told the court that upon examination of the complainant, she had a whitish vaginal discharge, the hymen was broken and there were lacerations on the vaginal walls. PW5 also stated that he performed a high vaginal swab test which revealed the presence of both spermatozoa and epithelial cells, although he could not say whose spermatozoa it was. In any event, defilement can still occur without ejaculation and without deep penetration. On the basis of the above findings, I have no doubt in my mind that the complainant herein was gang defiled and that the crime was carried out by the appellant under the watchful eye of his accomplice, Wanyama Samuel who is still at large.

Conclusion

34. In conclusion, I find that inspite of the respondent's counsel conceding the appeal; this appeal has no merit on both conviction and sentence. The appeal is hereby dismissed in its entirety. The appellant has his right of appeal to the Court of Appeal within 14 days from today.

Orders accordingly,

Judgement delivered,dated and signed in open Court at Kakamega this 18th day of August 2016

RUTH N. SITATI

JUDGE

In the presence of ;-

Mr. Ombaye for Onsando……..…for Appellant

Mr. Ng'etich…….……for Respondent

Mr. Lagat……...Court Assistant