



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 122 of 2010

MUSEREKA SAMWEL CHACHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of SRM Hon. J.R. Ndururi, dated and delivered on 25th May, 2010

in Kehancha SRMCRC NO.1045 of 2009)

JUDGMENT

1. The appellant was arraigned before the SRM's court at Kehancha on one count of gang defilement contrary to **section 10** of the **Sexual Offences Act, 2006**. He was charged alongside Siongo Samwel Chacha who was first accused. It was alleged that on the 15th day of July 2009 at [particulars withheld], Kuria District within Nyanza Province intentionally and unlawfully caused penetration of his genital organs into L.R., a girl aged 14 years.
2. The first accused in the lower court jumped bail while the trial was in progress and he is still at large. The appellant pleaded not guilty. The prosecution called 9 witnesses.
3. The complainant, L.R., a 15 year old minor at the time of hearing testified as PW1. She testified that at about 7.30 p.m. on 15th July 2009, she was given 100/= by her father and asked to go and bring sugar at a shop that was about 200 metres away from their house. As soon as she stepped out of the gate, she was grabbed by the throat and squeezed so she could not scream. The assailant placed a panga on her face. Then another person appeared and shone a torch at her. The person who had grabbed her first pushed her towards the second person until she fell down. The first person asked R. where her home was and when she mentioned that it was right there where they were, she was dragged some 50 metres away by the first person while the person who had a torch remained behind. The first assailant who had dragged R. for 50 metres then sought to know whether that boy had gone away and when he received the answer in the affirmative, he took R. further on to a place where there was security light and asked her whether she knew them. R. looked up and saw his dark face and the gaps in his teeth. The person who was asking the questions was the first assailant. He wore a black jacket while the second person wore a reddish garment over his body. After surveying the area for a while, the two assailants took R. to a dark place and held her against a wall.

She was informed that the two wanted to have sex with her.

4. The two forced her to the ground, lifted her skirt, removed her underpant and proceeded to defile

her. The first assailant had his turn while the second one kept watch and then they exchanged positions after a while. After the two were done with her, they warned her not to say anything, otherwise they would cut her up. Thereafter, the two assailants disappeared into the night. R. managed to get up and to walk home as she cried. She was bleeding. On getting home, R. informed her mother of the ordeal. She was taken to Isebania Sub-District Hospital by her father where she was treated and discharged. The treatment notes were given to her father. While she was still at the hospital, R. saw the appellant and his co-accused being escorted to the hospital by police officers. She recognized the 2 immediately as the two persons who had defiled her. She started screaming. She was able to recognize the two persons by the clothes they were wearing, the first assailant was still wearing the black jacket while the second assailant was wearing the reddish garment.

5. Later on, R.'s father took her to the police station where she recorded her statement. After recording her statement, she went back to the hospital to collect the underpant which she had forgotten there. At the police station, R.'s father was issued with a P3 form which was later filled by Charles Simiyu, a clinical officer at Isebania Sub District Hospital who testified as PW2. R. identified her blood stained underpants, the P3 form, a black jacket which the 1st accused in the lower court was wearing on the night of the alleged attack, a reddish jacket which the appellant is said to have been wearing. R. was also able to identify the appellant and his co-accused during the hearing. She did not know them before the day of the incident.

6. During cross examination, R. stated that after she had been grabbed by the throat, she could not scream because the grip on the throat was tight. She also stated that she was able to identify the appellant when the assailants took her to a place where there was a security light and asked her if she knew them. She also said that when the appellant and his co-accused were taken to the hospital where she was, R. was able to identify them immediately she saw them from the clothes they were wearing.

7. PW3, C.W. (C.), a retired clinical officer confirmed R.'s testimony to the effect that on 15th July 2009 at about 7.30 p.m., he sent R. with Kshs.100/= to the nearby shop to buy sugar; and that she did not return until about 30 minutes later. On her return, she narrated her ordeal to him and told him that she could identify her assailants because she had seen their faces when they took her to a place where there was a security light. Both R. and C. denied that they had a grudge with the appellant.

8. Charles Simiyu (Simiyu) who testified as PW2 treated R. at Isebania Sub-District Hospital under reference number 8636/09. On examination of R.'s genitalia, Simiyu found that there was a tear on the labia minor with some lacerations. Spermatozoa was noted on laboratory examination. R. was treated and put on ARV's for 28 days in addition to anti-pregnancy drugs and other urinary infection drugs. The P3 form together with R.'s treatment notes for 15th July 2009 were produced as **P. Exhibit 2 and 3** respectively.

9. PW4 was P.M.W. (P.). He recalled how, at about 7.00 p.m. on 15th July 2009, R. was sent to the shop by C. to go and buy sugar. When R. returned to the house at around 8.00 p.m., M. noticed that she was crying hysterically. Together with some of his friends P. went in search of R.'s assailants. R. had described the appellant by the clothes he was wearing. P. testified further that while he and R. were at the hospital, the appellant and his co-accused were brought there and that when she saw them, R. started screaming saying that they were the ones who had defiled her. Neither the appellant nor his colleague who is now at large put any questions to P.

10. Number 210160 Sgt. John Kimani testified as PW5. His testimony was that at about 8.30 p.m. on 15th July 2009, he was walking from his house near the Mark Hotel in Isebania. He was dressed in plain clothes. As he walked along, he met with 2 young men who ordered him to stop and to sit down. The 2 young men were armed with pangas. PW5 made as if to sit down, but instead he took out his gun, cocked

it and ordered the 2 young men to lie down. They complied. Members of the public came to the scene. With the help of the members of the public, the 2 young men were tied with ropes. PW5 then telephoned police for help. The police came to the scene and assisted PW5 to take the 2 young men to Isebania police station.

11. At the police station, PW5 learnt that someone had been defiled near where he had met the 2 young men. PW5 went back to the scene in the company of PC Josphat Kamara, PW7. It was established that the place where PW5 had met the 2 boys was near where R. had been defiled. Neither the appellant nor his co-accused put any questions to PW5.

12. PW7 was Number 45430 Police Constable Josphat Kamara of Isebania police station, Crimes Branch. When he reported for duty on 16th July 2009 at about 8.00 a.m., he went through the O.B from which he saw that he was required to investigate a case of gang rape involving the complainant herein. The complainant was also present at the offices of the Crime Branch. He recorded her statement. PW7 filled out a P3 form for her before escorting her to Isebania Sub-District Hospital for treatment and examination. R. was examined by Simiyu who also filled the P3 form.

13. After R. had been treated and examined, she took PC Kamara to the scene of crime which was about 150 metres away from the gate to the complainant's home. PC Kamara stated that there was a big electric light at the scene of crime which could enable one to see anything which was 50 metres away. He also testified that the grass at the scene was disturbed. He drew a rough sketch plan and also met with PC Kimani, PW5, whose house is about 50 metres from the scene. PC Kimani is the one who had arrested the appellant and his co-accused and escorted them to Isebania Police station. PC Kamara recovered R.'s blood-stained under pant and skirt.

14. PC Kamara prepared an exhibit memo so that the exhibits could be forwarded for chemical analysis. The following exhibits were forwarded for examination:

- *Red underpants with yellow, white and blue stripes marked AB- PMF19 accompanied by Exhibit Memo Form marked AB 1 and 2 CR 672/77/09.*
- *Blood samples for Siongo Samwel marked C-1.*
- *Blood sample for Musereka marked C-2.*
- *Complainant's blood sample marked C-3.*
- *Red underpant with black stripes (PMF1-11).*
- *Under pants and skirt of the complainant in a khaki envelope, C1, 2 & 3 CR 72/77/99 (cream underpants PMF1-4))*
- *Pink skirt (PMF1-12)*

15. PC Kamara personally delivered the specimens to the Government Chemist in NaiR. for analysis. They were marked B99/09. According to the results from the Government Chemist, which results PC Kamara also personally collected, it was established as follows:-

- *Ex AB1 and XB2 had no blood stains.*
- *The blood sample of the suspect AB2 was found to be of Group O.*

- *The blood sample of Exhibit XP1 was found to be of Group B.*

16. The analyst made an opinion to the effect that the complainant had had sexual contact with a group O secretor who could have been the suspect Musereka Samwel Chacha, the appellant herein. The analyst also concluded that the blood stains on complainant's clothing marked C2 and C3 matched in group the blood sample of the complainant and that the sample could have been from the complainant after injury. PC Kamara produced the PMF1-9 to 12 as **P. Exhibits 9-12** respectively.

17. PC Kamara also received 2 pangas and 2 jackets from the OCS, Isebania Police station – PMF1-5 and 6. The pangas and the jackets were marked PMF1-14. The witness also testified that when he interrogated R., she told him that the appellant was wearing a red jacket while the 1st accused was wearing a black jacket with white stripes. The two jackets were later recovered from the appellant and the 1st accused following an identification parade conducted by Number 55015 Inspector Felicien Nafula, PW6, of Isebania Police Station. PC Kamara also told the court that R. had told him that she was able to identify the appellant and his co-accused when the two were taken to Isebania Sub-District Hospital for examination. She was able to identify them by the same clothes she had seen the appellant and his co-accused wearing before they defiled her. The 2 pangas were produced as **P. Exhibit 14** while the red and black jackets were produced as **P. Exhibits 5 and 6** respectively. PC Kamara said that he had never known the appellant before this incident and that he did not have any differences with him.

18. During cross examination, PC Kamara testified that when he visited the scene of crime, the appellant and his co-accused did not accompany him. He also testified that the scene of crime was an open space with grass and next to a building which appeared secluded with little commotion. PC Kamara denied a suggestion that the blood that was found on the complainant's underpants was cow's blood or that it was blood from the complainant's monthly period. That the Government Chemist had confirmed the blood was human blood. PC Kamara also testified that he did not submit any semen for examination and he could not therefore say whether any of the defilers ejaculated. He also said that **P. Exhibit 11** had a blood spot. He denied that he had interfered with the details on the Exhibit Memo Form – **P. Exhibit 10**.

Although it was true that many people wore red and black jackets, PC Kamara stated that the red and black jackets produced in evidence were recovered from the bodies of the appellant and his co-accused. PC Kamara also confirmed both during cross examination and re-examination that the complainant's underpants were recovered from the complainant while she was at the hospital. PC Kamara also confirmed that he did not take the pangas for finger printing because he did not find it necessary to do so.

19. PW8 was Number 219379 Chief Inspector Kaburu Manyara of Isebania police station. He stated that while he was in his house at about 8.00 p.m. on 15th July 2009, he received a call from Sgt. Kimani of AP Camp Isebania requesting for a vehicle to transport 2 suspects he had arrested in possession of pangas. PW8 made arrangement for the transport. He also received another call from Cllr. Werema informing him of R.'s ordeal and that the suspects had already been arrested. PW8 proceeded to the cells where he found the appellant and his co-accused. He asked the appellant and his co-accused to strip so that he could confirm whether the allegations of defilement were true. PW8 said he noticed traces of blood on the appellant's underwear and on his private parts. That was also the case with the appellant's co-accused. When interrogated further on the presence of the blood on their bodies, the appellant and his co-accused alleged that they had been beaten up.

20. Thereafter, PW8 instructed PC Amos Musyoka (not called as a witness) to escort the appellant and his co-accused to Isebania Sub-District Hospital for examination. On examination, it was confirmed that the appellant and his co-accused exhibited traces of blood and spermatozoa on their private parts and underpants. PW8 also subsequently saw R. who told him how she had been defiled just outside the gate to her residence. PW8 confirmed to the court that though the appellant had been arrested before in

connection with another case and ordered to keep peace by the court, there was no grudge between the two.

21. Number 56808 Police Constable Mohemi Giburu testified as PW9. He is the one who instructed PC Amos Musyoka to take the appellant and his co-accused to Isebania Sub-District Hospital for examination. On arrival at the hospital, they found R. who on seeing the appellant and his co-accused screamed: **“These are the people who have raped me.”** and that R. became wild and went all over the hospital screaming. The appellant was then taken for examination. PC Giburu did not talk to R.. PC Giburu stated that he had no grudge with the appellant.

22. PW6 was Number 55015 Inspector Felicien Nafula of Isebania Police Station. She stated that she conducted identification parades for the appellant and his co-accused and that R. managed to pick out the appellant from the group of 8 men where the appellant had stood between the 3rd and 4th persons. PW6 prepared the identification parade forms for both the appellant and his co-accused. The forms were produced as **P. Exhibits 7 and 8** respectively.

23. At the close of the prosecution case, the appellant was found to have a case to answer. In his defence, the appellant gave unsworn evidence and testified that on the material day, he was on his way home when he met with police officers on patrol. He was arrested and taken to Isebania Police Station where he found his co-accused whom he did not know. The two of them were taken to hospital where he saw R. whom he did not know. He stated that the police instructed R. to say that he was the one who had defiled her. The appellant was then taken for medical examination. The appellant stated that it would appear that it was his co-accused who is still at large who appeared to have committed the offence. The appellant did not call any witnesses.

24. After carefully considering the evidence that was placed before him, the learned trial magistrate found that there was sufficient evidence on record to prove that the complainant was defiled on the material day. The learned trial magistrate also found that there was sufficient evidence to prove that the complainant was 14 years old at the time of the incident, particularly from documentary evidence of the baptismal card which was produced at **P. Exhibit 1** as well as the assessment done by PW2. The learned trial magistrate also found that though the incident happened at night, and that the only evidence of identification was that of the complainant, he was satisfied that there was sufficient light at the place where the incident took place to enable the complainant clearly identify her attackers to the extent of describing the jackets each of them was wearing, a black jacket in respect of the first accused and a red jacket in respect of the appellant. The trial court also made a finding that the appellant and his co-accused were arrested by PC Kimani some 50 metres away from the scene of the incident and that soon thereafter, when the appellant and his co-accused were

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stripped and checked and eventually examined at Isebania Sub-District Hospital, they were found to have traces of blood on their private parts and underpants. Finally the learned trial magistrate was satisfied that the appellant and his co-accused were identified by R. when the two were taken to the hospital where she was and she also picked each one of them at the identification parades.

25. On the basis of the above findings, the learned trial magistrate found the appellant guilty as charged and convicted him accordingly under **section 215** of the **Criminal Procedure Code**. The appellant was said to be a first offender. In mitigation, the appellant pleaded for mercy, saying that he was an orphan and the eldest son in the family. The court sentenced the appellant to 15 years imprisonment.

26. The appellant was aggrieved by both the conviction and sentence. He has come before this court on appeal. He has set out 18 homemade grounds which can be reduced to the following:-

- 1) *That the learned trial magistrate erred in law and in fact by failing to accord the appellant's counsel adequate time to represent him and by relying on insufficient evidence to convict the appellant.*
- 2) *That the learned trial magistrate erred in law and fact by relying on the evidence of identification parade when it was clear that the appellant had already been exposed to the appellant before the parade.*
- 3) *That the learned trial magistrate erred in both law and fact by failing to establish the actual age of the complainant and by relying on contradictory and fabricated evidence and in failing to conduct a voire dire examination for complainant.*
- 4) *That the learned trial magistrate erred in both law and fact in basing the appellant's conviction on inconclusive medical evidence.*

27. At the hearing of the appeal, the appellant relied on his written submissions. I have carefully read the same. I also heard submissions from Mr. Gitonga, learned prosecuting counsel by which he opposed the appeal. After considering all the above, I note that the incident took place at about 7.30 p.m., so the issue of identification is key in deciding whether or not the prosecution proved its case against the appellant beyond any reasonable doubt. I also note that the star witness R. was 14 years at the time of the alleged offence. A question arises as to whether failure by the court to conduct a voire dire examination on her was fatal to the prosecution case.

28. As this is a first appeal, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. I am also under a duty to consider and weigh the judgment of the learned trial magistrate, which I have done, remembering only that I do not have the opportunity to see and hear the witnesses who testified before the trial court. See **Okeno –vs- Republic [1972] EA 32;** **Pandya v-s- R. [1957] EA 336** and Gabriel Kamau Njoroge – **vs- Republic [1982-88] KAR 1134**. I also find that this case turns on the question of a single identifying witness and whether such evidence by the complainant could be relied upon in making a finding of guilty.

29. The issue of whether or not a trial court should conduct a voir dire examination was discussed by the Court in the case of **Nywela –vs- Republic [1989] KLR 452**. In the case, the appellant was tried and convicted of indecent assault on a female and sentenced to six months imprisonment. One of the grounds of appeal was that the trial court based its judgment and conviction on improperly admitted evidence of children of tender years. The court held *inter alia* as follows:-

1. *There is no definition in the **Oaths and Statutory Declarations Act (Cap 15)** of the expression “**child of tender years**” but in the absence of special circumstances the court takes it to mean any child of an age or apparent age of under fourteen years. However, whether a child is of tender years is a matter of the good sense of the court where there is no statutory definition.*
2. *The decision whether or not to conduct a voir dire examination of a child witness of tender years rests with the trial court.*
3. *If from its general assessment a trial court thinks a witness is not a child of tender years, an appellate court which did not have the same advantage as the trial court to see the witnesses will be in no firm position to find that the trial judge's exercise of discretion in accepting the witness's testimony without a voir dire examination was wrong.*

30. The court in the **Nywela case** (above) quoted a passage by Windham JA in the case of **Kibangeny – vs- R [1959] EA 92 at p. 94** where the learned Judge expressed himself thus:-

“There is no definition in the Oaths and Statutory Declarations

Evidence of the expression “child of tender years” for the purpose of section 19. But we take it to mean, in absence of special circumstances, any child of an age, or apparent age, of under 14 years; although as was stated by Lord Goddard, CJ in R. –vs- Campell [1956] 2 All ER 272 –

“Whether a child is of tender years is a matter of the good sense of the court --- where there is no statutory definition.”

31. In the instant case, R. was said to be 14 years old, and in terms of the definition above given as to who a child of tender years is, I cannot fault the trial magistrate for choosing not to conduct a voir dire examination upon her. R. gave a very vivid description of her assailants and how after the appellant had grabbed her, they walked with her for about 50 metres to where there was a bright security light and while standing under that light, the appellant asked the complainant to say whether she knew them. R. stated the following regarding what happened while the three of them were under that light.

“The one who was holding me asked me whether I knew them. I

looked up and saw his face. He was dark and had gaps in his teeth. He was wearing a black jacket. I also saw the 2nd person was wearing a reddish garment over his body. The two examined the area and led me to a dark place. They took me against the wall. The one who was holding me told me they wanted to have sex with me. He forced me to the ground, lifted up my skirt and removed my underwear. He proceeded to defile me. The other kept vigil.”

32. From the above, I am satisfied, just like the trial magistrate was that the conditions prevailing at the time of the commission of the offence were conducive to error free identification of the appellant by R. The appellant and his co-accused had not covered their faces at all. Soon after the incident, PC Kimani met with the appellant and his co-accused who ordered PC Kimani to sit down. The events quickly unfolded, and the appellant and his co-accused were arrested and eventually taken to police. After the appellant’s arrest, reports of R. having been defiled right near where the appellant was arrested do the rounds and when the appellant is taken to the Isebania Sub-District hospital, he and his co-accused are instantly identified by R. as **“these are the men who defiled me.”** The appellant is also found to be having blood and spermatozoa on his private parts and underpants. The appellant and his co-accused are found wearing the very jackets which R. has described to the police. In my humble view, all these events were not mere coincidences. With the kind of description R. gave of the appellant, and the fact that she was able to identify them at the hospital, I agree with the appellant that the identification parade conducted by No.55015 Inspector Felicien Nafula was of no probative value.

33. I have carefully read the judgment of the trial court and I am satisfied that the learned trial magistrate properly considered the law relating to a single identifying witness as set out in **Abdallah Bin Wendo – vs- R. [1953] 20 EACA 166.** R.’s evidence as to identification of the appellant remained unshaken throughout the trial. There was nothing contradictory about the said evidence. R.’s evidence was corroborated in every material particular by the medical evidence of the P3 form, the evidence by Chief Inspector Kaburu Manyara, PW8, the evidence of PC Kamara and PC Kimani.

34. In the premises and as submitted by counsel for the respondent, this appeal lacks merit. The same is accordingly dismissed on both conviction and sentence. R/A within 14 days.

35. It is so ordered.

Dated and delivered at Kisii this 25th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:-

Present in person for Appellant

Mr. Mutua (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.