



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. 7 OF 2018

E H A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 292 of 2015 by the Senior Resident Magistrate – Hon. J.M. WEKESA delivered on 3rd August, 2017 at Lodwar)

JUDGEMENT

1. The Appellant **E H A** was charged with the offence of gang defilement contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 6th day of August 2015 at [particulars withheld] village in Turkana West Sub-county within Turkana County intentionally caused his penis to penetrate the vagina of **A.O.** a child aged fourteen (14) years.

2. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** the particulars of which were that on the 6th day of August 2015 at [particulars withheld] village in Turkana West Sub-county within Turkana County intentionally touched the vagina of **A.O.** a child aged fourteen (14) years with his penis.

3. He pleaded not guilty to the charges, was tried, convicted and sentenced to fifteen (15) years imprisonment on the main count.

4. Being dissatisfied with the said conviction and sentence he filed this appeal and raised his home grown grounds of appeal raised the following summarized grounds for the purposes of this judgement:-

- a) He was convicted in the absence of crucial witnesses.*
- b) The marked evidence did not convict him with the alleged offence.*
- c) The prosecution evidence was made up of hearsay and full of glaring contradictions.*
- d) His defence was rejected without cogent reasons.*

5. When the appeal came up for hearing before me the Appellant who was unrepresented filed written submissions which he relied upon while Mr. Mongare appeared for the State and opposed the appeal.

SUBMISSIONS

6. On behalf of the Appellant it was submitted that he was falsely charged in the place of his brother who escaped after the commission of the offence. It was submitted that the prosecution evidence was that the complainant had been gang defiled yet he was the only one charged. It was submitted that the conditions prevailing was not ideal for positive identification. It was submitted that since he had his own wife there was no cogent reason for him to defile the complainant. It was finally submitted that very vital prosecution witnesses were not called to testify and therefore adverse inference should be made against the prosecution and that those witnesses called only presented hearsay evidence.

7. On behalf of the State it was submitted that the prosecution called all the vital witnesses which were necessary to prove its case and that the medical report produced corroborated the evidence of the complainant. It was stated that there was no need for another eye witness to corroborate the complainant's evidence this being a sexual offence cause and further that the defence of the Appellant was considered and properly rejected.

8. This being a first appeal the court is legally required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as was stated in **OKENO v REPUBLIC [1972] EA 32:-**

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

PROCEEDINGS AND ANALYSIS THEREON

9. The complainant **PW1** a minor who was found intelligent enough to testify on oath stated that she was at home alone when three (3) boys namely E B and A carried her to Bush’s house and removed her clothes and defiled her in turns starting with E then B and A (the Appellant). After the incidence she reported to K P R called K who arrested the Appellant and Bush. She stated that there was moon light and was able to see the Appellant and recognize their voices. The Appellant was known to her since they were previously in the same school. She stated that the Appellant is the one who defiled her last and took her back her home.

10. **PW2 KENNEDY WASILWA** a clinical officer at Kakuma Mission Hospital confirmed the age of the complainant to be fourteen (14) years and confirmed that the same had been defiled and infected with sexually transmitted disease. **PW3 CHARLES EKIRU** re-arrested the Appellant together with one Chris who he took to the police station and later took the victim to the hospital. He confirmed that Chris was released after investigations. **PW4 PC JENNIFER KAMAU** confirmed having received a report of gang defilement and re-arrested the Appellant.

11. When put on his defence the Appellant stated that he met three (3) people:- his brother B E, his in-law, along with a man who is also his friend with the complainant whom they were carrying. He had a phone spot light which he used to identify the three who were defiling the complainant and that the complainant sought his help and he took her to her home where he found only little children. The next day when he went to her home to check on her the parents turned against him.

DETERMINATION

12. From the proceedings and submissions, I have identified the following issues for determination:-

a) Whether the Appellant was positively identified.

b) Whether the prosecution case was proved to the required standard.

13. On the issue of identification:- the Appellant herein was known to the complainant having previously studied with her in the same school. She knew the Appellant and his gang well by name and was able to recognize their voices. The Appellant in his defence put himself together with the complainant whom he alleged to had rescued from his brother and the two others but his defence is contradicted by that of **PW3** and **PW4** on how he was arrested. If it is true as he alleged that he had rescued the complainant, then the question that remains unanswered is why he did not make any report thereon. I see no reason for the complainant a girl aged 14 years would have put her honour at risk in alleging to had been gang raped if it was not true. I am therefore satisfied that the Appellant was properly identified and placed at the scene.

14. On whether the prosecution case was proved to the required standard in convicting the Appellant the trial court had this to say:-

“Section 10 of the Sexual Offences Act stipulates that 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. Under this Act, the word “gang” means two or more persons.

The essential element of gang defilement is defilement committed in association with two or more persons. In order to prove defilement, the prosecution must prove 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.” This position was fortified in the case of **MARIC OIRURI MOSE v REPUBLIC [2013] eKLR**, when the Court of Appeal stated thus, “many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girls’ organ. . .

Since the accused herein is facing the offence of gang defilement, I will consider the other limb on whether he was with the other assailants not before court and if so, if they had a common intention in the commission of the offence. The offence was committed in the wee hours of the morning i.e. 2.00 a.m. after the complainant was forcefully taken away from her home to Bush’s house and defiled in turns. The assailant kept talking as they headed to Bush’s house and she recognized their voices clearly. She said at one time, they went to the same school with the accused although he was ahead of her in the upper class. They defiled her in turns and when E said he was going to look for another group of boys to come and defile her as well, the accused herein who was left to enjoy his turn felt pity for the complainant after he was done with her and he asked her to leave. He reportedly escorted her safely to her home.”

15. I am satisfied that the Appellant's defence was properly rejected and that the prosecution case was proved beyond any reasonable doubt thereby making the Appellant's conviction safe.

16. On sentence:- Under **Section 10** of the **Sexual Offences Act No. 3 of 2006** the sentence provided for upon conviction is imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life. It is noted that the sentence given to the Appellant is the minimum provided for in law and whereas sentencing is a discretion of the trial court, I find no fault with the same as it was lawful sentence.

17. I therefore find no merit on the appeal herein both on conviction and sentence which I hereby dismiss and affirm the Judgement of the trial court on conviction and the sentence thereof.

18. The Appellant has a right of appeal and it is so ordered.

Dated, delivered and signed at Lodwar this 5th day of March, 2019.

J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistantd*