



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL CASE NUMBER 21 OF 2018**

**BETWEEN**

**EDWIN LORITA.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

***(Being an appeal from original conviction and sentence dated 30<sup>th</sup> October 2018***

***by Hon. P. Y. Kulecho in Kapenguria PMC Criminal Case No. 31 of 2018 (SO)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant herein Edwin Loriga was charged alongside Godwin Madareng with ***gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006***, the particulars thereof being that on the 22<sup>nd</sup> day of July 2018 at [particulars withheld] Village in Mosop Location of Pokot Central Sub-county within West Pokot County, in association with GODWIN MADARENG, unlawfully and intentionally caused his penis to penetrate the vagina of C.M, a child aged 7 years.
2. In the alternative, he was charged with committing an ***indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006***. The offence was allegedly committed in the same place and time and against the same victim, C.M, in the main count. The appellant and his co-accused pleaded not guilty to the charges.
3. During the ensuing hearing, the prosecution called 5 witnesses to testify. At the conclusion of the prosecution case, the appellant and his co-accused were found to have a case to answer and were accordingly placed on their defence. The appellant gave sworn evidence in which he denied committing the offence. He attributed this case to a land dispute that the said exists between his family and the complainant's family. The appellant did not call any witnesses.
4. On conclusion of the hearing the appellant was found guilty as charged on the main count convicted and sentenced to life imprisonment. The appellant's co-accused who was a juvenile was committed to Shikusa Borstal Institution for a period of three years. The appellant's co-accused has not preferred any appeal.

**The Appeal**

5. The appellant preferred this appeal which is premised on grounds that the charge sheet was defective; that the learned trial court failed to determine the age of the complainant and thereby imposed an unlawful sentence; that the prosecution evidence lacked corroboration and therefore that the prosecution case was not proved beyond any reasonable doubt to warrant a conviction. The appellant prays that his appeal be allowed in totality.
6. As this is a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only remembering and making allowance for the fact that it has no opportunity of seeing and hearing the witnesses

who testified during the trial. *Okeno versus Republic [1972] EA 32* refers.

### **The Prosecution Case**

7. From the evidence of the five witnesses, the prosecution case runs as follows: - On 22<sup>nd</sup> July 2018 the complainant, PW1 was sent to collect some tobacco from her grandmother's home which is in the same compound as the home of the appellant. On asking for the tobacco, the appellant told PW1 that the store in which the tobacco was, was locked. The appellant was together with his co-accused. Suddenly the two young men grabbed PW1 and pushed her into a corner. She fell on the ground. The appellant then did bad manners to her by removing his penis and inserting it into her vagina. As the appellant defiled PW1, his co-accused kept watch, before he took over as the appellant now kept watch. Once the ordeal was over, PW1 went home. She changed into clean clothes as the clothes she had worn when going to her grandmother's house were blood stained. PW1 later narrated the ordeal to her mother PW2 who took her to hospital.

8. PW2 stated that on 22<sup>nd</sup> July 2018 at around 4.00pm, she sent PW1 for some tobacco from the appellant's home. At around 5.00pm PW2 heard screams. On going out to see what the matter was, PW2 saw PW1 walking home while screaming. PW2 noticed blood and wetness on PW1's clothing. PW2 also screamed. Later PW2 took PW1 to Sigor Hospital for examination and treatment. PW2 stated that PW1 informed her that the appellant and his co-accused had done bad manners to her in turns.

9. Though acknowledging during cross examination that she did not witness the incident, PW2 was categorical that PW1 told her it was the appellant and his co-accused who had defiled her in turns. PW2 also testified that PW1's clothes appeared wet and blood-stained. She also testified that she examined PW1's private parts and could see that PW1 had been defiled.

10. PW3 was CL, PW1's grandmother. She was asked by PW2 to examine PW1's private parts after PW1 had reported the incident to PW2. On examination, PW3 was convinced that PW1 had been defiled because PW1's clothes were covered in semen. PW3 also confirmed that PW1 had implicated the appellant.

11. Susan Lopus, a Clinical Officer at Sigor Sub-County Hospital (PW4) examined PW1 on 23<sup>rd</sup> July 2018. PW1 had already been seen under OP No. 10944/18. On examination PW4 noted the following:-

- Tenderness on the anterior chest wall and supra pubic region
- Normal external genitalia
- Reddened vulva with slight oedema
- Freshly perforated hymen
- Clear vaginal discharge
- Laboratory examination revealed pus cells in urine
- No spermatozoa noted

12. In PW4's opinion PW1 had been defiled. After administering PEP, PW4 filled the P3 form and signed the same – Pexhibit 1. PW4 also filled the PRC form on 23<sup>rd</sup> July 2018 – Pexhibit 2. PW4 also assessed PW1 for age, filled and signed PW1's age assessment report – Pexhibit 3. In cross examination, PW4 confirmed that PW1 had implicated the appellant and his co-accused as the perpetrators of the crime against her.

13. Number 88513 Police Constable Simon Lokortodo from Sigor Police Station testified as PW5. He is the one who received the report of the incident on 23<sup>rd</sup> July 2018 at around 2.00pm. After booking the report, he escorted both the victim and the suspects to Sigor Sub-County hospital for examination. PW5 investigated the case by recording statements. He confirmed that during investigations, PW1 implicated the appellant and his co-accused as the ones who defiled her.

### **The Defence Case**

14. On being put on his defence, the appellant gave sworn evidence. He denied committing the offence. He stated that the possible reason for these charges being leveled against him was a land dispute between his family and the complainant's family. The appellant did not say where he was on 22<sup>nd</sup> July 2018 between 4.00pm and 5.00pm.

### **Issues, Analysis and Determination**

15. For the case against the appellant to succeed, the prosecution ought to have proved penetration, age of the victim and the fact that the appellant, together with another committed the offence.

16. *Section 10 of the Sexual Offences Act no. 3 of 2006* defines gang rape as follows:-

**“10. 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 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.”***

17. Looking at the evidence as a whole, I have no doubt in my mind that the offence of gang rape in this case was proved. PW1 stated clearly that her assailants defiled her in turns. There were two of them. When PW2 and PW3 examined PW1 before taking PW1 to the police or the hospital, they were both satisfied that PW1 had been defiled. PW4 corroborated the testimonies given by PW1, PW2 and PW3 with the medical evidence which included laboratory examination. From the evidence of PW4, PW1's hymen was freshly broken and her vulva was reddened with slight oedema. The laboratory examination revealed pus cells, which was a sure sign of sexual activity.

18. The next issue is whether it was the appellant and his co-accused who defiled PW1 in turns. PW1 stated so when she reported the incident to PW2, PW3, PW4 and even to PW5. The appellant on his part, without saying whether or not he was at the scene on the material day and time, alleges the case against him was a frame-up due to a land dispute. The appellant had ample time to cross examine all the witnesses, and if indeed it was true there was a land dispute between the two families, he could not have failed to remember to question the witnesses on the same. I note from the record that the appellant did not put any questions to PW2 after PW2 testified. The question put to PW3 by the appellant elicited the following answers. **“I did not witness the incident. The child implicated you.”** Again the issue of a land dispute was not put to PW3 who was the matriarch of the family. In my considered view this issue of there being a land dispute was an afterthought on the part of the appellant, because if it was not, he could have raised it with PW5, the investigating officer, who also confirmed that PW1 implicated the appellant.

19. As I make these conclusions, I am aware that the only direct evidence in support of the charge against the appellant is that of PW1, a child aged 7 years old. She was taken through a *voir dire* examination before being allowed to proceed with her unsworn testimony. In her judgment, the learned trial court noted that there was not mistaken identity because the incident took place during the day, and further that the appellant and his co-accused were well known to PW1. The learned trial court also noted that PW1 had no motive to want to falsely accuse the appellant and his co-accused in the matter. I am also of the view that PW1's testimony, apart from it being consistent, is protected by the **proviso to section 124 of the Evidence Act**, and thus needed no corroboration as long as the trial court found her a credible witness. The trial court found her to be such a witness.

20. The appellant also raised an issue to the effect that the charge sheet was defective. In his submissions, the appellant suggested that the charge sheet did not disclose the offence. I have myself gone through the charge sheet and conclude that the appellant's complaint does not have any merit in it.

21. The appellant also complained that his age was not proved. There is however evidence from Kapenguria District Hospital dated 26<sup>th</sup> July 2018 which confirms that as at the time of examination, the appellant was 19 years old. Though the appellant's age assessment form was not produced in evidence, the pre-sentence report dated 21<sup>st</sup> November 2018 gives the appellant's age as 19 years. In my view therefore, the appellant's age was properly appreciated by the trial court.

22. The final issue for determination is one of sentence. The trial court imposed a sentence of **“life imprisonment as provided by law, in particular considering the age of the child.”** It is trite that an appellate court shall not interfere with the discretion of the trial court in sentencing an accused unless such sentence is unlawful or is excessive or too low in the circumstances of the case.

23. **Section 10** provides for minimum sentence of 15 years imprisonment which may be enhanced to imprisonment for life. In this case, the victim was, indeed a child of tender years. The appellant was also assessed to be 19 years old. There is no doubt that what the appellant and his co-accused did to PW1 was abhorrent to say the least and PW1 will live with that emotional scar for the rest of her life. However, both the appellant and his co-accused were said to be first offenders. The pre-sentence report was also not out rightly against the appellant being given a lenient sentence.

### **Conclusion**

24. In light of the above, I find a reason to interfere with the sentence of life imprisonment imposed by the trial court. I therefore make the following

final orders in this appeal:-

***a) The appellant's appeal on conviction be and is hereby dismissed.***

***b) The appellant's appeal on sentence is allowed to the extent that the sentence of life imprisonment is set aside and in lieu thereof, I sentence the appellant to fifteen (15) years imprisonment with effect from 21<sup>st</sup> November, 2018.***

***c) Right of appeal to the Court of Appeal within 14 days from the date of this judgment.***

25. It is so ordered.

**Judgment delivered, dated and signed in open court at Kapenguria on this 9<sup>th</sup> day of April, 2019**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

Appellant – present in person for appellant

M/S Kiptoo present for respondents

Mr. W. Juma – court assistant