



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 13 & 12 OF 2018**

**RAPHAEL NDERITU.....1<sup>ST</sup> APPELLANT**

**SAMUEL NGUGI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 4550 of 2013 delivered by Hon. S. Jalango, SRM*

*on 13<sup>th</sup> October, 2017).*

**JUDGMENT**

**Background.**

1. Raphael Nderitu and Samuel Ngugi, hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Appellant respectively were each charged in the main counts (Counts I and II respectively) with the offence of Gang Rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. It was alleged that on 25<sup>th</sup> September in Kayole division within Nairobi County in association with others not before court intentionally and unlawfully caused their penis to penetrate the vagina of A.A, a child aged 15 years. In the alternative, each was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that they intentionally touched the vagina and breast of A.A, a child aged 15 years with his penis.

2. The Appellants were arraigned in court and at the conclusion of the trial found guilty in each of the main counts and sentenced to serve 15 years imprisonment. They were dissatisfied with that court's decision and have lodged the present appeals against the conviction and sentence. Both Appellant set out his grounds of appeal in respective Petitions of Appeal filed 17<sup>th</sup> January, 2018. The grounds of appeal set out therein are similar. They that and they are; that the prosecution failed to prove its case beyond reasonable doubt, that the prosecution case relied on unfounded facts and shoddy investigations, Section 169 (1) and (2) of the Criminal Procedure were contravened, that the trial court failed to consider the time spent in custody as part of the sentence contrary to Section 333(2) of the Criminal Procedure Code.

**Submissions**

3. The Appellants submissions were similar. They submitted that that no evidence was adduced to support penetration. They argued that the complainant's evidence was not supported by the medical evidence. They questioned the ability of the complainant to identify them while in an intoxicated state and submitted that her state of intoxication should have been evaluated during the initial report.

4. They also argued that the truthfulness of the complainant was called into question by the inconsistency in her evidence regarding whether she was a student or not. They submitted that from the evidence it was not clear that the investigating officer carried out independent investigations in the matter and that he relied on hearsay evidence to charge them. They were of the view that the burden of proof was not discharged by the prosecution and further that his defence statement was not taken into account by the trial court.

5. Additionally, the 2<sup>nd</sup> Appellant submitted that whereas the complainant had indicated that she was attacked by "Samuel" it was not disclosed how she came to know him and whether this was before the incident or during the incident. He questioned the failure to avail medical evidence to corroborate the complainant's evidence and submitted that the conviction could not be safe in the circumstances. With regards to the sentence passed he submitted that his mitigation and the time spent in remand custody were not considered. He urged the court to consider the same and accordingly pass a more lenient sentence.

## **Evidence**

6. **PW1**, A.A, who was the complainant recalled that on 25<sup>th</sup> September, 2013 she met a friend called Spider whom she identified as the 1<sup>st</sup> Appellant, who asked her to visit him at around 2:00 p.m. She did not find him at his place but on her way out she met him and they were back to the house where they sat, conversed and drank alcohol. The 1<sup>st</sup> Appellant left her in the house and came back at around 6:00 p.m. and when she informed him she wanted to go home he refused. As she struggled to leave he called his friends who came and undressed her. 1<sup>st</sup> Appellant was the first to rape her and that the rest of the men raped her in turns. She identified the boys who raped her as Spider, Samuel, Patrick and others whom she did not now. In the process the 1<sup>st</sup> Appellant's mother, who lived in the same plot arrived and the boys took off. She dressed up and while on her way home she met police officers on patrol to whom she reported the incident. They took her to the police station where she reported the matter before being escorted to a hospital for examination and treatment.

7. **PW2**, J.A.O, PW1's mother recalled that on 25<sup>th</sup> September, 2013 when she arrived home in the evening she did not find her daughter but received a call at around 11:00 p.m. informing her that her daughter was at the police post. She proceeded to the post where she was informed what had occurred and they proceeded to the hospital where the child was treated. She recalled that afterwards she was called to the police post and shown two boys who were responsible for the perpetration of the heinous acts against PW1. **PW3, Barbara Salano Were** was a clinical officer at MSF- Gender Violence Recovery Centre. She examined PW1 on 25<sup>th</sup> September, 2013. She observed visible physical injuries and the anatomy of the private parts was normal although there were multiple small inner abrasions on the inner wall of the vagina and at the vaginal entry. Her hymen was round with irregular margins which were normal. There was also a whitish vaginal discharge and a vaginal swab confirmed the presence of male sperm. In cross examination she stated that there was no bleeding but there was bruising and that the injuries were less than 24hours old. The complainant was also examined by **Dr. Kamau** who filled a P3 Form which he identified.

8. **PW4, PC Susan Wanjiru** commenced her investigations after the Appellants had been arrested. She recorded the complainant's statement before escorting her to the Government doctor for examination where a P3 for was filled. She produced the P3 Form which indicated that PW1 had been defiled. She also produced the complainant's Birth Certificate.

9. In his sworn defence, 1<sup>st</sup> Appellant stated that on 24<sup>th</sup> September, 2013 he was sent by his mother to Buruburu where he was to check on their house and did not return home that day as he was searching for stolen iron sheets. On the following day he visited the 2<sup>nd</sup> Appellant whom he wanted to assist in fixing the carpet at his house as he wanted to marry another woman. That as they fixed the carpet five police officers arrived and arrested them. He stated that the complainant was his friend and when she heard that he was marrying another woman she threatened him. He in turn slapped her whereupon she threatened him again. He later received information that the complainant was pregnant and that was the reason she was following him. He recalled that he informed the mother what had happened and she went to meet the complainant's family who demanded Kshs. 200,000/-. When they failed to get the money they dismissed her. He denied engaging in sex with the complainant.

10. **DW2**, the 2<sup>nd</sup> Appellant testified that on 25<sup>th</sup> September, 2013 the 1<sup>st</sup> Appellant requested for his help to fix a carpet in his house. While they were fixing the carpet police arrived and arrested them. They informed them that a child had been raped. He testified that he did not know the complainant and he was not aware of any grudge between her and the 1<sup>st</sup> Appellant. In cross examination, he denied that he was with the 1<sup>st</sup> Appellant on 24<sup>th</sup> September, 2013.

11. **DW3**, Margaret Wambui was DW1's mother and she recalled that on 24<sup>th</sup> September, 2013 she sent him to Buruburu to fix her house which had been knocked over by a vehicle. She recalled that he did not return home that day. On the following day she received information that he had been arrested on allegations of rape. That she visited the complainant's home where the father demanded money from her and threatened her with a panga.

12. **DW4**, Rose Wanjiku was the 2<sup>nd</sup> Appellant's mother and she recalled that on 24<sup>th</sup> September, 2013 he spent the night at home and that on the following day she received information that he had been arrested.

## **Determination.**

13. It is now the duty of this court to reevaluate the evidence on record and arrive at its own independent conclusions. The court must however have regard to the fact that it has neither heard nor seen the witnesses. Having considered the submissions and the evidence record I find that the following issues arise for determination:

- i. *Whether Section 169(1) and (2) of the Criminal Procedure Code was violated.*
- ii. *Whether the offence was proved beyond reasonable doubt.*
- iii. *Whether the sentences passed were proper.*

## **Whether Section 169 of the Criminal Procedure Code was violated**

14. Section 169 provides as under;

***“(1)Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of***

*pronouncing it.*

***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***

***(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”***

15. The Appellants contend that the judgment of the trial court violated Section 169(1) by failing to disclose the reasons for arriving at its decision. However, it is clear at paragraph 24 of the judgment the trial court set out two issues for determination, namely; whether the two accused persons were guilty of gang defilement contrary to section 10 of the Sexual Offences Act and whether the two accused persons were guilty of an indecent act with a child. Accordingly, this ground of submission fails.

16. With regards to Section 169(2) the Appellants contend that their defences were not taken into account by the trial court. The court has scoured the judgment of the trial court and it is clear that the court did set out the gist of their respective defence cases before finding, at paragraph 35, that the respective defences were immaterial to the present matter. This was premises on the ground that they set out alibis for 24<sup>th</sup> September, 2013 which was a date irrelevant to the present case. This submission also fails accordingly.

**Was the offence proved beyond reasonable doubt?**

17. The offence of gang rape has as one of its crucial elements the need to prove that the rape or defilement was perpetrated by two or more persons. Other elements constituting the offence are proof of penetration, proof of absence of consent(not applicable where the victim is a child) and identification of the perpetrator.

18. With regards to lack of consent it was clear from the evidence adduced that the complainant was born on 4<sup>th</sup> September, 1998 and therefore at the time of the offence she was 15 years of age. This meant that she was statutorily barred from giving consent and any acts of carnal knowledge with her were carried out without consent.

19. With regards to penetration the evidence of the complainant was that she was subdued and raped by a bunch of men who she deemed to number about ten. Her evidence was corroborated by the medical evidence that was adduced by PW3 and the P3 form. The evidence of PW3 was that on examination, she had multiple skin abrasions on the inner wall of vagina and vaginal entry. Further that a vaginal swab indicated the presence of spermatozoa. This evidence was reproduced in the Post Rape Care Form. When P3 report indicated that an examination of the genitalia disclosed fresh blood in the opening and that the hymen was torn with fresh margins. From the foregoing it is clear that there was penetration of the complainant's genital parts. This court finds the element proved beyond a reasonable doubt.

20. On identification, an evaluation of the complainant's evidence indicates that she knew the 1<sup>st</sup> Appellant before the incident, a fact he confirms, and that on the day in question he invited her to his house where they partook of alcohol and bhang. That he left her there and when he returned he would not let her go which escalated to forcing her way out of the house. It is at this point that the 1<sup>st</sup> Appellant involved his friends who subjugated her, undressed her before defiling her. She testified that the 1<sup>st</sup> Appellant was the first to defile her then the rest followed. She built on this in her cross examination by stating that the 2<sup>nd</sup> Appellant was the second person to defile her.

21. She identified both Appellants in court as part of the posse that committed the heinous act. She testified that she knew the 1<sup>st</sup> Appellant before the events as he was her cousin's friend. While she did not indicate how she knew the 2<sup>nd</sup> Appellant before the matter at hand she did identify him on the dock and this was supported by circumstantial evidence that the Appellants were arrested at the *locus in quo* on the same day as the offence. In light of the foregoing this court finds that the Appellants were identified as the perpetrators of the offence in question. Accordingly the final element of the offence, of the perpetrator(s) being in association of two or more persons was effectively proved.

22. After re-evaluating the evidence on record, I have no doubt ten in my mind that the offence of gang rape against both Appellants was proved beyond a reasonable doubt. Their conviction was safe and I uphold it.

**Sentence:**

23. With regards to the sentence, the Appellants urged the court to consider the time served in remand custody as part of their sentence in line with Section 333(2) of the Criminal Procedure Code. They took plea on 30<sup>th</sup> September, 2013. On 6<sup>th</sup> June, 2014 the 1<sup>st</sup> Appellant was admitted to bail but it appears he was arrested and charged in another matter on 28<sup>th</sup> December, 2015 and remanded in custody. He was discharged matter on 14<sup>th</sup> April, 2016 but remained in custody until the conclusion of the trial. He was cumulatively in remand custody for a period of 2 years, 5 months and 5 days. With regards to the 2<sup>nd</sup> Appellant he was in custody throughout the trial a period of 4 years, 3 months and 13 days.

24. Section 10 of the Sexual Offences Act provides for a minimum sentence of 15 years imprisonment. As such, the sentence passed was legal and I uphold it save that the same shall be reduced by the period each of the Appellants remained in custody as tabulated above.

25. In sum, the appeal is dismissed.

**DATED and DELIVERED this 1<sup>st</sup> day of November, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. 1<sup>st</sup> Appellant in person.

2. 2<sup>nd</sup> Appellant in person.

3. Miss Nyauncho for the Respondent.