REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 77 OF 2012

HAMISI CHARO KARISA.....1ST APPELLANT

MATANO MASHA GARAMA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 464 of 2012 of the Principal Magistrate's Court at Kilifi – R.M. Kagoni, RM)

JUDGEMENT

1. This is a rehearing of the appeal pursuant to the order of the Supreme Court in the case of **Republic v Karisa Chengo & 2 others [2017] eKLR**.

2. Hamisi Charo Karisa (the 1st Appellant) and Matano Masha Garama (the 2nd Appellant) being aggrieved with the conviction and sentence have filed this appeal. They had been charged with the main count of gang defilement contrary to Section 10 of the Sexual Offences Act (the Act). The particulars of which were that the 1st Appellant on 6th May, 2012 at 19.00 hours at (particulars withheld) in association with the 2nd Appellant intentionally caused their penises in turns to penetrate the vagina of PMK., a child aged 14 years.

3. The alternative charge was that of committing an indecent act with a child contrary to Section 11 of the Act. The particulars being that the 1st Appellant on 6th May, 2012 at 19.00 hours at (particulars withheld) in association with the 2nd Appellant, intentionally caused their penises in turns to touch the vagina of PMK., a child of 14 years.

4. On their plea of not guilty to all counts they were tried and found guilty of the main charge and each one of them sentenced to serve a term of 15 years imprisonment. Being aggrieved by both the conviction and sentence they filed a joint appeal but with separate grounds of appeal which were amended prior to the rehearing of their appeal.

5. The 1st Appellant's grounds of appeal are that: the charge was incurably defective; identification was not satisfactory; Section 36(1) of the Act was not adhered to as no DNA test was carried out; the trial court contravened Section 63(3) of the Evidence Act by considering irrelevant facts such as the recovery of the petticoat and shoes which was not proved; the prosecution case was contradictory; the arresting persons were not called as witnesses to connect him to the offence; and his defence was not considered.

6. The grounds of appeal for the 2nd Appellant are: the trial court did not consider that the conditions were not conducive for positive, accurate and proper identification resulting in mistaken identity therefore there was need to conduct an identification parade pursuant to the Force Standing Order, Cap 46; the trial court failed to conduct a *voire dire* examination pursuant to Section 19(1) of the Oaths and Statutory Declarations Act; and the trial court failed to consider his defence.

7. The appeal was disposed of by way of written submissions.

8. The 1st Appellant submitted that the charge was incurably defective and not at par with Section 214 (1) of the Criminal Procedure Code, that there is no offence of gang defilement. In support of his submission that a charge should be properly drafted, he relied on the Court of Appeal decisions of **Nyongo v R 1 of 1993** and **Mutinda Mwai Mutana Mombasa HCCRA 282 of 2008.** He further urged that the evidence did not link him to the offence as PW1 PM, the complainant, did not mention him to her mother PW2 M.S. as her assailant and the first report to the police was given by her parents before PW1 reported to them about him. He referred to **Terekal & another v R (1952) EACA** as supporting his case.

9. It was the 1st Appellant's submission that there was no proof that penetration occurred and the samples being the discharge and spermatozoa were not tested to establish that they belonged to him. He referred to the case of **Fredrick Wadia Nasanju MSA HCCRA of 2012 (UR)**. He further asserted that the conclusion by the doctor did not indicate that there was defilement. He also urged that the arresting persons were not called as witnesses and urged the court to consider the decisions of **John Kenga App No 118 of 1984** and **James Kuloba Wasile v R [2008] eKLR** on this issue.

10. The 1st Appellant in addition submitted that PW1 was not straight forward as her report to the doctor was that her mouth was held preventing her from screaming and in court stated that she froze and could not scream. He relied on the decision of **Ndungu Kimaru v R 1979 LLR 282** to buttress his point.

11. In his submissions the 2nd Appellant urged that the prevailing conditions impeded positive identification as it was dark given the hour indicated in the charge sheet, the witness did not give evidence of the quality of light, the alleged victim became unconscious and it was a highly stressful situation as the alleged victim thought that her assailants were armed hence there was a high possibility of error.

12. The 2nd Appellant urged further that identification by recognition did not meet the required standard as at one point the alleged victim claimed to have known the 2nd Appellant yet did not know his name. He referred to the Court of Appeal decision of **Abdalla bin Wendo (1953) 20 EACA 166** to urge that it is possible for a person to misidentify even close relatives. He urged that the alleged victim did not describe him at the time her report was recorded in the Occurrence Book. He relied on the decision in the case of **Terekali & another v R (1952) EACA** where the court held that the evidence of first report of a complainant to a person in authority acts as a benchmark to test the truth and accuracy of subsequent statements. He also cited the decision of **Mohamed Bin Alwi (1942) E.A.C.A 72** where it was held that the first report to the police should be put in evidence to confirm how the accused was identified.

13. In addition, the 2nd Appellant urged that the evidence of a single identifying witness ought to be tested with great care as per the decision in **Matianyi v R Cr. App No.6 of 1986,** and that when considering visual identification the length of time the incident took ought to be considered. The 2nd Appellant also referred to **Roria v R (1967) EACA 589** for the proposition that evidence of a single identifying witness causes uneasiness and **Walter Omolo v R (1991) 245** that visual identification should be treated with greatest care and dock identification is unacceptable unless the witness had given the description of the suspect and there was a properly conducted identification parade.

14. The 2nd Appellant further urged that the witness whose evidence the court is to rely upon ought not to create the impression that the witness is not straight forward as held in **Ndungu Kimaru v R.** (citation not provided). He submitted that the alleged victim contradicted herself in stating that she knew him yet did not know his name. That an identification parade was therefore imperative to eliminate the possibility

of error and the only reason he was arrested was that the 1st Appellant allegedly led those who arrested him to his house.

15. He in addition urged that the alleged victim was of tender years and no *voire dire* examination was carried out as required by Section 19(1) of the Oaths & Statutory Declarations Act and Section 233 of the Criminal Procedure Code to determine if she possessed sufficient intelligence and if she was telling the truth resulting in a failure of justice. He supported his submissions by referring to the cases of **Samuel Wanini Njuguna v R [2012] eKLR, Patrick Kathurima v R [201]eKLR** and **Gamaldene Abdi Abdiraham & others v R [201] eKLR** (the exact years the decisions were made were not provided for the last two cases).

16. The 2nd Appellant also submitted that his defence was not considered and the trial court failed to evaluate the entire evidence as per the case of **Okeno v R (1973) EA 32** and there was therefore a failure of justice.

17. Opposing the appeal, the State submitted that the prosecution's case was proved; that Section 124 of the Evidence Act was applied; and that the evidence of PW1 was corroborated by PW2 and the medical evidence. They further urged that the identification by recognition was free from error and relied on the decision of **Douglas Muthanwa Ntoribi v R [2014] eKLR.** In addition it was submitted that the defence was considered by the court.

18. This being a first appeal the onus of this court is to reconsider, re-*analyse and re-evaluate the evidence which was before the trial court and reach its own conclusions - see* ***Okeno v R [1972] E.A. 32*** and John Mwangi Kamau v Republic [2014] eKLR. *In addition to this, the* court in its appellate jurisdiction ought not to interfere with a finding of fact by the trial court that had the advantage of gauging the demeanour of the witnesses, *unless the finding of fact was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles - s*ee ***Chemagong v Republic [1984] KLR 611*** *and* ***Gunga Baya & another v Republic [2015] eKLR.***

19. The issues arising are: whether or not the charge was defective; whether or not the main charge was proved; and whether or not the evidence of PW1 was admissible.

20. The appellants were charged with an offence termed as gang defilement contrary to Section 10 of the Act which provides:

> "A**ny 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 been enhanced to imprisonment for life."**

21. The said provision of law does not refer to an offence known as gang defilement. In **Kilome v Republic [1990] KLR 194** it was held that:

> **"The paramount consideration is whether there was prejudice occasioned to the accused in putting up his defence because of the words used."**

22. The record attests to the fact that the charge and the particulars were clearly drawn as to enable the appellants to understand the nature of the offence and the charge they faced. Additionally, the record is clear that the offence and particulars thereof were explained to the appellants in a language they understood. Further, the offence of gang rape as defined by Section 10 requires prove of rape or defilement by more than one person. The use of the term gang defilement was thus not prejudicial to the appellants in any way. Indeed the term defilement is used in the section under which the appellants was charged.

23. It is trite law that the onus to prove lies on the prosecution throughout the trial and the standard of

proof is that of beyond reasonable doubt. The prosecution was thus to prove the ingredients of the offence being identity of the perpetrator who was in association with others/another or in the company of others/another having common intention and the ingredients of defilement being that the victim was a child and there was penetration.

24. The age of the alleged victim was proved by PW2 MS, the mother of PMK, corroborated by the birth certificate. PMK was said to have been born on 26th July, 1998 and as the offence allegedly took place on 6th May, 2012 PMK was therefore 13 years and 9 months at the time of the alleged offence. This was almost 14 years hence in my view the age of the complainant was sufficiently proved.

25. The prosecution's case was that PMK was accosted by two men known to her who caressed her all over without her consent then dragged her into a house which was 200 metres from where she was accosted. She lost consciousness and when she came to, she was lying naked alone, her clothes were under a bed and she felt pain in her private parts, lower abdomen and thighs and was confused. Finding the door unlocked she left the house and spotted her uncle's house which was nearby. She went there and informed her aunt of the ordeal. She was taken to her home from where she was taken to hospital on the same night.

26. To prove penetration a P3 form and initial treatment notes were produced. PW4 Dr. Hashim Suleiman produced the P3 form filled by Dr. Agnes Kalu whose handwriting he was familiar with. It was filled on 10th May, 2012. It indicated that the hymen was broken, there was whitish discharge, presence of semen on vagina and blood in urine was noted. The initial treatment notes filled on 7th May. 2012 which were prepared by PW4's colleague, Dr. Said, were also produced. They indicated that there was no bleeding or discharge, no tears or lacerations, hymen was broken and spermatozoa was seen.

27. The prosecution was required to prove beyond reasonable doubt that there was penetration. It is the position as submitted by the 1st Appellant that there was no conclusion in the P3 form that penetration had taken place. Penetration is defined under Section 2 of the Act as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

28. There was no laboratory report on the discharge or an indication that the discharge was semen or spermatozoa. PW4 did not offer more as to how the conclusion was reached that it was semen that was seen in the vagina so as to buttress the point that there was penetration. However the broken hymen gave this probability.

29. However, it is noted that the medical officers who attended to the complainant in their normal course of business interact with bodily fluids and they can easily tell whether such a fluid is semen. The trial court believed the victim's account but indicated that it required corroboration. The trial court indicated as follows: **"The complainant being 14 years old is not a child of tender years...I therefore have no reason to doubt her truthfulness as a witness. That notwithstanding the law requires that there be corroboration...The complainant was examined at Kilifi District Hospital and found to have been defiled. I find the medical evidence tendered is sufficient corroboration...".**

30. The law provides under Section 124 of Evidence Act that: **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

> **Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person, if, for reasons to be recorded in the proceedings the court is satisfied that the child is telling the truth."**

31. I have no reason to depart from the conclusion of the trial court that there was proof of penetration. The complainant testified as to what was done to her and that evidence established penetration. The

proviso to Section 124 did not require any corroboration once the trial court found the complainant was telling the truth. All that the court needed to do was to record why it believed the complainant.

32. The prosecution had the onus to prove the identity of the perpetrator(s). Both appellants in their defence denied any involvement. PW1 testified that the two men passed her on her way home at 6.45 pm. They then retreated and began to enquire as to where she was going to and insisted on offering her escort though she stated that she was fine. PW1 knew both men. The 1st Appellant had been hired to work at their home and had done so for a month before leaving on his own volition and she had seen the 2nd Appellant in the neighbourhood. PW2 testified that PW1 told her that both appellants were involved. PW2 also confirmed that she knew the 1st Appellant who had previously worked for them.

33. The appellants submitted that positive identification was marred by the highly stressful situation as the complainant had presumed that her assailants were armed and she lost consciousness. The 2nd Appellant also challenged the quality of light at the given hour as to allow identification free of error.

34. The conviction was based on a single identifying witness. The Court of Appeal in ***Abdalla bin Wendo and another v Republic*** **(1953) 20 EACA 166** established that:

> **"Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, *especially* when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

35. A similar position was taken in the cases of **Roria** (supra) and **Matianyi** (supra)**.**

36. Guidelines in determining the question of identification as laid down by the English case **R. v Turnbull (1976) 3 All E.R. 549** have been incorporated in our jurisprudence by the Court of Appeal, an example being the case of **David Musembi Mue v Republic [2000] eKLR.**

37. The English decision in part listed certain questions as key in establishing whether an alleged identification by a witness is satisfactory. The questions are:

i. How long did the witness have the accused under observation?

ii. At what distance? In what light?

iii. Was the observation impeded in any way as for example by passing traffic or a press of people?

iv. Had the witness seen the accused before? How often? If only occasionally had he any special reason for remembering the accused?

v. How long elapsed between the original observation and the subsequent identification to the police?

vi. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

38. There is no indication as to the length of time taken when the assailants were with PW1 before she lost consciousness. There was also no evidence led as to the quality of light. The perpetrators however had to have been in close proximity to the complainant in order to converse with her and caress her giving her ample time to see them. There is no indication that the hour they met, and PW1 indicates that it was 6.45 p.m., was such that the visibility was poor. I therefore find that she recognised the two appellants.

39. The possibility of error cannot be ruled out in identification or recognition. However, the possibility of an error was eliminated by the fact that the following day PW1 was able to pick out the house she was allegedly taken to and it was in the same house the 1st Appellant was found. The 1st Appellant then led to the arrest of the 2nd Appellant.

40. The two persons were in association with each other or had common intention. Common intention is defined in Section 21 of the Penal Code as follows:

"Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of such purpose, each of them is deemed to have committed the offence."

41. The prosecution was able to prove all the ingredients beyond reasonable doubt as the evidence adduced by the appellants through cross-examination and their testimonies did not shake the same. The trial court considered the defences. It stated as follows:

> **"I have considered the accused person's defences. The first accused person did confirm how PW2 told the court he was arrested. That was all he stated in his defence. Such defence has no merit and accordingly dismissed. The second accused gave a similar version and having dismissed the first accused person's defence I proceed and dismiss the second accused persons defence."**

42. The appellants had challenged the admissibility of the evidence of PW1's evidence as no *voire dire* had been carried out. The Court of Appeal in Johnson Muiruri v Republic [1983] KLR 447 adopted the Court of Appeal's finding in ***Kibangeny Arap Kolil v Republic*** [1959] EA 92, that the failure by the trial court to conduct *voire dire* examination was a good ground for allowing the appeal.

43. Section 19(1) of the Oaths and Statutory Declarations Act calls for *voire dire* examination of children of tender years. T*his is to determine whether a minor of tender years understands the solemness of oath taking and where* the court is not so satisfied unsworn evidence may be received if in the opinion of the court the said minor has sufficient intelligence and understands the duty of speaking the truth.

44. PW1 was just three months shy of 14 years. The trial court made a determination that she was not of tender years based on the definition of a child of tender years in the Children Act. There is nothing on record to show that the trial court, which had the opportunity of observing the witness, had reason not to receive the evidence of PW1 under oath. Whereas the complainant was of tender age as per Kibangery Arap Kolil (supra), the Children Act, 2001defines a child of tender years to mean a child under the age of ten years. The determination by the trial court that the complainant was not a child of tender years cannot therefore be faulted. The trial court was better placed to gauge the intelligence of the child and decide whether *voire dire* examination was necessary. It found that such an examination was not required and there is no reason for interfering with that finding.

45. The case having been proved to the required standard of beyond reasonable doubt, I find no merit in the appeal. The conviction is upheld. The sentence imposed is the minimum sentence provided by the law. The appeal is therefore dismissed in its entirety.

Dated, signed and delivered at Malindi this 14th day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT