



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.122 OF 2016

(From SPM's Court at Bungoma Cr.616 of 2012 by: Hon. C.L. Yalwala (SRM))

QUINTO OMUSUNGU IMARO.....1ST APPELLANT

SILVANUS ODERO ALUKU.....2ND APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants **Quinto Omusungu Imaro** and **Silvanus Odera Aluku** were jointly charged with the offence of gang defilement contrary to Section 10 of the Sexual Offences Act.

The particulars of the charge are that on 13/3/2012 at [particulars withheld] in Teso North District of Busia County, in association with another not before the court, intentionally and unlawfully caused their penises to penetrate the vagina of AA a child aged 17 years.

In the alternative charge, both appellants faced a charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act in that on 14/3/2012 at [particulars withheld], intentionally and unlawfully caused their genitals to come into contact with those of a child AA a child aged 17 years. The appellants denied the charges and the matter proceeded to full trial. The court found both the appellants guilty of the offence of attempted defilement contrary to Section 9(a) and (b) of the Sexual Offences Act. Each was sentenced to serve 10 years imprisonment.

The appellants are aggrieved by the said conviction and sentence and have preferred appeals which were consolidated. A summary of the grounds of appeal are as follows:

(1) That the conviction was based on contradictory evidence;

(2) That the identification of the appellants was wanting;

(3) That the charge was not proved to the required standards.

In support of the above grounds, the appellants also filed written submissions which are similar and in which they reiterated that they could not have been identified under the prevailing circumstances, in that it was night and the identifying witness used a torch; that the evidence of PW1 and 3 was contradictory as to whether PW1 screamed after the assailants had fled or before they fled. They therefore pray that the conviction be quashed and sentence set aside.

Ms. Njeru, learned counsel for the State opposed the appeal. She submitted that the complainant was able to identify Quinto, the 1st appellant, who was a neighbor; that it is the 1st appellant who held her as the 2nd one tore her under pant and made her fall; that PW3 who responded to the screams flashed a torch and called out the 1st appellant's name; that it is PW3 who called PW2, the complainant's mother; that PW4 a neighbor met the appellants coming from the direction of the screams; that the doctor did not find any evidence of defilement but the complainant's pants were torn which was evidence of attempted defilement. Counsel submitted that the evidence placed the appellants at the scene; that the evidence disclosed a lesser charge and the conviction was therefore proper.

The prosecution called a total of 8 witnesses in support of their case. PW1 AA who was then aged 17 years, having been born on 1/11/1994 was a student in standard 6. She recalled that on 13/3/2012, she was sent to [particulars withheld] Shopping Centre and when returning home at about 7.00 p.m. at a bend with a fence, she was suddenly held by the 1st appellant on the neck and she could not turn or scream. The 2nd appellant who was with the 1st appellant got hold of her waist, fell her down, started to tear her inner pants; that the 2nd appellant unzipped

his trouser and inserted his penis in her vagina.

PW1 heard the 1st appellant ask the 2nd appellant if he had finished but he said he had not and the two ran off. She screamed and PW3, M arrived and called out Quinto's name. PW1 said that she knew the 1st appellant as a neighbor; that it was not yet very dark then; that the 1st appellant used to wear a yellow cap which he had on the said day. As for the 2nd appellant, she did not know him before but identified him by the scar near his eye which she saw when he was defiling her.

PW2 Delphin Luro, PW1's mother was called by PW3 MN who informed her that PW1 had been defiled by Quinto – 1st appellant who she identified using a torch. PW2 went to the scene, found PW1 who said that she could identify 2 of the 3 people who had attacked her, as Quinto and a 2nd person who had a scar on the face. PW2 said that she took PW1 to hospital that night but were turned away till next day; that on the way, they met the appellants and PW1 stopped suddenly and told PW2 that they are the ones who had defiled her and she went to report at the Administration Police Post but on going back where they had seen the assailants, found the two had been arrested by the assistant chief and members of the public.

PW3 MN recalled the 13/3/2012, she was at her home about 7.00 p.m. when the two appellants passed by and greeted her. PW3 knew both appellants before; that after a short time, she heard a scream from nearby and she ran there and found the 2nd appellant on top of PW1 as the 1st appellant held down PW1. She asked what they were doing and they ran off. She said it was not very dark and she had a spotlight and she was able to see them. As she walked home with PW1, she met PW4 PM who was responding to the screams. Next day, PW1 was treated and she handed over DW1's torn under pant to police. PW3 identified the two appellants in a hotel and they were arrested.

PW4, PM was in his homestead about 6.45 p.m. on 13/3/2012 when he saw two people pass on the foot path next to his home. About 20 minutes later, he heard screams and went to the place and found PW1 about 100 metres from his home. PW4 found PW1 in company of PW3 and the girl said that the people wanted to rape her. He reported at Malaba Police Post and when he went to record his statement, he identified the two appellants as the people he saw pass by his home as they had greeted him.

PW5 Samuel Kibet, a Clinical Officer at Teso North Sub-County Hospital produced the P3 form which was filled upon examining PW1 who had attended hospital on 13/3/2012. He examined PW1 and found no injuries to her genitalia nor were there any spermatozoa. He concluded that there was no evidence of penetration but there was an attempted defilement due to the torn pant.

PW8 Sgt. Beatrice Barmasai was on duty at Malaba Police Station on 14/3/2012 when she found a defilement report booked. She started investigations and the two appellants were already in cells. She recorded witness statements and escorted PW1 to Kocholia Hospital where the P3 was filled. She produced a torn green under pant as an exhibit.

When called upon to defend himself, the appellant testified on oath that he had nothing to tell the court about 13/2/2012, but that on 14/3/2012 about 5.00 p.m. he was at the market when he met two people who said they had been looking for him and they arrested him; that while at the cells, the 2nd appellant and another were taken there and it was alleged that they jointly committed the offence. He denied knowing the complainant but that the 2nd appellant is his cousin and they were at home on 13/3/2012 about 7.00 p.m.

The 2nd appellant also said how he was arrested on 14/3/2012 in a hotel at Kocholia, taken to Kocholia Centre where he found the 1st appellant and was joined by a 3rd person. Both denied committing the offence.

I need to point out that the trial court made an error in numbering of the witnesses. PW3, MN and PW6 are one and the same person.

PW3 had testified and was recalled and the court re-numbered her as PW6. PW4 PM was recalled and the court re-numbered him as PW7. In total, therefore, only 5 witnesses were called not 8.

I have considered the grounds of appeal, the evidence on record, the defence of the appellants and the rival submissions.

The appellants had been charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act. The section provides 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 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.”

The key ingredients of the offence of gang rape are as follows:

(1) Proof of rape or defilement;

(2) 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.

In this case, the complainant was a minor aged 17 years. The question therefore is whether the offence of defilement was committed.

The offence of defilement is provided for under Section 8 of the Sexual Offences Act which provides as follows:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

To prove an offence of defilement, the victim must be a child and there must be proof of penetration.

Penetration is defined under Section 2 of the Sexual Offences Act as: **“the partial or complete insertion of the genital organs of a person into the genital organs of another person”**.

The complainant’s birth certificate was produced in evidence. It shows that she was born on 1/11/1994. As of 13/3/2012, when the offence was committed, she had just turned 17 years old – 17 years 4 months. She was a child.

Whether penetration – was proved;

PW1 told the court that the 1st appellant held her while the 2nd one made her fall, tore her pant, removed his trouser and inserted his penis in hers. She was taken for treatment on the next day but the doctor did not find any evidence of penetration, that is, there was no injury to the complainant’s genitalia, no evidence of spermatozoa. However, there was evidence that PW1’s inner wear was torn and PW3 collected it from the scene and handed it to the police on the same day. PW1 told the court that at one time, the 1st appellant asked his co-accused if he had finished with the act and he denied.

I am in agreement with the finding by the trial court that there was no proof of penetration but an attempted defilement of the complainant.

The next question is whether the appellants were properly identified as the culprits. PW1 told the court that the incident took place about 7.00 p.m. and it was not yet dark. Her evidence was corroborated by PW3 who came to the scene and said that it was not yet dark.

PW3 had seen the two appellants pass by her home a few minutes before the incident. PW3 knew both appellants, she said they greeted each other and she knew the 1st appellant by name Quinto.

PW1’s evidence was further corroborated by PW4’s evidence that the two appellants had just passed by his home at 6.45 p.m. and he had greeted them even though he did not know them by name.

As respects PW1 and 3, they did not merely identify but recognized the appellants as persons they knew. Evidence of the three was consistent, that it was not yet dark. Besides, PW3 had a torch which he flashed at the assailants as the appellants fled from the scene.

In the end, I am satisfied that it is the appellants who attempted to defile the complainant. Whereas the 1st appellant held the complainant, the 2nd appellant tried to commit the actual act. They had a common intention. I am satisfied that the trial court properly convicted them under Section 9(a) and (b) of the Sexual Offences Act.

After convicting the appellants, the court considered their mitigation and the fact that they were first offenders and sentenced them to 10 years imprisonment being the minimum sentence for the said offence. This court has no discretion to interfere.

Consequently, I find the appeal to be without merit and it is hereby dismissed.

Signed and Dated at NYAHURURU this 8th day of May, 2019.

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R.P.V. Wendoh

JUDGE

Delivered by S. Riechi (J) at BUNGOMA this 20th day of May, 2019.

PRESENT:

Ms. Nyakibia - Prosecution Counsel

Wilkister - Court Assistant

Appellant - present