REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 75 OF 2015

JACKSON IRUNGU GITAU.....1ST APPELLANT

JOHN KAMAU KIARIE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Nakuru Chief Magistrate's Criminal Case No. 157 of 2012** by **Hon. M.I.G. Moranga S. R. M** on **24/03/15).***

JUDGMENT

1. **Jackson Irungu Gitau** (1st Appellant) and **John Kamau Kiarie** (2nd Appellant) respectively were arraigned before court and charged with the offence of gang rape. Having been taken through full trial they were convicted and sentence to **fifteen (15) years imprisonment**.

2. Aggrieved, they appealed on grounds that the charges they faced were fatally defective. The case was marred by contradictions and inconsistences; medical evidence adduced was not cogent and the defence put up by the Appellants was dismissed but the court did not give any cogent reasons.

3. Facts of the case were that on the 10th July 2012 the Complainant, a minor was on her way home when she encountered the 1st Appellant who grabbed her and took her to his one roomed house. He removed her uniform and used her clothes to gag her mouth. He violated her sexually an act that made her bleed from her genital organs. On finishing the 2nd Appellant knocked the door and was allowed in by the 1st Appellant. The 2nd Appellant also demanded to have sex with her. He also violated her sexually as the 1st Appellant sat on the stool and watched. On finishing the 1st Appellant had another turn. The three of them slept on one bed until morning. The 1st Appellant escorted her but did not reach her home. She wiped herself and went to school. Thereafter she disclosed to her aunt that she had been defiled. They report to the police who investigated and arrested the Appellants who were subsequently charged.

4. When put on their defence, the Appellants denied the charges. The 1st Appellant stated that when arrested he had no identity card. When arraigned in court he was shocked to hear of defilement charges. He alluded to having worked for the mother of the complainant who did not pay him. When he demanded for his dues she threatened him with dire consequences.

5. The 2nd Appellant stated that he was arrested and taken to the AP camp where he met the 1st Appellant. He was shocked to be charged with defilement yet he had neither interacted with either the Complainant or his family.

6. The learned magistrate analysed evidence adduced and found that the Complainant a child was penetrated by the Appellants and found them guilty of gang – defilement.

7. The Appellants canvassed the appeal by way of written submissions. It was urged by both Appellants that considering the age of the Complainant, as disclosed they should have been charged with gang-defilement but not gang-rape therefore the charge was defective. Further that the exact date when the offence was alleged to have been committed made the charge defective as it could not be ascertained whether it was on 10th or 11th July 2012.

8. That the Complainant contradicted herself as to whether the offence was committed by Kamau (2nd Appellant). That the investigation officer who stated that after investigations he formed the opinion that the Complainant was defiled but not by both Appellants.

9. Both Appellants argued that the prosecution did not call evidence to rebut the defence put up pursuant to Section 309 of the Criminal Procedure Code, and they questioned how the court reached the sentence meted out.

10. In response, the State through learned counsel, Mr. Omutelema opposed the appeal. He urged that the Complainant knew the 1st Appellant very well and her evidence about how he led her to a room and defiled her is consistent. That he was joined by the 2nd Appellant whom the Complainant recognized because there was a kerosene lamp that they lit. That evidence of defilement was corroborated by medical evidence. On sentence he urged that the minimum sentence for the offence was fifteen (15) years that was meted out.

11. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

12. The learned magistrate had been faulted for not finding that the charge was defective. The Appellants were accused of contravening the law which provides for either gang rape or defilement.The investigating officer possibly out of ignorance brought a charge of gang-rape against the Appellants. Each one of them filed a separate charge in the same case.

13. Evidence of the age of the Complainant was adduced by PW3, A W, her mother who stated that she was twelve (12) years old. She stated that her birth documents were burnt during the tribal clashes of 2007 – 2008 therefore she did not have documentary evidence in that regard. In the case of **Mwalengo Chichoro Mwajembe –Vs- Republic Criminal Appeal No.24 of 2015 (UR)**, the Court of Appeal stated that:

> ***"…the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense."***

14. Doctor **Toka,** however examined the complainant for purposes of assessing her age. She found her having No.3rd molar tooth on the lower cavity. The age was therefore assessed at 15 years. Since the mother of the child did not state the date of the Complainant's birth, the age assessment should be taken as the correct estimate of the complainant's age.

15. In the case of **Twahengane Alfred Vs. Uganda (2003) UG CA6** the Uganda Court of Appeal held that:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

16. It is true the charge sheet indicates the age of the Complainant as 10 years. These were contradictions but the question to be posed is whether the intention was to deliberately misrepresent the fact to the detriment of the Appellants? Looking at the offence created by Section 10 of the Sexual Offences Act, it is gang-rape. The sentence to be imposed is not based on the age. There is nothing like the sentence being imposed based on the category of age. Whether the victim is raped or defiled in the case of an adult or child respectively, the sentence is similar.

17. In **Sigilani –Vs- Republic (2004) 2 KLR 480** it was stated as follows.

> ***The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that the court can understand. It will also enable an accused person to prepare his defence."***

18. The Appellants were charged with an offence that is created by statutes, namely Section 10 of the Sexual Offences Act. The ingredients of the offence were captured in the particulars. As a result the Appellants understood the charge and did prepare for their defence. As a result they participated in the trial and cross-examined all witnesses who testified. Therefore the alleged confusion that was created did not render the charge defective.

19. In proving the charge beyond any reasonable doubt the state was duty bound to prove, in addition to the age, the act of penetration and the fact that it was done in association with others or any person who has a common intention or is in the company of another.

20. It is stated in the particulars of the offence that the offence was committed on the 10th and 11th day of July2012. The complainant who had gone to school on the 10th day of July 2012 did not return home. The act is stated to have been perpetrated on her person on the night of 10th – 11th July, 2012. On examination by PW2. **Jacob Chelimo,** the clinical officer on the 12th July 2012, found she sustained injuries. Her labia minora (genitalia) had lacerations, her hymen was missing and she had a foul smelling discharge. A high vaginal swab done revealed the presence of epithelial cells and pus cells. He opined that there was evidence of penetration on the minor. Evidence adduced of the fact of penetration was not challenged.

21. It is however argued that the appellants did not perpetrate the act of penetration as alleged for the Complainant was not a person worth being believed.

22. According to the Complainant the person who took her to the house where the incident took place was the 1st Appellant. She stated that he gagged her mouth using clothes and penetrated her genital organs using his male genital organ. The episode took long prior to the 2nd Appellant joining him. On entering the house the 2nd Appellant sat on the bed with her as the 1st Appellant sat at the edge. The 2nd Appellant then demanded to have sex with her and proceeded to do so in the presence of the 1st Appellant. Soon after the 2nd Appellant completed the act, the 1st Appellant had another round in the presence of the 2nd Appellant. The Complainant stated that the light from the lamp that was lit

enabled her to recognize them as they were persons that she used to see. However, when she was re-called to testify on the 24th day of March, 2014 on cross-examination and re-examination she stated thus:-

> ***"You and Kamau and I knew you before. You did not do anything to me. I mentioned you earlier. He used to sleep at Irungu's house. He was there but did not do anything. He came at 8 p.m. Irungu opened the door for him. I slept on the bed. We slept the three of us in that bed. There was lighting in the house. It is called "Kanyitera" a kerosene thin wick lamp.***
>
> ***Kamau just slept as Irungu defiled me. He has not threatened me. (taken through statement) what I said in my stated is true. He defiled me. I am not related to Kamau. I am not his friend. Nothing forced me to change my statement. He did not defile me. I did not lie in my statement***."

23. The witness did absolve the 2nd Appellant from any blame.

24. To prove the offence the prosecution was required to prove that the act was committed by the Appellant is association with another or that they had a common intention to commit the offence. Committing the ofence in association with another would mean that they did it jointly or together. **Section 21** of the Penal Code defines Common intention thus:-

In the case of **Njoroge V Republic (1983) KLR 197** the Court of Appeal stated that:

> ***"……Common intention may be inferred from the presence, their actions and the omission of either of them to disassociate himself from the assault."***

Evidence adduced by the Complainant was that the 2nd Appellant went to the house at 8.00p.m. and he used to sleep at the house of the 1st Appellant.

25. This is a witness who at the outset alleged that the 2nd Appellant defiled her and the 1st Appellant took another turn in the presence of the 2nd Appellant. Having changed her story that the 2nd Appellant did not defile her, it may not be true that the act of defilement, if any did take place in the presence of the 2nd Appellant, therefore he cannot be blamed to have not disassociated himself from the act of defilement.

26. Regarding evidence adduced that the 1st Appellant defiled her. What was established was the fact that the Complainant did not understand the duty of speaking the truth that is why she could lie and later on repudiate what she had stated. Her credibility was questionable.

27. In the case of **Ndungu Kimani V Republic (1979) KLR 282** it was held that:

> **"The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straight forward person or raise a suspicion about trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence."**

28. There was no eye witness to the act to corroborate the evidence of the Complainant as to who perpetrated the act of defilement. She stated that when they went to the home of the 1st Appellant, his mother and siblings were there but she did not raise any alarm. She had at the outset described vividly how the 2nd Appellant violated her sexually thus:

> ***"……Kamau also said that he also wanted to have sex with me. He pulled my dress up. He removed my pant…He removed his pant ant trouser half way. He had sex with me by inserting the organ he uses to pee into my organ which I use to pee and stayed in there for a while before he stopped. He had sex with me."***
>
> **Later on she recanted the evidence. She did clearly proved to be a person whose evidence could not be accepted. It was therefore doubtful if the 1st Appellant committed the act of defilement as alleged.**

29. A re-consideration of evidence adduced shows that the conviction of both Appellants was unsafe. Therefore the Appeal is meritorious and is allowed. The conviction is hence quashed and the sentence imposed set aside. The Appellants shall be set free unless otherwise lawfully held.

30. It is so ordered.

Dated, Signed and **Delivered** at **Nakuru** this **13th** day of **December, 2018.**

L.N. MUTENDE

JUDGE