



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL CASE NO. 113 OF 2015

(An appeal from Judgment in original Kitale CMCR Case No. 184 of 2013 delivered on 13/10/2015 by P.W. Wasike Resident Magistrate)

**KEVIN WANYONYI OMOCHO }
HILLARY NYONGESA MANGE}APPELLANTS**

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellants were charged with the offence of **Gang defilement** contrary to **Section 10 of the Sexual Offence Act No. 3/2006**. The particulars of the offences was that **on the night of 14th January 2013 within Trans-Nzoia County in association with Hilary Nyongesa Mange intentionally caused his penis to penetrate the vagina of D G a child aged 15 years.**

The second count was **Gang defilement** contrary to **Section 10 of the Sexual Offence Act No. 3/2006**. The particulars was that **on the night of 14th January 2013 within Trans-Nzoia County in association with Kevin Wanyonyi Omocho intentionally caused his penis to penetrate the vagina of D G a child aged 15 years.**

The third count was **Burglary** contrary to **Section 304(2) and stealing** contrary to **Section 279(b) of the Penal Code.**

The particulars were that **on the night of 14th January 2013 within Trans-Nzoia County** jointly and with another not before court broke and entered the dwelling house of **A N K** with intent to steal therein and stole therein one weighing machine and 225 kg of shelled maize all valued at Kshs 25,000 the property of **A N K**.

The appellants denied the charges. The prosecution called 4 witnesses whose evidence can be summarised as hereunder.

PW1 D G was asleep in her mother's house together with her siblings. Her mother was sleeping in the kitchen where she was guarding her maize. She testified that in the cause of the night while asleep at around 11 pm she heard some noise and when she woke up she saw torches beamed to her. They were ordered to lie down and covered with blankets. They inquired where their mother was. The said persons tied her hands from behind and they proceeded to defile her in turns. She said that she could not identify them.

Thereafter they left and that is the time she rushed outside where she met her mother and screamed for help.

She was subsequently taken to Kitale District Hospital for treatment. Later she recorded her statement with the police and the P3 form filled.

PW2 A N K was asleep in the kitchen where she had her maize. She heard people knock in the big house where the children were. She said she saw torches and could only identify the 1st appellant whom she had seen during the day. She saw him being given the weighing machine. She said that she saw his face with the help of the light from the torches. Thereafter they left and that was the time PW1 came out of the house and they screamed for help. She confirmed also that they stole 2 bags of maize and a weighing machine. She took PW1 to hospital the following day. She also participated in the identification parade where she was able to point out the 1st appellant.

PW3 Phanis Silali produced the age assessment report prepared by Dr Kennedy Ndege which showed the age of the complainant to be 15 years.

PW4 Simon Kibe conducted the identification parade in which the 1st appellant was picked out by PW2.

PW5 Linus Ligare produced the P3 form on behalf of PW1. He said that he examined her and concluded that she had been defiled as there was pus cells in private parts, and hymen torn on the right side.

PW6 Edward Moricho is a police reservist. He testified that on 15/1/2013 2 village elders requested him to accompany them to arrest the 1st accused. They found him in his house with his wife. He arrested him and found 7 kg of maize which they carried. They took him to Matisi police post.

PW7 P.C. Wycliffe Cheptoo was instructed by Sergeant Wendo to pick the 2nd appellant from Kobos B. He went and found pw2 who directed him to where the second appellant was.

When put on their defence the 1st appellant gave sworn evidence. He said that on 15/1/2013 he worked in his shamba till 2 pm when he went home for lunch. While at home he saw 6 men together with the landlady called Jane who identified themselves one being a police reservist. They took him to Matisi police post where he saw a bodaboda fellow with 7 kg of Maize which was collected from his house. He was taken to Kitale police station. One Andayi, a police officer took him to his office where he saw 2 women and was interrogated. He said that on 17/1/2013 an identification parade was conducted and one of the ladies whom he had seen earlier picked him from the parade. He generally denied the charges.

The said appellant said that he was at Kobos B Centre on 17/1/2013 when he was arrested and taken to Matisi police station and later to Kitale police station. He had been accused of Stealing a motorbike.

He was released on bond of Kshs 6000 but was later arrested and instead of being charged with the offence of Stealing a motor bike he was charged with the offence of rape. He denied that he knew the complainant herein.

Analysis and Determination

I have perused the entire proceedings together with the parties submissions herein. This appeal basically inches on identification. The learned state counsel conceded to the appeal agreeing with the appellant that the identification was not foolproof. He said that there was doubt whether the complainants were really in a position to truly confirm the identity of the assailants. Madam Arunga the learned counsel for the appellants argued that there was no sufficient evidence to suggest that the light from the torches could enable the witness especially PW2 to clearly identify the attackers. On her part PW1 was not in a position to clearly identify those who were defiling her.

Whereas PW2 may have identified one of the attackers there is no evidence to suggest that she told the police when she made the report. Mr Andayi the supposed investigator did not testify. How then were they able to arrest the appellant if there was no such suspect clearly identified by the complainant?

During the evidence in chief PW1 stated as follows

“A police Andayi told us there was a suspect and a line was made and pointed out the 1st accused. I knew his face I saw him the previous day. The Identification Parade form PMFI 4. I touched and held him when I identified him on the line. He said nothing I found no other, 2nd accused. He was not yet arrested. The one I identified had seen him during the day. The other is a neighbour I usually see.

I have seen him at night when a torch was lit.”

If these were the people she knew, I do not find any evidence to suggest that she mentioned their names to the police. Infact as rightly conceded by Mr Abele the identification parade was superfluous.

In the premises I do allow the appeal, set the appellant free unless lawfully held.

Delivered this 6 th day of October, 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Abele for prosecution

Arunga for appellants

Accused present

Kirong – Court Assistant