IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 76 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 77 OF 2019

BETWEEN

BERNARD KARIUKI WACEKE.....1ST APPELLANT

WILLY MWANIKI WANGARI.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 24th September

2018 in Criminal Case (SO) No. 14 of 2017 at Gatundu Magistrates Court before Hon. C. Makari, RM)

JUDGMENT

1. The appellants, **BERNARD KARIUKI GACEKI** and **WILLY MWANIKI WANGARI**, were charged with the offence of gang rape contrary to **section 10** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the offence were that on 3rd March 2014 between 0200hrs and 0500hrs in [particulars withheld] village of Gatundu North Sub-county in Kiambu County intentionally and unlawfully, the appellants jointly did an act which caused penetration with genital organ namely penis into the genital organ namely vagina of NM, a child aged 16 years.

2. As this is the first appeal, I am required to review all the evidence and come to my own conclusion as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see ***Okeno v Republic*** **[1972] EA 32**, ***Kiilu and Another v Republic*** **[2005] 1 KLR 174**). In order to fulfil this duty, it is necessary to set out the evidence as it emerged before the trial court.

3. The prosecution called 4 witnesses to prove its case. PW 1 testified that on 3rd March 2014 at about 2.00am, she was asleep with her mother, PW 2, in the same room when she heard someone call out PW 2. The person also told her to keep quiet. She recalled that the 2nd appellant had a torch and she was able to see him. The assailants told her mother to get under the bed while demanding to know where she kept the money. They started ransacking the house looking for money. The 2nd appellant got to her bed and demanded money from her. He covered her face with a blanket and started to remove her clothes as she struggled. He also removed his trouser while threatening to cut her if she screamed with the panga he put on her neck. He inserted his penis into her vagina and when he finished he went to talk to the 1st appellant and they asked PW 2 what was in the suitcase in the next room. The 2nd appellant came back and molested her again. They went to the next room ransacked it and came back and threatened them if they told anyone. PW 1 told the court that she knew the appellants as they were boda boda riders and they were from the same village.

4. PW 2 recalled that on the material day at about 2.00am, she was awoken by someone with a panga pulling her blanket. The person demanded that she get out of bed and give up money. The two assailants, whom she recognised as the appellants, started ransacking the room while demanding money. They told her to go under the bed and remove the money. They also had torches with which they were using as they searched for money. PW 2 further testified that the 2nd appellant climbed on PW 1's bed, removed his trouser and defiled her. At the time the 1st appellant had a slasher and was keeping guard. After he finished, the 1st appellant climbed on her and also defiled her. All the time she was covered with the blanket. The assailants remained there until morning and left but not before threatening to behead them if they told anyone. PW 2 told the court that she knew the appellants as they were from the locality.

5. After the assailants had left, PW 1 and PW 2, realized that the appellants had gained entry by removing bricks from the wall. PW 2 alerted a neighbour and then she took PW 2 to the hospital for examination and treatment. She also reported the matter to the police station where she was issued with a P3 medical report. PW 2 also took PW 1 to Nairobi Women's Hospital for tests.

6. The Investigating Officer, PW 3, recalled that after hearing that a girl had been defiled on the morning of 3rd March 2014 at about 9.00am, he proceeded to the scene but found that PW 1 had been taken to hospital. Later that day he revisited the home and found PW 1 and PW 2 who narrated to him what happened. He recorded statements and obtained the P3 medical form from the Hospital. He also produced PW 1's birth certificate which showed she was born on 16th October 1997.

7. PW 4 was the doctor who produced the P3 medical form and treatment notes on behalf of the doctors who treated and examined PW 1. According to PW 4, PW 1 was first treated on 3rd March 2014 while the P3 medical form was signed after PW 1 was examined on 6th March 2014. When PW 1 was examined on 3rd March 2014, the vagina was warm and moist, there was redness and the hymen was broken and a whitish discharge. He opined that this was evidence of penile penetration.

8. When placed on his defence, the 1st appellant made an unsworn statement in which he denied the offence. He stated that he was a boda boda operator. He stated that he was in Juja from 3rd March 2014 to 5th March 2014. He was arrested on 5th March 2014 after being called to pick a customer. On reaching there he was attacked by members of the public. The 2nd appellant's mother, DW 2, told the court that on the morning of 3rd March 2014, she met another woman who told her that she had heard that PW 1 had been defiled by 6 men. She went to find out what was happening whereupon she met PW 1 who told her that she had been defiled by 6 men. She also met PW 2 who told her that 6 men had defiled PW 1. She asked who they were but she told her she did not know them.

9. In his unsworn statement, the 2nd appellant denied the offence. He stated that he was a boda boda rider and that on 2nd March 2014, he was in Nairobi where he met with his brother. He was working with him until 4th March 2014. When he returned to Gatundu on 5th March 2014, he was arrested. DW 4, the 2nd appellant's brother, testified that he was with the appellant on the night of 3rd March 2014.

10. On the basis of the aforesaid evidence, the appellants were convicted. They now appeal against conviction and sentence. Their case as set out in the grounds of appeal and written submissions is that the prosecution failed to prove all the elements of the offence. More importantly they contended that the trial magistrate failed to find that the appellants were not properly identified and that they were the subject of mistaken identity. They pointed out that the evidence was at variance with the first reports made by PW 1 and PW 2. The appellant complained that the trial magistrate failed to consider their alibi defence. The respondent contended that the prosecution proved all the elements of the offence. Counsel urged that the identification of the appellants was free from error and in any case the appellants were persons well known to the witnesses hence the case was one of recognition and that they were positively identified.

11. The offence of gang rape is provided for under **section 10** of the ***Act*** which states;

> *Any person who commits the offence of rape or <u>defilement</u> 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 than fifteen years but which may be enhanced to imprisonment for life.* [Emphasis mine]

12. Although the side note to **section 10** of the ***Act*** refers to gang rape, the same offence refers to defilement. The essential element of gang defilement is defilement committed in association with two or more persons. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

13. PW 1 described in detail as to how she was subjected to an act of penetration by the assailants. Her testimony was corroborated by PW 2 who was in the same room and was watching what was happening. PW 1's testimony was corroborated by the testimony of PW 4 who produced medical reports which showed she was treated on the day the incident took place and which confirmed that indeed an act of penetration had taken place. Further, both assailants acted jointly in threatening PW 1 and PW 2 and achieving their intention of each committing the felonious act.

14. The substantial issue in this appeal is whether the appellants were implicated in the gang defilement. The issue of identification in difficult circumstances has been the subject of various decisions of our court. The Court of Appeal has given guidance on how visual evidence of identification in those circumstances is be approached in a plethora of authorities (see ***Abdalla Bin Wendo & Another v R* [1953] 20 EACA 166**, ***Anjononi & Others v Republic* [1980] KLR 59**) and ***Francis Kariuki Njiru & 7 others v Republic* NRB CA Cr. Appeal No. 6 of 2001 [2001] eKLR**). In ***Wamunga v Republic* [1989] KLR 424** the Court of Appeal warned that;

> ***[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.***

15. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic* [1986] KLR 198** and ***R v Turnbull* [1967] 3 ALL ER 549)**. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic* [1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic* [1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

16. The appellants emphasized that PW 1 and PW 2 failed to name the suspects at the first opportunity. In ***Simiyu and Another v Republic***

[2005] 1 KLR 192, 195, the Court of Appeal expressed the following view where the suspects were not named in the first report as follows:

> *If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See* ***R – v- Kabogo s/o Wagunyu 23 (1) KLR 50****). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe…. Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification…. In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory.*

17. It is with these principles in mind that I now turn to consider the evidence. PW 1 and PW 2 both testified that they knew the appellants as they were from the same village. This was not disputed by the appellants and their witnesses hence this was a case of recognition rather than identification of a stranger. PW 1 and PW 2 testified that the appellants had torches which they were using while demanding money and ransacking the room. Given the proximity of the appellants with PW 1 and PW 2, the time taken and the level of interaction, I am satisfied that the circumstances were favourable for positive identification.

18. The trial magistrate also accepted that the appellants were recognised by their voices. He cited ***Choge v Republic*** **[1985] KLR 1** where the Court of Appeal stated as follows;

> *Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the Accused person's voice that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.*

19. The appellants were in the room for some time and when they first came they demanded money, ransacked the room, issued threats to the witnesses, defiled PW 1 and once again threatened them. Since PW 1 and PW 2 knew the appellants and given the time spent together in the confined space of the room where they were talking are all circumstances which I am satisfied were clear and made the identification positive and free from error.

20. The appellants contended that the first reports by PW 1 and PW 2 did not name them. When PW 1 was cross-examined on this issue, she stated that the first report was just a report and that she named the appellants in the statement she made to the police. PW 2 also stated the she named the appellant in her statement. PW 3 admitted that the first report did not bear the appellants' name but the recorded statements of the witnesses named the appellants. When re-examined, PW 3 also stated that when he spoke to PW 1 initially, she was so traumatized that she did not speak and only opened up after counselling.

21. I do not read the case of ***Simiyu v Republic*** **(Supra)** to mean that it is in every case that the suspect must be named in the initial report. What I understand the Court of Appeal to be saying is that the first report is one of the factors that go into weighing the quality of evidence of identification. In this case, the appellants were named as suspects in the recorded statements. In ***Japheth Gituma Joseph and 2 Others v Republic*** **NYR CA Criminal Appeal No. 132 of 2014 [2016] eKLR**, the Court of Appeal considered the evidential value of the records in the Occurrence Book vis-à-vis the recorded statement and took the view that:

> *[17] In conclusion, we venture to say that the recording of names of suspects of crime in the OB is not a statutory requirement and that the OB entries by their nature cannot be considered as a first report against a suspect for purposes of impeaching the credibility of a witness in connection with visual identification of a suspect. Rather, the official statement to a police officer or other oral reports made to police or to other persons immediately after the commission of the crime is normally the proper basis for impeaching the credibility of the witnesses. Where the issue of first report and first opportunity is raised to impeach the credibility of the evidence of visual identification, it is sufficient that the name or description of a suspect is given by the witness in their official statement to police. This first ground of appeal has no merit.*

22. In this case, the appellants were known and their identity was clearly stated in the recorded statements. At this point I also dismiss the testimony of DW 2 who suggested that PW 1 and PW 2 told her that there were 6 assailants and that she did not know the names of any of them. Nothing in the evidence of the prosecution emerged to show that there were more than two assailants. I also reject the appellant's alibi defence as the appellants were positively identified, there was no suggestion that they were lying or that there was a grudge or that PW 1 and PW 2 would randomly pick the appellants from their village to fix the offence on them.

23. The final element of the offence of defilement is the age of the child. PW 3 produced PW 1's birth certificate showing that she was born on 16th October 1997. At the time the offence was committed she was aged 16 years. From the evidence and for the reasons I have given, I affirm the conviction as the prosecution proved that the appellants are the ones who broke into PW 2's house and proceeded to each subject PW 1 to acts of penetration under threats of violence.

24. As regards the sentence, the appellants were sentenced to serve 11 years' imprisonment. The mandatory minimum sentence under **section 10** of the ***Act*** is 15 years' imprisonment. The trial magistrate took into account the fact that the appellants had served 4 years in custody since they had been convicted previously and the court ordered a re-trial which gave rise to this appeal. Mandatory minimum sentences under the ***Act*** have been declared unconstitutional (See ***Francis Karioko Muruatetu and Others v Republic*** **[2017] eKLR and** ***Christopher Ochieng v Republic*** **KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR). However, I have no reason to depart from the sentence imposed by the trial court.**

25. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 16TH DAY OF JANUARY 2020.

R. N. SITATI

JUDGE

Appellants in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.