



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 160 OF 2018

BETWEEN

STEPHEN WATINDI OKWARO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No.164 of 2016 delivered by Hon. E. K. Suter (SRM) on 8<sup>th</sup> June 2018).*

JUDGMENT

1. The Appellant, **Stephen Watindi Okwaro** and another were charged with gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 15<sup>th</sup> day of November 2016 at around 1530 hours in Embakasi East Sub-County within Nairobi County, jointly caused their penises to penetrate the anus of **PNN**, a child aged ten (10) years.
2. In the alternative, they were charged with committing an indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on the 15<sup>th</sup> day of November, 2016 at around 1530 hours in Embakasi East Sub-County within Nairobi County, they jointly touched the anus of **PNN**, a child aged ten (10) years.
3. The Appellant pleaded not guilty to the charges. Upon trial, it was found that the prosecution had failed to prove either of the offences charged against the Appellant. Accordingly, the trial magistrate invoked **Section 179** of the **Criminal Procedure Code** and convicted the Appellant of a lesser offence namely sexual assault contrary to **Section 5(1)** of the **Sexual Offences Act No. 3 of 2006**. He was sent then sentenced to serve twenty (20) years imprisonment. Aggrieved by both the conviction and sentence, he preferred the instant appeal.
4. The Appellant raised four (4) grounds of appeal which are that he was not identified as the perpetrator, that the prosecution evidence was inconsistent and contradictory, that the trial court erred in relying on conflicting medical evidence and that his defence his defence was not considered as provided under Section 169(1) of the Criminal Procedure Code.

#### Summary of Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32**). I accordingly summarize the evidence as under.
6. The complainant **PW1, PNN**, a minor aged ten (10) years gave a sworn testimony. He recalled that on 15<sup>th</sup> November, 2016 at about 8.00 pm, he was playing with other boys at the shopping centre when a big boy got a hold of him and took him to the Appellant in a house nearby. He found two other men watching television in one of the rooms. They put water in a basin and told him to take a bath. He started crying. They told him to keep quiet or else they would pierce his ears with pliers. The Appellant took him to another room and told him to give him money if he wanted to be released. PW1 told the Appellant that he did not have any money but would bring him Kshs. 40/= later. The Appellant started touching his buttocks and told him that if he did not have the money, he would pay with his buttocks since he did not need the money.
7. The Appellant removed PW1's trouser and panty then his own. Thereafter, he told PW1 to bend while holding a seat as he stood behind him. He then inserted his male organ into PW1's anus and defiled him. He urinated on PW1's buttocks in the process. When he finished, he told PW1 to get out. PW1 felt like his anus had been torn up in the process. PW1 went and stood outside the house while shaking

8. PW1's cousin **PW3, BON**, was watching television with PW1 outside the subject house which was an electronics shop when the 2<sup>nd</sup> accused went and dragged PW1 into the shop. He saw PW1 being taken into another room within the shop. A short while later, PW2 heard PW1 crying and ran to get PW1's mother **PW5, DAM**. They went back about two minutes later and found PW1 standing outside the shop looking sad. When they asked him what had happened, he told them that the Appellant had locked him up inside a room and beaten him. PW5 asked the Appellant why he had done so and the Appellant told her that it was the 2<sup>nd</sup> accused who had been trying to scare PW1 to take a bath.

9. Thereafter, PW5 sent PW1 and PW3 to get some money for supper from PW1's father while she remained in her grocery stall near the television shop. While on their way, PW3 noticed that PW1 was walking slowly with some difficulty as though he was in pain. PW1 told him that the Appellant had done "tabia mbaya" with him. When they went back to PW5's stall, PW3 informed PW5 about what PW1 had told him. PW1 confirmed to PW5 that the Appellant had defiled him. When the Appellant was confronted by PW5, he denied committing the offence. PW5 took PW1 to Picasa hospital. The doctor there declined to check PW1 and instead called the police. When PW5 went back to the shop where PW1 had been defiled, she found that the Appellant had escaped. The 2<sup>nd</sup> accused called the Appellant back to the shop. The police came and took PW1 and the Appellant to Embakasi Police station.

10. PW1's father **PW6, TNN** was still at work on the same day at about 8.00 pm, when he was told by one Nick to go home as something bad had happened. Upon reaching his home, he was informed about the incident and told that PW1 had been taken to the hospital.

11. **PW4, Selina Nyambu**, a clinician at MSF Juja Road Clinic examined PW1 on the same day at about 11.30 pm. PW1 told her that he had been defiled by a man who warned him not to tell anyone. He appeared sad at the time of the examination. He was normal on physical examination. On genitalia examination, his penis and scrotum were normal. However, the external orifice of his anus was reddened and his anal sphincter was loose and could allow the index finger in. This confirmed that something had penetrated his anus. Further, his anal swab showed presence of spermatozoa. PW4 conducted a HIV and STI test and administered a Hepatitis B and PEP vaccine. She also gave PW1 pain killers and scheduled him for counseling. She prepared a Post Rape Care Report and a medical certificate on the same date and produced them in evidence. She opined that the reddening and loosening of the anal muscles could be caused by penetration with a penis or a finger. However, where a finger is used, it has to be repetitive for the anus to be loose.

12. **PW2, Doctor Kezia Shako** of Police Headquarters examined PW1 on 17<sup>th</sup> November, 2016. PW1 complained of painful defecation. The anatomy of his genitalia was normal and his anus was also normal with no injury. She filled and signed a P3 Form which was produced in evidence. She stated that it was not unusual that PW1's anus had no injury at the time she examined him because research shows that injuries on the anus heal faster.

13. **PW7, PC Stephen Kilele** of Embakasi Police Station investigated the case. He visited the scene of crime and recorded witness statements. He produced in evidence PW1's birth certificate indicating that he was born on 6<sup>th</sup> October, 2006.

14. Upon being placed on his defence, the Appellant elected to give a sworn testimony. He testified that on the 15<sup>th</sup> November, 2016, he was resting in his house when the 2<sup>nd</sup> accused called him at around 6.00pm and told him that he had defiled a boy at the shop. He boarded a motorbike and went to the shop where he found a crowd of people assembled. He told them that he was the one that was alleged to have defiled PW1. He informed them that he had been at the shop earlier and had spent less than thirty minutes as he was just dropping some goods. PW5 incited the crowd against him and they started beating him.

15. A person who sells water in the area intervened and told them not to beat him. The people who had assembled there ran away leaving him with PW1, PW5 and the person who had intervened. The person accompanied the three to a clinic which was about 150 metres away from the shop to confirm if PW1 had been defiled. However, neither PW1 nor the Appellant was examined at the said clinic. PW5 called other men to the clinic. The men slapped him but PW5 intervened again and told them to let the police handle the matter. The police went to the clinic and took him and PW1 away in a police vehicle. The Appellant was taken to Embakasi Police Station where they harassed him and beat him with iron rods. He was put in the cells. Thereafter, a police officer went into the cells with two women who were wearing gloves. The women started holding his penis thereby causing him to ejaculate because they were playing with it. The police beat him up when he ejaculated. The women carried his sperms in the gloves. He stayed in the cells until Thursday when they took his finger prints. He was later taken to court and charged with the offences in question.

16. In the judgment delivered by the trial court, the trial magistrate found that the evidence on record did not prove the offences charged. It was of the view that the offence established was defilement but could not convict the Appellant of the same since that is a more serious offence than the offences charged.

### **Analysis and determination**

17. The Appellant filed his written submissions on 14<sup>th</sup> May, 2019. The Respondent did not tender any submissions. I have accordingly considered the evidence on record and the Appellant's submissions after which I have concluded that the issues arising for determination are whether the prosecution proved its case beyond a reasonable doubt and whether the imprisonment term of twenty (20) years should be enhanced.

### **Whether the prosecution proved its case beyond a reasonable doubt.**

18. It behooves me to first determine whether the offence of gang rape was established. **Section 10** of the **Sexual Offences Act** provides for the offence of gang rape 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 than fifteen years but which may be enhanced to imprisonment for life.”*

19. From the said provision, it is clear that there are two key ingredients of the offence namely: Proof of rape or defilement; and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not *per se* commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.

20. This is a case that involved a child of 10 years. Therefore, the issue of consent does not arise. It is a case requiring that the prosecution firstly established the offence of defilement and secondly proof that the assailant was in association with another or other persons in committing the offence of defilement or that the assailant did not *per se* commit the offence of defilement, but with common intent, was in the company of another or others who committed the offence.

21. In order to prove the offence of defilement, three elements require to be established, namely penetration, identification of the assailant and age of the minor.

22. As regards penetration, the Appellant submitted that the medical evidence presented in the trial court was unreliable because the observation made by the two medical officers was at variance. He argued that PW4 stated that the external orifice of PW1's anus was reddened and the anus sphincter loosened whereas the P3 Form indicated that PW1's anal structure was normal.

23. PW1 testified that the Appellant removed his trouser and panty then removed his own. Thereafter, he told PW1 to bend while holding a seat as he stood behind him. He then inserted his male organ in PW1's anus and did bad manners to him. He urinated on PW1's buttocks in the process. When he finished, he told PW1 to get out. PW1 felt like his anus had been torn up in the process. PW1's evidence was corroborated by the medical evidence of PW4 who stated that the external orifice of PW1's anus was reddened and his anal sphincter was loose and could allow the index finger in. This confirmed that something had penetrated his anus. Further, his anal swab showed presence of spermatozoa. A further corroboration is found in the evidence of PW2 who stated that PW1 complained of painful defecation when he appeared before her for examination. In the premises, it was not necessary for the prosecution to produce in evidence the panty and trouser that PW1 was wearing at the time of the alleged incident as contended by the Appellant.

24. As regards the age of PW1, PW7 produced PW1's birth certificate indicating that he was born on 6<sup>th</sup> October, 2006. This means that PW1 was ten (10) years old at the time of the incident.

25. The next question therefore is whether the Appellant was positively identified as the sexual offender. The Appellant submitted that the purported visual identification by PW1 was unreliable and could not sustain a safe conviction because the circumstances prevailing at the time of the alleged offence could not favor a positive identification since PW1 stated that he was defiled at 8.00 pm when it was darkish. Further, he argued that the element of mistaken identity could not be completely ruled out since the 2<sup>nd</sup> accused was also in the shop. According to him therefore, he was framed up with an offence he did not commit.

26. Notably, the only evidence regarding the identity of the Appellant was that of PW1 since there was no other eye witness as is often most sexual offence cases. The evidence of PW1 was that a big boy grabbed him and took him to the Appellant inside the shop. He narrated how the Appellant took him to another room then started touching his buttocks. While there, the Appellant removed his trouser and panty then removed his own. He then told him to bend and hold a seat, then inserted his penis into his anus and defiled him. PW1 further stated that the Appellant urinated on his buttocks in the process and he felt like his anus had been torn up. In examination, PW1 maintained that it was the Appellant who defiled him while the 2<sup>nd</sup> accused and two other men were watching television in a different room. He insisted that the 2<sup>nd</sup> accused did not see what the Appellant was doing to him. PW5 on her part testified that PW1 told her that the Appellant had defiled him. It was her testimony that she went and confronted the Appellant who taunted her to go and report to the police. She stated that she went and told people but when they went back to the shop, they found that the Appellant had fled.

27. PW1's testimony was accordingly corroborated by the medical evidence as analyzed hereinabove. However, it is a well settled principle that there is no need for corroboration in cases of sexual offences where the court believes that the complainant is telling the truth. (See proviso to **Section 124** of the **Evidence Act**). Indeed, in the judgment of the trial court, the trial magistrate while relying on the provisions of **Section 124** of the **Evidence Act** indicated that she had the benefit of observing PW1's demeanor and did not find any reason to doubt his testimony that he was defiled by the Appellant.

28. Looking at the totality of the evidence that was adduced by both the prosecution and defence, I find that the offence was committed between 6.00 pm to 7.00 pm. I say so because PW1 said it was darkish while PW3 stated that the incident occurred at 4.00 pm and took about two minutes and further that PW5 took about two minutes to go to the shop after he had called her. Both the Appellant and DW2 made reference to a time between 6.00-7.00 pm as the time when PW5 went to confront them in the shop. Further, in the medical certificate prepared by PW4, it is indicated that PW1 was said to be a victim of a sexual assault which occurred on the aforesaid day at 6.00 pm at Jua Kali area.

29. I am satisfied that there was sufficient light that favoured a positive identification of the Appellant by PW1. There was also no reason on record as to why the Appellant could have been framed up with the offence. I am no doubt convinced that the Appellant was positively identified as the sexual offender.

30. There is no evidence that the offence was committed in association with another or with common intention in the company of another. As such, I am in agreement with the trial magistrate that the evidence on record did not establish the offence of gang rape which the Appellant was charged with but that of sexual assault. It suffices to state that the alternative charge of committing an indecent act with a child could not stand, the element of penetration having been established. So then, what is the legal basis for convicting for the offence of sexual assault?

31. Trial courts have the power to convict for offences other than those charged. **Section 179** of the **Criminal Procedure Code** provides as follows in this regard:-

*“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but he remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*

*“(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.”*

32. The Court of Appeal sitting in Nyeri observed as follows in *James Maina Njogu v. R, Cr App No. 38 of 2004* regarding **Section 179** of the **Criminal Procedure Code**:

*“It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the “remaining particulars are not proved”, the “remaining particulars” being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.”*

33. The principle to be applied when substituting an offence with the one for which the evidence is established is that the offence substituted must be cognate and minor to the offence that an accused was initially charged with. In *Robert Mutungi Muumbi v. Republic, Cr App. No. 5 of 2013*, the Court of Appeal stated as follows in this regard:

*“An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.”*

34. The *Black’s Law Dictionary 9<sup>th</sup> Edition page 1186* defines a cognate offence as:-

*“A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.”*

35. Concise Oxford English Dictionary, 12<sup>th</sup> Edition on other hand defines the word cognate as:

*“related to or descended from a common ancestor. Compare with.”*

36. **Section 5** of the **Sexual Offences Act** defines the offence of sexual assault as follows:

*“5(1) Any person who unlawfully-*

*a. penetrates the genital organs of another person with-*

*i. any part of the body of another or that person; or*

*ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional medical hygiene or medical purposes;*

*b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.*

*(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”*

37. The offence of sexual assault, just like gang rape, requires proof of two elements namely penetration and the positive identification of the sexual offender. These two elements were satisfactorily established. The question that therefore arises is whether the offence of sexual assault is minor and cognate to the offence of gang rape.

38. *No doubt* the offence of sexual assault is minor to gang rape since the penalty prescribed for gang rape is a minimum sentence of fifteen (15) years whilst the sentence for sexual assault is imprisonment for a minimum term of ten (10) years. It is also cognate (related) to gang rape as both are in the same category of sexual offences. I cannot therefore fault the trial court for convicting the Appellant of the minor and cognate offence of sexual assault.

39. The Appellant further contended that the evidence tendered by the prosecution witnesses was scanty and contradictory. He pointed out that PW1’s testimony that he was defiled at 8.00 pm contradicted PW3’s statement that the incident occurred at 4.00 pm.

40. Contradictions and inconsistencies will only be considered fatal if they are substantial and material to the issues in question. In this case, the contradiction regarding the time of the offence was very minor and did not negate the fact that the Appellant sexually assaulted PW1.

41. Finally, he submitted that the trial court did not accord his defence due consideration. This contention also lacks basis since it is very clear from the trial court's judgment that his defence was found to be a mere denial which did not outweigh the strong prosecution evidence. His defence that he was mishandled at the police station and he had to release sperms was a move to preempt the prosecution desire to ask for DNA samples. I come to a safe conclusion that the conviction was proper.

**Whether the imprisonment term of twenty (20) years should be enhanced.**

42. Before this appeal was set down for hearing, the Appellant was notified of the likelihood of enhancement of the sentence should his appeal against the conviction fail. **Section 354 (3) (ii) and (iii)** of the **Criminal Procedure Code** empowers the High Court to enhance or reduce a sentence upon hearing an appeal. This mandate was buttressed in the case of **J.J.W. v Republic [2013] eKLR** where the court observed as follows:

***“.....It is correct that when the High Court is hearing an appeal in a Criminal case, it has power to enhance sentence or alter the nature of the sentence....However, sentencing an Appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the Appellant. Because of such a situation, it is a requirement that the Appellant be made aware before the hearing or commencing of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross-Appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the Appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the Appellant or informing the Appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal”***

43. The trial court sentenced the Appellant to serve twenty (20) years imprisonment. Section 5 (2) of the **Sexual Offences Act** prescribes for imprisonment of a term of not less than ten years but which may be enhanced to imprisonment for life. I note that the Appellant took advantage of a ten (10) year old boy who will have to live with the psychological torture of having been defiled. Accordingly, I set aside the sentence of twenty (20) years and substitute it with a term of thirty five (35) year jail term. It is so ordered.

**DATED and DELIVERED** this 4<sup>th</sup> day of **March, 2020**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*

2. *Mr. Momanyi for the Respondent.*