



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.74 OF 2019 & 202 OF 2018

JACKSON GODLOVE KAAYA1ST APPELLANT

EMMANUEL WILLIAM NASSARY2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Kanyiri SRM delivered on 30th August 2018 in Makadara CM Cr. Case (S/O) No. 57 of 2016)

JUDGMENT

The 1st Appellant, Jackson Godlove Kaaya, was charged in count 1 and the 2nd Appellant, Emmanuel William Nassary, in count 2 with the offence of **gang rape** contrary to **Section 10** of the **Sexual Offences Act**. The particulars of the offence were that on 28th April 2016 at Cross-Road in Nairobi County, each Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JWW a minor aged 14 years old. In the alternative charge, the Appellants were charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 28th April 2016 at Cross-Road in Nairobi County, each Appellant intentionally and unlawfully caused his penis to penetrate the vagina of JWW a minor aged 14 years old. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellants were convicted as charged on the main charge of gang rape and were each sentenced to serve life imprisonment.

In their petitions of Appeal, the Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were of the view that the prosecution failed to establish its case against them to the required standard of proof beyond any reasonable doubt. They faulted the trial court for failing to take into account the conduct of the complainant immediately after the alleged sexual assault. They took issue with the fact that the identification parade was not conducted in accordance with the Police Force Standing Orders. They were aggrieved that the trial court in convicting them, relied on the medical examination report which indicated that the complainant's vagina had a foul discharge. It was the Appellants' view that the foul discharge was a symptom of a sexually transmitted disease, yet the Appellants were not diagnosed with any such infection. They faulted the trial magistrate for failing to take into account their alibi defence in arriving at her decision. They were further aggrieved that the sentence meted by trial court was harsh and excessive in the circumstances. They opined that the trial magistrate failed to consider their mitigation in meting out the sentence. In the premises, the Appellants urged this court to allow their respective appeals, quash their conviction and set aside the sentence that was imposed on them.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. During the hearing of the Appeal, the Appellants filed written submission in support of their appeal. They urged this court to consider their appeal. This court also heard oral submission from Mr. Larabi for the Appellants and Ms. Akunja for the State. Mr. Larabi was of the view that the prosecution failed to establish its case against the Appellants to the required standard of proof beyond any reasonable doubt. He asserted that the prosecution's case was inconsistent and full of contradictions. He submitted that the complainant stated that she was dragged into the Appellant's house. She was screaming. It was her testimony that her aunt rescued her. However, her aunt denied having gone to the scene of crime. Counsel for the Appellant averred that these were material contradictions in the prosecution's case.

Mr. Were further submitted that the complainant stated that the 2nd Appellant did not sexually assault her. He averred that the fact that PW2 reported the incident to the police five days after it was alleged to have occurred raised doubt as to the guilt of the Appellants. He stated that the when the 1st Appellant was arrested, the 2nd Appellant went to visit him. He was also subsequently arrested. Counsel for the Appellants was of the view that the conduct of the 2nd Appellant in visiting the 1st Appellant was indicative of his innocence. He asserted that the medical report produced in evidence indicated that the complainant had contracted a sexually transmitted disease. However, when the Appellants were examined, they were not diagnosed with any sexually transmitted disease. He opined that the Appellants could therefore not have defiled the complainant as the evidence on record indicated that there was no use of condom when the complainant was assaulted.

Counsel for the Appellants further averred that the identification parade conducted at the police station was in violation of the Police Force Standing Orders. He was of the opinion that the prosecution failed to establish the ingredients of the offence of **gang rape**. He asserted that the Appellants were framed of the present charges. He stated that the sentence meted by the trial court was harsh and excessive in the circumstances. In the premises, he urged this court to allow the Appellants' appeal.

Ms. Chege for the State conceded to the appeals. She averred that the complainant was a special needs child who testified through an intermediary. She submitted that the prosecution's case was inconsistent and full of contradictions. She was of the view that the Appellants' conviction was not safe. She stated that the complainant testified that after she was sexually assaulted, she immediately informed her aunt. However, the said aunt told the court that she found out about the incident a few days later. She further asserted that the prosecution failed to avail the blood-stained clothes the complainant was wearing at the material time to the Government Chemist for analysis. She conceded that the identification parade was not conducted in accordance with the law. She opined that the ingredients of the offence were not established by the prosecution. She therefore urged this court to allow the Appellants' appeal.

The facts of the case according to the prosecution are as follows. PW1, JWW is the complainant in the present case. She stated that she was fourteen (14) years old at the time. It was her testimony that on a date she can't recall in 2016. She visited her aunt, Aisha. She was accompanied by her mum. Her aunt lived with her two children. Her mother left her at her aunt's place. She stayed there for a while. Her aunt would leave them in the house when she went to work. She identified the two Appellants as her aunt's neighbours. She stated that they lived in the same plot. The plot only had one toilet and one bathroom which were located on the ground floor. On the material day, she went downstairs to take a bath. After she had bathed, she went to the hanging lines to hang her underwear. Suddenly, the 2nd Appellant grabbed her and covered her eyes and mouth. He dragged her to their house. The Appellants lived together in the same house. She only had a *leso* wrapped around her body. The 2nd Appellant threatened to stab her if she raised an alarm. The Appellants tied her hands and legs. The 1st Appellant then inserted his penis in her vagina. She stated that the 2nd Appellant did not penetrate her.

After they were done, PW1 stated that they untied her hands and left. She screamed. Her aunt came to her rescue and carried her to her house. PW1 however later recanted that statement and averred that she told her aunt about the incident a couple of days after it happened. This is because she was afraid at the time. Her aunt took her to a hospital for treatment. She also reported the incident to a police station. At the police station, PW1 was asked to identify the persons who had sexually assaulted her. She stated that she identified the Appellants at their identification parades. She testified that the Appellants were known to her as she has seen them before at the plot.

PW2, AN, is the complainant's aunt. On 1st May 2016, she went to work and came back home at about 7.00 pm. When she got home, PW1 went downstairs to take a bath. She came back after about an hour. She refused to eat dinner that night and complained of a stomach ache. Two days later, PW2 noticed that PW1 was walking with a limping gait. She asked her what was wrong. PW1 told her that the *maasai* men who lived next door dragged her to their house and did "*tabia mbaya*" to her. She stated that she was not able to scream since the men covered her mouth with a blanket and threatened to stab her if she made any noise. PW2 told the court that the two Appellants were her next door neighbours.

PW2 stated that when the Appellants came back home, PW1 pointed to the 1st Appellant as the one who did the "*tabia mbaya*". She told her that the 2nd Appellant was the one who tied her hands. PW2 went to Kamukunji Police Station the following day and reported the incident. She thereafter took PW1 to Nairobi Women's Hospital. PW2 took police officers to the Appellants' house where they found three men. The Appellants were not in the house. They met the 2nd Appellant on their way downstairs. He was arrested. Later, PW1 went to the police station where she identified the 2nd Appellant as one of the men who sexually assaulted her. As they were leaving the station, they met the 1st Appellant. PW1 informed the police officers that the 1st Appellant was the one who tied together her hands and legs with a rope. The 1st Appellant was subsequently arrested. PW2 stated that the Appellants had been her neighbours for about one year.

PW3, Dr. Peter Ngatia Warui, was based at Nairobi Women's Hospital. He adduced evidence on behalf of Dr. Njoroge who had earlier examined the complainant. Dr. Njoroge had since left the hospital. He stated that he had worked with Dr. Njoroge for about three years and was familiar with his handwriting. He produced into evidence the complainant's Post Rape Care Form. The complainant was examined on 2nd May 2016. She was alleged to have been defiled on 28th April 2016. The complainant stated that the perpetrators did not use a condom when they sexually assaulted her. The complainant complained of supra-pubic pain just below the umbilical cord. On examination of her genitals, there was presence of a whitish discharge from her vagina. There were also bruises on her anal opening. Her vaginal wall was bruised and hyperemic. Her hymen was torn at 5 and 7 o'clock. The Post Rape Care Form indicated the complainant's diagnosis was indicative of penetration in her vagina and anus.

PW4, JM, is the complainant's father. He stated that the complainant was born in year 2002 and was 14 years of age. He testified that the complainant had gone to visit her aunt (PW2) for about two weeks. PW2 called him on 1st May 2016 and informed him that there was an issue concerning the complainant. The following day, he went to Nairobi Women's Hospital where the complainant had been admitted. The complainant began to cry as she informed him what had happened. The following day, police officers came to the hospital and took down the complainant's statement. After the complainant was discharged, she went to the police station where an identification parade was conducted. She identified the 2nd Appellant as one of the men who sexually assaulted her. The 1st Appellant came to the station to visit the 2nd Appellant. He was also arrested after the complainant pointed him out as one of the men who assaulted her. The complainant thereafter identified him in an identification parade.

PW5, Dr. Maundu, examined the complainant on 6th May 2016, approximately eight days after the complainant was alleged to have been sexually assaulted. He testified that the complainant's supra-pubic region was tender. She had bruises on her labia minora and labia majora. Her hymen was torn. She also had bruises on her anal region. PW5 examined both Appellants on the same day. They had no visible physical injuries on their genitals. On cross examination, he stated that there was presence of foul discharge from the complainant's vagina. Her hymen had been broken with fresh tears. He produced in evidence P3 forms belonging to the complainant and the Appellants.

PW6, Inspector Francis Mutua, was based at Kamukunji Police Station. He conducted the Appellants' identification parades on 4th May 2016. With regard to the 1st Appellant, the parade was comprised of nine people. The 1st Appellant stood between the 3rd and 5th person. The

complainant identified him by touching him. The same procedure was followed with regard to the 2nd Appellant. He chose to stand between the 2nd and 3rd person. The complainant identified him as well. PW6 stated that both Appellants were satisfied with how the parade was conducted since they signed the parade forms. He produced the identification parade forms in evidence.

PW7, CPL Jennifer Ngala, was the investigating officer. She was assigned the case on 2nd May 2016. The complainant was alleged to have been sexually assaulted by two men. She was living with her aunt (PW2). PW2 noticed that the complainant was experiencing difficulty walking. After inquiring what was wrong, the complainant informed her that she had gone to take a shower. As she was leaving the bathroom, she was grabbed by two of her neighbours. They took her to their house, gagged her mouth, tied her hands and sexually assaulted her. PW7 visited the complainant in hospital and recorded her statement. She stated that the 2nd Appellant was arrested on 4th May 2016. The 1st Appellant was arrested the following day after he came to the station to visit the 2nd Appellant. The complainant pointed him out to her father. He was subsequently arrested. PW7 further testified that the complainant's age was assessed at Kenyatta National Hospital. She produced the age assessment report into evidence which indicated that the complainant was thirteen and a half (13½) years old. She also produced in evidence a medical report by Dr. Omondi from Kenyatta National Hospital dated 30th October 2016 which established that the complainant suffered mental disability.

The 1st Appellant was put on his defence. He stated that on the material day of 28th April 2016, he went to work and came back to the house at 1.00 pm. He sold eggs for a living. He thereafter left the house at about 3.00 pm and went back to work. He came back home at 10.30 pm. He told the court that he was arrested on 2nd May 2016 when he came back home at about 1.00 pm. The police officers took him to Kamukunji Police Station. They informed that he was alleged to have sexually assaulted a minor. The 2nd Appellant was arrested on 5th May 2016, when he came to visit him at the police station. The 1st Appellant stated that the investigating officer demanded Ksh.50,000/- to facilitate his release. He however refused to give out the money. He was detained for about 11 days after which he was later arraigned before the trial court. He maintained that he was not in the house at 7.00 pm when the offence was alleged to have been committed. He denied sexually assaulting the complainant. He stated that he had never seen the complainant before at the plot. He averred that the investigating officer and PW2 were present when the investigation parades were conducted. He stated that PW2 had been his neighbour for close to 3 years. They never had a disagreement.

The 2nd Appellant was put on his defence. He stated that he was at work when the offence was alleged to have occurred. He also sold eggs for a living. He stated that the 1st Appellant called him on 4th May 2016, and informed him that he had been arrested. He was arrested at the police station when he went to visit the 1st Appellant. Prior to his arrest, the 2nd Appellant testified that PW2 had asked for Ksh.50,000 to facilitate the release of the 1st Appellant. He was arraigned before the trial court on 11th May 2016 where he was charged with the present offences. He stated that he had never seen the complainant before at the plot where they lived. He further told the court that the investigating officer and PW2 were present when the identification parade was conducted. He asserted that the complainant pointed him out and identified him during the identification parade. He stated that he never had any disagreements with PW2 prior to his arrest.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellants. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses. (See **David Agwata Achira –vs- Republic [2003] eKLR**). In the present appeal, the issue for determination is whether the prosecution established the charge of **gang rape** contrary to **Section 10** of the **Sexual Offences Act** brought against the Appellants to the required standard of proof beyond any reasonable doubt. This court has re-evaluated the facts of this case. Gang rape is committed when a person commits rape or defilement 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.

In a case of defilement, the onus is on the prosecution to establish that there was penetration, that the victim of the sexual assault was a child and finally, the identity of the perpetrator. The first issue is whether the prosecution established that the complainant was a minor. The complainant stated she was fourteen (14) years of age. Her father who testified as PW4 told the court that she was fourteen and a half (14½) years old. The investigating officer also produced in evidence an age assessment report (*Prosecution Exhibit No.7*) from Kenyatta National Hospital which indicated that the complainant was approximately thirteen and half years old. This evidence remained unchallenged by the Appellants. This court therefore holds that the prosecution did establish that the complainant was a child within the meaning of **Section 2(1)** of the **Children Act**.

Section 2(1) of the **Sexual offences Act** defines penetration as:

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

In the present appeal, the complainant told the court that she went to take a bath in the bathroom which was located downstairs in the plot where she resided with her aunt. After she had bathed, she went to hang her underwear on the communal clothing lines. The 2nd Appellant grabbed her and covered her eyes and mouth. She only had a *leso* wrapped around her body. He dragged her to the house, where he lived with the 1st Appellant. At the house the 1st Appellant inserted his penis in her vagina. The medical evidence adduced by PW3 and PW5 established the element of penetration. PW3 gave evidence on behalf of Dr. Njoroge who examined the complainant on 2nd May 2016, three days after the sexual assault was alleged to have occurred. On examination of her genitals, PW3 stated that there was presence of a whitish discharge from her vagina. She had bruises on her anal opening. Her vaginal wall was also bruised and hyperemic. Her hymen was freshly torn at 5 and 7 O'clock. The Post Rape Care Form indicated the complainant's diagnosis was indicative of penetration in her vagina and anus.

PW5, Dr. Maundu, examined the complainant on 6th May 2016, approximately eight days after the complainant was alleged to have been sexually assaulted. He testified that the complainant's super-pubic region was tender. She had bruises on her labia minora and labia majora. Her hymen was torn. She also had bruises on her anal region. On cross examination, he stated that there was presence of foul discharge from the complainant's vagina. Her hymen had been broken with fresh tears. The medical evidence by PW3 and PW5 corroborated the element of

penetration as narrated by the complainant. The prosecution therefore did establish the ingredient of penetration to the required standard of proof beyond any reasonable doubt.

The third issue is the identity of the perpetrators. The complainant was staying with her aunt (PW2). It was PW2's testimony that the complainant had been staying with her for about two weeks prior to the incident. The complainant was the only identifying witness. She told PW2 that the Appellants were the men who sexually assaulted her. She testified that the Appellants were well known to her since she had seen them around the plot. They lived next door to PW2. According to the evidence on record, the incident was alleged to have occurred at about 7.00 pm. The complainant stated that she had just come from the communal bathroom when the 2nd Appellant grabbed her and covered her eyes and mouth. The complainant did not state the source of light she used to identify the 2nd Appellant before he blindfolded her. The said bathroom was located on the ground floor while the Appellant's house was on the 2nd floor. The complainant testified that the 2nd Appellant dragged her to their house.

It was her testimony that at the house, the 2nd Appellant removed her blindfold, and threatened to stab her if she raised an alarm. The complainant failed to state whether the house was well lit, to enable her identify the 2nd Appellant. She stated that the 2nd Appellant immediately put back the blindfold after threatening her to keep quiet. She testified that the 1st Appellant then proceeded to insert his penis in her vagina. The court was not informed how the complainant was able to identify the 1st Appellant since she was blindfolded. The complainant averred that after the Appellants were done, they untied her hands and feet and left her in the house. At this point she screamed, and her aunt came to her rescue. She stated that her aunt covered her up with a *leso* and carried her to her house. The complainant however recanted this testimony and told the court that she did not immediately inform her aunt of the incident until a few days later because she was afraid. PW2 in her testimony stated that the complainant informed her of the sexual assault two days after it had happened. PW2 did therefore not rescue the complainant from the Appellants' house. Apart from the complainant, none of the other prosecution witnesses saw what happened that night.

From the evidence on record, the two Appellants had other housemates. PW2 stated that the Appellants lived with other boys in their house. She averred that when she took police officers to the Appellants' house, they found three men in the house. The Appellants were not there. As stated earlier in this judgment, the incident occurred at night. The complainant did not tell the court what source of light she used to identify the 2nd Appellant who she stated grabbed her and blindfolded her. The complainant was blindfolded when the sexual assault occurred. She failed to explain to this court how she was able to identify the 1st Appellant as person who sexually assaulted her. The only description she gave of her perpetrators was tall and short. She stated that she did not know their names. This court is not convinced that the circumstances in the present case were sufficient for a positive identification of the Appellants. Her subsequent identification of the Appellants either in the parade or by recognition was therefore not reliable.

In addition, since the Appellants lived with other men in their house, the prosecution failed to rule them out as possible perpetrators of the sexual assault. In **R V. Turnbull and Others [1976] 3 All ER**, Lord Widgery CJ, observed as follows;

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...”

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.”

In the present appeal, other than the evidence of the complainant, no other evidence was led by the prosecution to connect the Appellants to the present offence.

The court also notes that the complainant suffered from mental disability. According to a medical report submitted by the prosecution to court (prepared by Dr. J. Omondi, a Psychiatrist at Kenyatta National Hospital), the complainant suffered from moderate to severe intellectual development disorder. This made her to be vulnerable that she required supervision at all times. Considering the mental condition of the complainant, this court is hesitant to convict the Appellant on the basis of the evidence of identification by the complainant. The prosecution was required to adduce other evidence which would corroborate the complainant's testimony of identification. It was no wonder that the complainant's testimony regarding the circumstances in which she was sexually assaulted was inconsistent and incoherent. The lack of corroborative evidence in regard to the complainant's evidence of identification, renders such testimony to be tenuous and unreliable.

It should further be observed that the complainant had not stayed with her aunt for such a length of time as to be certain that she was able to positively identify her assailants. PW2, her aunt testified that the complainant had stayed with her for about two weeks. The testimony of the Appellants as regards their movements at the time, precluded a finding that they could have been in contact with the complainant within the plot for more than a few minutes in a day. For a person with mental disability such as the complainant, this court is not certain that such a short period of exposure would enable the complainant be certain that she had positively identified the Appellants. Another piece of evidence that would corroborate the complainant's testimony is medical evidence. Both doctors called by the prosecution testified that the complainant had a foul smelling discharge from her vagina. It was obvious that she was suffering from a sexually transmitted disease. The Appellant should have been medically examined at the time to determine whether or not they too suffered from a similar sexually transmitted disease. In the absence of such evidence, the prosecution's evidence of identification was weakened.

From the above reasons, the evidence of identification, taken into totality is not water-tight and free of error as to support the conviction of the Appellants. In the premises therefore this court finds merit in the appeal lodged by the Appellants. The prosecution, correctly in the view of this court, conceded to the appeal. The Appeal is hereby allowed. Their respective conviction by the trial court is quashed and the custodial sentence set aside. The Appellants shall be released forthwith from prison and set at liberty unless otherwise lawfully held. It is so ordered

DATED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE