



REPUBLIC OF KENYA

High Court at Busia

Criminal Appeal 130 of 2011

PA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1) DOO and PA were convicted of the Offence of Gang Defilement Contrary to Section 10 of The Sexual Offences Act, Act No 3 of 2006. Both were sentenced to 15 years imprisonment. A (The Appellant) is aggrieved and has preferred this Appeal against both the conviction and sentence.

2) It had been alleged that on the 3rd day of October 2010 at(Particulars withheld) Village having a common intention to penetrate the vagina of SR (hereinafter S) a child aged 15 years, and in one others company, intentionally and unlawfully caused DO' penis to penetrate the vagina of the said S.

3) ZRO (PW1) is the mother of S. She came home on the morning of 3rd October 2010 to some distressing news. That was about 5.00 a.m. S reported that she had been defiled by O with the assistance of the Appellant. S had a human bite to her mouth and blood stains on her vagina. Her mother also noted the presence of sperms in her young daughter's vagina. She took the girl for medical attention to (Particulars withheld) District Hospital and later to (Particulars withheld) Hospital for more advanced attention.

4) S and her sister S(PW2) had on the evening preceding the incident attended an event at the home of a relative. As they returned home, they met O and the Appellant. The Appellant inquired about the whereabouts of their other sister R .This did not go down well with S who told them off. The two sisters and their mother had earlier on seen O and the Appellant at their relatives home.

5) The early hours of 3rd October 2010 were wretched for S. At 4.00a.m, two people entered into the room where she was sleeping. She recognized them to be O and the Appellant. They were known to her. O raped her as the Appellant restrained her from fighting back by holding her hands and legs. They left in a huff on hearing some commotion on the outside.

6) The following day, Dr. Zachariah Njau (PW4) of Alupe District Hospital attended to S. This was after her initial visit to Busia District Hospital on the very day of the sexual assault. An examination showed multiple bruises on the girls' cheek, multiple bruises on her labia and the presence of spermatozoa in her genitalia.

7) In an unsworn statement, the appellant denied committing the offence. He alleged a frame up. That the Complainant (perhaps her mother!) was involved in a land dispute with him. That was the motive for trumping up the charges.

8) The Appeal generally challenges the weight and quality of evidence that was used to arrive at the conviction. The Appellant thought it weak and unreliable. It was also the view of the Appellant that the order in which the witnesses testified prejudiced his defence. That in particular he was prejudiced when the evidence of complainant was received as a last witness.

9) This is a first Appeal and this Court is required to re-evaluate the evidence that was adduced before the trial Court. The Court must thereafter reach its own conclusion. The Court will, however, remember that unlike the trial Court, it does not have the benefit of seeing and hearing the witnesses testify and due allowance must be given for this (see **Okeno –vs- Republic** [1972]E.A.32)

10) S testified how, in the earlier hours of 3rd October 2010, two men made entry into a room in which she was sleeping. She says that she saw the faces of the two men as one of them had lit a match stick. And this is what she said in answer to a question by the Appellant,

“I saw you from the light from the matchbox.”

The witness also told Court that she was able to recognize the Appellant as he was well known to her. She had earlier, on cross- examination, told the Court that,

“I know you too well. I saw you.”

11) The Learned Magistrate was satisfied with this evidence. In considering the credibility of S’s testimony one must have regard to the events of the preceding evening. The Appellant and O had been seen together at a ceremony at the home of PW1’s in-law. They had been seen by S, PW1 and PW2. And S and PW2 again saw them on their way home from the ceremony. The witnesses knew the two well. O is a relative while the Appellant was a neighbour. The witnesses saw them well enough to notice that O was wearing a cap. And it was the presence of this cap at the scene that would heavily incriminate O. But what was the sufficiency of the evidence against the Appellant?

12) This Court, would like the Learned Magistrate, hold that S recognized the Appellant. The light produced by the match stick provided the light that enabled her see the face of the Appellant. The Appellants face was familiar to S as he was well known to her. And she may not have had a difficulty recognizing him as she had seen him twice in the last 12 hours of the incident. The account given by S was also believable as her testimony was corroborated by the medical evidence of the P3 form. Not only had she suffered some bruises on her face and neck, but there was presence of spermatozoa in her genitalia.

13) The evidence of S was that by holding her hands and legs, the Appellant prevented her from warding off the sexual aggression of O. In this way the Appellant assisted O in defiling her. This amounted to the offence of gang rape under the provisions of Section 10 which reads:-

“10. 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 fifteen years but which may be enhanced to imprisonment for life.”

The Appellant was in the company of O when O defiled the complainant and even more dire, he actively assisted and aided O to commit this repugnant offence.

14) The evidence on record put into doubt the defence of the Appellant. It was his Defence that the entire case was a frame-up involving a land dispute between the complainant’s mother and himself. This

line of defence would not in my view displace the corroborated evidence of the complainant who recognized the Appellant. So, just like the Learned Magistrate, this Court disbelieves the Defence. It is not lost on the Court that the Appellant did not field any questions on this alleged Defence when cross-examining the prosecution witnesses.

15) I turn to consider the complaint raised about the sequence in which the witnesses testified. The complainant testified as the last prosecution witnesses. Although the Appellant argued that this prejudiced him, he does not demonstrate that prejudice at all. Section 208 of The Criminal Procedure Code provides for the procedure to be followed where an accused does not admit the truth of the charge. That Section provides:-

“208 (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any)”

The only requirement is that the trial commences with the prosecution case. And is this not obvious? Our criminal Law System requires that the prosecution sufficiently makes out a case against an accused person before the accused is asked to make a Defence (Sections 211 and 306 of The Criminal Procedure Code). That said, that complainant need not be the first witness to take the witness stand. The practice of starting with the complainant may be borne out of conventional wisdom that it is orderly for the complainant to lay a detailed foundation of how the crime is said to have been committed and then for latter witnesses to fill in that evidence. An accused person who feels that the sequence of calling evidence by the prosecution jeopardizes his/her Defence is entitled to object and advance the reasons for his/her apprehension. No such objection seems to have been taken up in the instance before Court.

16) This Court reaches a decision that the conviction by the Learned Magistrate was proper and will uphold it. I would say the same about the sentence. The sentence for an offence under Section 10 of The Sexual Offences Act is an imprisonment of a minimum term of 15 years with the possibility of enhancement to imprisonment for life. The sentence of 15 years imposed by the Learned Magistrate cannot be faulted. The entire appeal must fail and I do hereby dismiss it.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 29TH DAY OF MAY 2013.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR STATE

**F. TUIYOTT
J U D G E**