



**REPUBLIC OF KENYA**

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

**CORAM: D.S MAJANJA J.**

**CRIMINAL APPEAL NO. 20 OF 2016**

**BETWEEN**

**DAVID NYAMONGO OGENDI .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. E.K Nyutu – PM dated 20<sup>th</sup> May 2016 at the Principal Magistrate’s Court at Nyamira in Criminal Case No. 1026 of 2014)*

**JUDGMENT**

1. The appellant, **DAVID NYAMONGO OGENDI**, was charged with the offence of gang defilement contrary to **section 10** of the **Sexual Offences Act** (“the Act”) as follows:

*On the 29<sup>th</sup> day of September 2014 within Nyamira County, in association with Shem Omaiyo Mose caused his penis to penetrate the vagina of PO a girl aged 15 years.*

2. The appellant was however convicted of the lesser offence of attempted defilement and sentenced to 15 years’ imprisonment. He now appeals against conviction and sentence based on his petition of appeal and written submissions. The thrust of his submissions was that the offence against him was not proved. The key issue in this case was whether the appellant was identified as one of the persons who sexually assaulted the complainant.

3. The facts giving rise to the case were that on 29<sup>th</sup> September 2014, the complainant (PW 1) was returning home at about 6.30 pm when two men emerged and dragged her to the bushes. She testified that the 1<sup>st</sup> accused held her by the throat while the appellant, who was the 2<sup>nd</sup> accused, held her and they both proceeded to remove her panty. The 1<sup>st</sup> accused inserted his penis into her vagina and while the appellant held her. As she screamed, another man approached them and the assailants ran away. The matter was reported to Nyamira Police Station after she was treated and examined at Itibo Health Centre. In her testimony she stated that she used to see the accused persons in the locality although she did not know their names.

4. The complainant’s mother, PW 2, told the court when PW 1 returned on the evening, she was crying but could not speak as she was in a state of shock. She was taken to Itibo Hospital for treatment. On the next day, she PW 1 narrated her ordeal and told her she could identify the assailants if she saw them as she used to see them in the area but did not know their names.

5. The Clinical Officer, PW 3, examined PW 1 on 30<sup>th</sup> September 2014. She had bruises on her back. She did not have any lacerations, blood stains or discharge on her private parts.

6. The arresting officer, PW 4, detailed the fact that he arrested the appellant and his co-accused on 12<sup>th</sup> October 2014 after receiving an arrest order. PW 5, an Inspector of Police, conducted the identification parade where PW 1 positively identified the appellant but could not identify the 1<sup>st</sup> accused.

7. The investigating officer, PW 6, recalled that PW 1 came to the police station with her father on 30<sup>th</sup> September 2014 to lay the complaint about the defilement that had taken place the previous day. He recalled that PW 1 insisted that she did not know the names of the assailants but she could identify them if she saw them.

8. The appellant denied the offence in his unsworn statement. He told the court that he was arrested and taken to Nyamira Police Station

where he was subjected to an identification parade. He denied that the child was known to him.

9. The appellant was convicted of attempted defilement as there was no evidence of penetration from the medical evidence but there was evidence that the appellant assisted in removing PW 1's panties and held her as the 1<sup>st</sup> accused proceeded to insert his penis in her vagina. To my mind, the fact that the appellant was with his co-accused and both acted together to grab PW 1 and drag her into the bushes where one accused proceeded to commit an act of defilement, implicates him in the offence on the basis of the doctrine of common intention and he ought to have been found guilty. However, I leave that issue at that as the substantial issue for determination is whether the appellant was one of the assailants.

10. This was a case of recognition in that the offence took place in the early evening and PW 1 was clear that she knew the appellant and his co-accused and could be able to identify them if she saw them. It is for this reason that the identification parade was mounted when the accused were arrested. What is not clear from the evidence is how the two accused were identified before arrest. PW 2 did not give the description given to her by PW 1 that would lead to the arrest of the accused persons. PW 4 stated that it is PW 1's father who led them to the arrest of both accused but he was not called to testify.

11. I find this conviction unsafe because while, PW 1 was sure and affirmative that the 1<sup>st</sup> accused was one of the assailants who defiled her and that she knew him, she could not identify him at the identification parade. She was however able to identify the appellant. The Court of Appeal has warned that in cases of recognition mistakes can be made (see *Anjononi & Others v Republic [1980] KLR 59*). This is one case where I cannot support the conviction and as I have shown there is major gap in the evidence pointing to the appellant.

12. I allow the appeal, set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KISII on this 4<sup>th</sup> day of DECEMBER 2018.**

**D.S MAJANJA**

**JUDGE**

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.