



No. 31

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO. 192 OF 2009**

DOMINIC OGETO NYABAYO ..... APPELLANT

**-VERSUS-**

REPUBLIC ..... RESPONDENT

**JUDGMENT**

**(Being an Appeal from the Original conviction and sentence of the Senior Resident Magistrate's Court at Keroka, Hon. J. Were in Keroka SRMCR Case No. 89 of 2008 dated 30<sup>th</sup> June, 2008)**

1. The appellant Dominic Ogeto Nyabayo was charged with the offence of defilement of a girl child contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. In the alternative indecent assault of a girl child contrary to Section 6(a) of the Sexual Offences Act No. 3 of 2006. After the case was heard the learned trial magistrate convicted the appellant on the 2<sup>nd</sup> count having not found evidence to support the charge on the 1<sup>st</sup> count. He was sentenced to 10 years and it is against this conviction and sentence that the appellant now appeals.
2. In his petition the appellant has raised the following grounds of appeal:-
  - i. ***The learned trial magistrate erred in law and in fact by admitting hearsay and circumstantial evidence which was not watertight to warrant conviction and sentence.***
  - ii. ***The learned trial magistrate erred in law and in fact by not fully analyzing the contradiction between PW2 and PW3 on the arrival time of PW1 at PW2's house and on the time that PW3 saw her outside which would have lead to the automatic acquittal of the appellant.***
  - iii. ***The learned trial magistrate erred in law and fact by overlooking the material discrepancy looming in the evidence in the subsequent testimony of PW3 which was instantly objected by the prosecution side during trial.***
  - iv. ***The learned trial magistrate erred in both law and fact by overlooking the medical report which never specified whose semen were found in PW1's genital areas.***
3. The brief facts of the prosecution case was that the complainant PW6 a child of 14years was headed for her grandmother's home when she met 3 men one who was on a bicycle. The two accused persons on the dock were the ones on foot. 2<sup>nd</sup> accused person wanted to be her husband since his wife had run away. She went to her grandmother's house but she did not get the money she was looking for but was sent to her other grandmother. She removed her school uniform and started walking towards her other grandmother's house where she met the 2 accused persons who included the appellant herein. The two had knives and they pulled her from the road threatening to kill her if she rejected them. She was taken by the two accused persons to a bush where the

- appellant held her down as the 2<sup>nd</sup> accused person defiled her. PW1 testified on how on the material day he met the complainant PW6 in the company of the appellant and the 2<sup>nd</sup> accused person. It was during the day and PW1 who is a neighbour to the 2<sup>nd</sup> accused person properly identified them.
4. PW2 testified that on that particular day they heard a child crying outside their house and invited her. The girl fell and fainted. He called his neighbours to come and assist him. At 6.00am they informed the police who came and took the girl to Nyansiongo hospital. He did not know why the girl fainted. PW3 corroborated the testimony of PW2. PW4 the clinical officer testified that he examined the complainant who alleged to have been defiled by people who she knew. When seen she was hysterical and was admitted for 3 days. He stated that the complainant's panties had blood stains and she was fearful on seeing men. She had bruises on her vagina, lacerations and fresh blood. He stated that semen can remain in the vagina up to 24 hours but he did not do a DNA to determine whose semen it was. He stated that it is possible to defile but not release semen inside the victim.
  5. PW5 testified that on 24<sup>th</sup> February 2008 while at station members of the public brought the 2<sup>nd</sup> accused on accusation of defiling a child. He arrested the 2<sup>nd</sup> accused person and took the child to St. Joseph Nyansiongo from where she was referred to Masaba District Hospital.
  6. The appellant in his defence testified that on the 23<sup>rd</sup> February 2008 he was taken from his house and asked if he knew the complainant. He was then arrested and charged. The appeal was opposed by the state. Miss Cheruiyot for the state submitted that the state was supporting both the conviction and the sentence. She submits that the appellant never objected to the testimony of PW3 as stated in his appeal nor did the appellant object to the testimonies of the prosecution witnesses. She further submitted that semen was found in the complainant's private parts although the medical officer did not do a DNA to confirm whose semen it was. The child when taken to the clinical officer was afraid of men and had to be convinced by the clinical officer. She further submits that considering the state and age of the complainant there is no reason for her to lie against the appellant and his co-accused. She finally concludes her submission by stating that the conviction and sentence is safe as it is the minimum sentence under the Sexual Offences Act and she prays that the appeal be dismissed.
  7. Having carefully considered this appeal and the record of proceedings and judgment and re-evaluated the evidence on record bearing in mind that I neither saw nor heard the witnesses and giving due allowance for the same as required in the case of *Okeno –vs- Republic* 1972 E. A 32, I find that for the reasons given herebelow, there is no merit in the appeal.
  8. The complainant PW6 stated clearly that it was the appellant who held her down as his co-accused defiled her. The two were seen in the company of PW6 by PW1. PW2 confirmed that he had called his neighbours PW1 and PW3 when the complainant was found by his wife crying outside his house and fainting on getting into the house. PW3 confirmed the call for assistance from PW2 when the complainant had fainted in PW2's house. PW4, the clinical officer testified to sexual penetration of the complainant on account the fact that "*her vagina had bruises and had lacerations and had blood*", but confirmed that no DNA on any semen was done.
  9. The complainant's (PW6) evidence that she had found the 2 accused persons with a third person who later gave her a place to sleep after the incident was confirmed by the evidence of PW1 who knew the 2 accused persons as his neighbours and who testified that he had been with the two accused persons at about 6.00pm on the material day when they were in the company of a "student lady", and that he proceeded on home leaving them behind, and that he later saw the two accused persons with the student at 10.00pm outside where they lived and that he had given her a place to sleep.
  10. PW6 was clear that she had been defiled by the 2<sup>nd</sup> accused while the 1<sup>st</sup> accused [appellant herein] held her down and prevented her from screaming. She further stated:

***“It was about 7.00pm and they held me and pulled me. They removed my pants and then defiled me. The 2<sup>nd</sup> accused took the 500/= I had. They took me to a plot near Manga. I informed the people on the plot, I wanted to go to Manga Police but they said it was late. They gave me a place to sleep. I went to the road and a motor vehicle came and they pulled me. The 3<sup>rd</sup> person who was with the 2 accused persons asked me to***

***sleep till the next day. I was given a place to sleep. The 2<sup>nd</sup> accused came with his wife and asked me to get out. The person who had accommodated me then opened the door. The 2<sup>nd</sup> accused came again at 8.30pm and ordered me that I was his wife and I should accompany him. I next found myself at Keroka Hospital. I do not know how I got there.***

This evidence is clearly consistent with the testimony of PW1 who said that the 2<sup>nd</sup> accused together with his wife came for the girl from the PW1's house and went with her and that PW1 was later called by PW2 to give first aid to the girl who had fainted. PW2 on his part confirmed that he had been awoken by his wife who heard a child crying outside his house in the plot where they lived with the 2 accused persons, and that when the girl was let into their house, she fell backward and fainted prompting him to call his neighbour PW1 and PW3 to help revive her.

There is an unclear answer to a question on cross-examination by the 1<sup>st</sup> accused that "You were defiling me", leaving a doubt whether she meant that the 1<sup>st</sup> accused also actually defiled her.

11. In the end the learned trial magistrate found that the evidence did not support the charge of defilement against the 1<sup>st</sup> accused but only the alternative charge [what he called count II] of indecent act. He said:-

***"The 1<sup>st</sup> accused is said to have held her and allowed the 2<sup>nd</sup> accused to defile her. I have no doubt from the evidence that the 2 accused person had been seen by PW1 prior to the offence, corroborating the evidence of the complainant. I do find that the prosecution evidence does not support the charge against the 1<sup>st</sup> accused in regard to the 1<sup>st</sup> count but only in regard to 2<sup>nd</sup> count and I accordingly convict him on the same. As regards the 2<sup>nd</sup> accused, the evidence adduced supports the conviction on the 1<sup>st</sup> count and I accordingly convict him on the same."***

12. It is wrong that the learned magistrate did not indicate the charge for which the accused were convicted as required by section 169 (2) of the Criminal Procedure Code as follows:- ***"In the case of a conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."*** However, the substituted charge sheet dated 19/3/2008 indicates the charge of indecent act of a girl child contrary to section 11 (1) of the Sexual Offences Act as the alternative charge facing each accused under the separate counts I and II, for the 1<sup>st</sup> accused and 2<sup>nd</sup> accused, respectively.

13. The offence of indecent act is only proved when its ingredients are proved within the meaning of the term indecent act under section 2(ii) of the Sexual Offences act as follows:-

***"indecent act" means an unlawful intentional act which causes-***

- a. ***Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
- b. ***Exposure or display of any pornographic material to any person against his or her will;"***

There was no evidence that the 1<sup>st</sup> accused had any contact with the "genital organs, breasts or buttocks of the complainant" to constitute the offence of indecent act. I think that the offence committed by the 1<sup>st</sup> accused along with his co-accused is gang rape under section 10 of the Sexual Offences Act which is in the following terms:-

***"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.”***

14. The trial court should have convicted the 1<sup>st</sup> and 2<sup>nd</sup> accused for the offence of gang rape pursuant to the provisions of section 179 (2) of the Criminal Procedure Code which permits conviction of a lesser offence in terms:

***“179 (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

Defilement of a child of 14 years attracts a minimum sentence of 20 years in prison while gang rape is punishable by a minimum sentence of 15 years imprisonment. In addition, section 186 of the Criminal Procedure Code which provides for conviction for an offence not charged, in the following circumstances:-

***“186. When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.”***

15. For the reasons set out above, I pursuant to section 354 (3) (a) (ii) of the Criminal Procedure Code alter the finding of the trial court and substitute therefor a conviction for gang rape under section 10 of the Sexual Offences Act. However, although there is a minimum sentence of 15 years imprisonment for offence of gang rape, as the appellant was not warned of the prospects of enhancement of sentence at the hearing of his appeal, I will not alter the sentence of 10 years imposed by the trial court. Had he been so warned, he might have abandoned the appeal as did the second accused on 22/11/2010.

16. Accordingly, the appellants appeal is without merit and is dismissed.

**Dated and delivered this 21<sup>ST</sup> day of JUNE 2013.**

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**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

..... **for the Appellant**

..... **for the Respondent**

**Mr. Edwin Mongare – Court Clerk**