REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 17 OF 2020

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. A.N. Sisenda (R.M) in Narok CMCR No. 18 of 2018 on 6th August 2020)

COSMAS KOECH..APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

JUDGMENT

[1] The appellant was charged with:

[2] Count I. the offence of gang defilement contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 11th day of February 2018 [Particulars Withheld] village Sogoo location, Narok South District within Narok County in association with others not before court intentionally caused his penis to penetrate the vagina of AC a child aged 12 years.

[3] The alternative count was committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 2006. The particulars were that on the 11th day of February 2018 [Particulars Withheld] village Sogoo location, Narok South District within Narok County intentionally touched the vagina of AC a child aged 12 years.

[4] Count II. Gang defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 11th day of February 2018 [Particulars Withheld] village Sogoo location, Narok South District within Narok County in association with others not before court intentionally caused his penis to penetrate the vagina of AC a child aged 13 years.

[5] In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 2006. The particulars were that on the 11th day of February 2018 [Particulars Withheld] village Sogoo location, Narok South District within Narok County intentionally touched the vagina of AC a child aged 13 years.

[6] The appellant was convicted on the two main charges and sentenced to serve 15 years' imprisonment for each count. The sentence to be served concurrently.

[7] Being dissatisfied with the said conviction and sentence he preferred an appeal as set out ten (10) grounds of appeal;

> **i. That the learned trial magistrate grossly erred in law and in fact in relying on the suspicious and fictitious evidence of witnesses.**
>
> **ii. That the learned trial magistrate grossly erred and / or misdirected herself in law and facts in holding that the medical evidence tendered as truthful and free from the error and doubt without critically observing that the same was not credible in light of the ages of the complainants.**
>
> **iii. That the learned trial magistrate erred in law and fact in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubtful without the benefit of properly conducted investigation.**
>
> **iv. That the learned trial magistrate gravely misdirected herself in law and fact in finding the appellant guilty as charged in the absence of corresponding medical evidence of sexual activeness on the part of the appellant;**

v. That the learned trial magistrate heavily misdirected herself in law in shifting the burden of proof to the appellant and further ignoring the defense of the of the appellant without proper evaluation;

vi. That the learned trial magistrate failed to test the evidence of the prosecution witnesses and caution the circumstances thereby convicting on flimsy , inconsistent and evidence that was not watertight enough ;

vii. That the learned trial magistrate grossly erred in law and fact in placing weight on the evidence without observing that their evidence contravened the provisions of article 50(4) of the constitution and section 36 (1) as read with section 36 (5) of the sexual offences act;

viii. That the learned trial magistrate erred in law and fact without observing that there were no substantive investigations by the investigating officers thereby basing the conviction on mere allegations and fabrication;

ix. That the learned trial magistrate erred in law and fact in believing the testimonies of the witnesses on record without considering that they mentioned witnesses were not called to testify; and

x. That the learned trial magistrate grossly erred in law and facts in convicting the appellant against the weight of the evidence.

[8] Ultimately, he prayed that this appeal be allowed and sentence be quashed or that this court evaluates the evidence and make its own finding in conviction and sentence.

Respondent's submission

[9] Mr. Karanja, the prosecution counsel, submitted that the two complainants testified that they were 12 and 13 years old respectively; this was corroborated by PW3 –the mother to PW1 as well as the aunty to PW2. Further the same was proved through age assessment which confirmed to be aged 12 and 13 years respectively.

[10] The respondent submitted that the fact of penetration was proved beyond reasonable doubt. The evidence of PW1 and PW2 on the fact of penetration was corroborated by the medical evidence produced in court by PW4.

[11] The respondent submitted that the appellant was someone who was familiar to the girls as well as his companions. PW1 and PW2 were consistent on the events of the material date. Medical examination revealed the appellant, PW1 and PW2 all suffered the same venereal disease.

[12] The respondent submitted that the trial court while rendering its judgment did consider the appellant's defence and dismissed it as it did not dislodge the prosecutions' case. In the same vein the respondent urged this court to dismiss the appellant's defence.

[13] On the sentence, the respondent submitted that the sentence passed on the appellant is a lawful sentence as the court in sentencing considered that the appellant and his two friends not only assaulted the two minors but took turns in defiling them. The appellant also with his friends infected the girls with venereal disease; gonorrhea. Mr. Karanja, therefore, urged this court to enhance the sentence to life imprisonment considering the circumstances. The respondent relied in the case of ***Onesmus Safari Ngao Vs Republic Criminal Appeal No. 5 Of 2020 Court of Appeal at Malindi (Unreported).***

[14] In conclusion, the respondent submitted that the conviction was safe as against the appellant and urged this court to uphold it as well as the sentence.

ANALYSIS AND DETERMINATION

Court's duty

[15] As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See ***Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.***

[16] I have considered the grounds of appeal and evidence adduced in the lower court and find the following as issues for determination.

i. Whether the offences were proved beyond reasonable doubt; and

ii. Whether the sentence was manifestly harsh and excessive

Elements of offence

[17] The appellants were charged with the offence of gang defilement contrary to Section 10 of the Sexual Offences Act which provide as follows: -

"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 the fifteen years but which may be enhanced to imprisonment to life.”

[18] Elements of the offence of gang rape or gang defilement are in Section 10 of the Sexual Offences Act are:-

a. Unlawful sexual act committed in association with another or others or

b. Being in the company of another or others who commit the offence with common intention of committing the offence.

[19] Accordingly, a person may not have engaged in the sexual act of defilement but is guilty of gang rape or defilement if he was in company of another or others who commit the offence with common intention of committing the offence.

[20] For gang defilement to be proved besides the above, the three ingredients of defilement being age of complainant, penetration and identification of assailant must be proved.

Age of the complainants

[21] The case of ***Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000***, is explicit on proof of age of the sexual victim that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

[22] What emerges from the authorities is that age may be proved through certificate of birth or age assessment by a qualified doctor or through other credible evidence such as baptismal card, notification of birth or school records or the evidence of parents or guardian.

[23] In this case, PW1 testified that on 21st May 2019 she was aged 12 years. She was subjected to an age assessment at Narok Referral hospital. Her age was assessed to be 12 years. The age assessment report was produced by PW5 as **P Exh 7.**

[24] PW2 testified that she was 13 years old. She underwent an age assessment as well. He age was assessed to be 13 years. Her age assessment report was produced as **P Exh1**.

[25] The mother’s evidence, that of the aunt as well as the age assessment reports of the complainant’s age prove the age of the complainants. In the circumstances, it was proved beyond reasonable doubt that the age of the complainants was 12 and 13 respectively. I do not find anything on which to disturb the finding of the trial magistrate.

Prove of penetration

[26] Section 2 of the Sexual Offences Act defines penetration as:

‘The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

[27] PW1 testified that on the said 11th February 2018 while in the company of PW2 they had gone to the river Amalo to wash their cloths. That they left the river which is about 3km from their house at around 7PM. At Kakunyot shopping Centre they were offered a ride by a boda boda rider Kimalet who promised to take them home. On reaching the sign post at Barakorwet Abel also joined them along the way the appellant also joined them. When they approached the victims’ residence the motorcycle did not stop instead it went and stopped in a bush near a school in [Particulars Withheld].

[28] PW1 stated that her cousin PW2 was hit by the appellant when she refused to follow the commands of the appellant and his companions. She stated how the appellant tore her black biker and her black underwear. The black biker and black underwear were produced in court as **P Exh 2** and **3** respectively.

[29] PW1 described how the appellant and his companions took turns in defiling her and that they did not use any protection while having sex. After the defilement the appellant and his companions ordered the girls to go home.

[30] PW2 corroborated the evidence of PW1 that she went through the same ordeal at the hands of the appellant and his companions. She also stated how the appellant and his companion tore the clothes of PW1.

[31] The evidence of PW1 and PW2 was corroborated by the medical evidence produced in court by PW4. PW4 stated that he examined PW2 and noted that her genitalia were swollen and her labia had abrasion. He also noted that her neck was also swollen and tender.PW4 produced PW2’s P3 form, treatment notes and PRC form as **P Exh 10, 8** and 9 respectively.

[32] PW4 also examined PW1. He noted that her labias were also swollen. He produced her p3 form, PRC form and treatment notes as **P Exh 5, 6**, and **4** respectively.

[33] PW4 also examined the appellant. He noted that his urine had pus cells just like PW1 and PW2. The appellant's urine had blood stains which he opined was an indication that the appellant may have been injured during the act.

[34] On reexamination, PW4 confirmed that the appellant and the two minors were found to be suffering from gonorrhea and he prescribed the medicine for the three of them.

[35] From the PRC forms produced, PW4 noted that the hymen of PW1 and PW2 was broken and longstanding. These pieces of evidence were cogent proof of penetration. The trial court was properly grounded on evidence in her finding that there was proof of penetration.

Identification of the perpetrator;

[36] The essential element of gang defilement is defilement committed in association with two or more persons. Penetration was proved. I will deal with the other limb on whether he was the one who caused the penetration or with the other assailants not before court and if so, if they had a common intention in the commission of the offence.

[37] PW1 and PW2 have been very consistent that it was the appellant in the company of Kimalel and Abel who had tricked them by offering them a lift on their motor cycle to their home but rode past their home to a bush near [Particulars Withheld] School. They then took turns in defiling them.

[38] PW1 in her evidence stated that the appellant herein also goes by the nick name of '***'nyam nyam'***. She stated that the ordeal took about two hours and thus had a lot of time to confirm the identity of her attackers including the appellant.

[39] The evidence of PW1 on identification was corroborated by her cousin PW2. They both stated that they used to see the appellant at Barakorwet Centre.

[40] The examination that was carried out on PW1 and PW2 as well as the appellant revealed that they had similar strain of venereal disease, thus making it more likely than not that the appellant participated in the gang defilement of PW1 and PW2. From the foregoing, there is no doubt in evidence of identification of the perpetrators; the appellant in company with others caused penetration of the two girls. I therefore find that this ingredient too was proved beyond reasonable doubt.

[41] The appellant in his defence stated that there was an existing grudge between him and PW3. That he was employed by PW3 but during cross examination PW3 denied having ever employed the appellant. She was categorical that she has never owned a hotel. She further stated that she has never differed with the appellant.

[42] I am satisfied that the Appellant's defence was properly rejected on the basis of evidence by the prosecution which proved beyond any reasonable doubt that the appellant defiled the children herein in company with others. The Appellant's conviction was safe.

On sentence

[43] The sentence prescribed in **Section 10** of the **Sexual Offences Act No. 3** of **2006** upon conviction is imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life.

[44] The aggravating factors weigh heavy; the appellant and his two friends penetrated the two minors in turns. It must have been real ordeal as the medical evidence reveals. They also infected the girls with a venereal disease; gonorrhea. More ordeal. The act of gang defilement on the two girls was also too traumatic that PW2 contemplated taking poison after the shameful act done to her. It was only sheer luck that she was seen in time and stopped from taking her life by PW3 with the assistance of a neighbor. It is noted that the sentence given to the Appellant is provided in law but exercise of discretion by the trial court ought to have been exercised judicially. The trial court did not consider the manner the offence was committed and traumatic effects on the girls which deserved a stiffer and deterrent sentence. Thus, the trial court committed an error in principle. The prosecution has sought for enhancement of sentence to life imprisonment. The request is reasonable and towards achieving due justice in the case. The circumstances herein warrant enhancement of sentence for the appellant. The acts of the appellant and the others in the gang defilement herein are only comparable to a pack of wolves who cunningly drive their prey to the trap and upon catching, they compete to, and devour the prey without mercy to satisfy their insatiable sexual appetite. They left the innocent girls with eternal dent of their integrity as human beings. They destroyed the beauty of a woman which is encapsulated in the pride, self-esteem, integrity and honour of the person. To say the least, their worth and innocence was irreparably damaged by this beastly act. They have also been left them with deep and chronic trauma which will affect them psychologically, emotionally and physically for the rest of their lives. These things must be said to dramatize what it real means to rape or defile a woman. I have stated before, and I will state it again without fear of contradiction, that whomever admires and defiles the prohibited; a child; will tremble in the right place; the prison. No wonder the legislative intent which is a reflection of the societal detestation of defilement exclude sexual offences from settlement through alternative dispute resolutions, traditional methods of dispute resolutions, plea bargaining, probation, community service order et al.

[45] The circumstances of this case could even justify enhancement to life sentence. However, in exercise of my discretion, I set aside the 15 years' imprisonment and enhance the sentence to life imprisonment for the two main counts of the offence. The appellant is sentenced to serve 20 years in prison for each count. The sentence to run concurrently.

[46] For purposes of Section 333 of the Criminal Procedure Code, the sentence shall commence from 28/2/2018 when he was first arraigned in court. I note he was never released on bond, hence the date of commencement of sentence.

[47] I therefore find no merit on the appeal herein both on conviction and sentence which I hereby dismiss. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 7TH DAY OF DECEMBER 2021

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F. GIKONYO M.

JUDGE

In the presence of:

1. The appellant

2. Kasaso CA