



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.227 OF 2013

CHUKWUDI OFFURE CHUKWO LAVINUS.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment of the Hon. Mr. J. N. Onyiego Ag. Chief Magistrate in

Kiambu Chief Magistrate's Criminal Case No.603 of 2013

delivered on 13/11/13)

JUDGMENT

The appellant herein Chukwudi Offure Chukwo Lavinus was charged in the main count with gang rape contrary to Section 10 of the Sexual Offences Act No.3 of 2008. Particulars of the offence of the offence were that on the 24th March, 2013 at ***[particulars withheld]*** within Nairobi County in association with another unlawfully and intentionally caused penetration of his genital organs namely penis into the genital organ namely vagina of A R W aged 12 years. In the alternative, he was charged with indecent Act contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006 in that he indecently touched the genital organ (vagina) of the said R W.

Count II related to the appellant's co-accused one Ude Chukwuma who was also charged with gang rape with alternative charge of Indecent Act.

The appellant was convicted on the lesser charge of Indecent Act and was sentenced to ten years imprisonment.

He appealed against both the conviction and sentence. He was dissatisfied that the complainant did not properly identify him, that essential witnesses were not called to testify, that the prosecution's case was a total frame up against him and that the trial magistrate did not consider his defence.

The appeal was canvassed before me on 27th July, 2015. The appellant relied on his written submissions while Learned State Counsel Miss Aluda made oral submissions.

In brief the appellant submitted that the age of the complainant was not proved as required by the law. In

that she herself stated that she was 12 years old while her mother indicated that she was 14. He submitted that the evidence of the complainant was contradictory and could not be relied on by the court. He poked holes with her evidence in that she testified that after the defilement she bled from her private parts and her clothes got soiled. In contrast, her mother testified that after she got her from the scene, she took her straight to school and did not change the clothes she was wearing which was an indication that the complainant was not wearing any soiled clothes. To that extent he urged the court not to rely on the complainant's evidence. He also submitted that in the face of contradictory evidence from the complainant it was important that an independent witness be called to testify to corroborate her evidence. This was in consideration of the fact that the evidence on record was that himself and the complainant met at a bar. Either the patrons in the bar or the bar owner ought to have been called to attest that the two were indeed together. He urged the court to set him free.

Miss Aluda conceded to the appeal. She submitted that the prosecution's evidence was contradictory. PW1 testified that the offence was committed at 5.00 a.m. whereas in cross-examination she indicated that it was committed at 10.00 p.m. Further, both the first report made at the police station and in the P3 form showed that the complainant had not suffered any injuries. She also submitted that the complainant had initially testified that she knew the appellant but later changed her story to state that she did not know him until the morning of the incident.

It was Miss Aluda's further submission that there were variations on the age of the complainant. The Dr. indicated her age as 13 years, PW1 testified that she was 14 years whereas her mother testified that she was 12 years. Moreover, in her statement PW1 recorded that she was defiled by one Desmond but the charge sheet showed a different name. Furthermore, when both the complainant and the appellant were found together they were not taken to hospital for examination until the next day. More interestingly, was the fact that the complainant testified that her clothes were bloodstained but the prosecution did not find it prudent to produce them in court. The soiled clothes were neither mentioned by PW2 who took complainant from the appellant's house and even PW3 her mother. Miss Aluda further urged the court to take into account the circumstances under which the complainant was found in the hands of the appellant. The complainant had been chased away by her mother at night. She was rescued by the appellant who unfortunately went with her to a bar until 3.00 a.m. Miss Aluda submitted that the person who ought to have been charged was her mother for neglecting her child who was a minor and a school going pupil. She submitted that the offence for which the appellant was convicted was not proved.

I have accordingly considered the respective submissions. The concession by the state counsel to the appeal notwithstanding, this being the first appellate court has to reevaluate the evidence and come up with its own independent finding. The complainant testified as **PW1** and after vore dire examination gave a sworn statement of evidence. She testified that she was born on 16th August, 1999 and was at *[particulars withheld]* Academy in standard eight. On the 24th March, 2013 as she went to church in the morning and after church went to visit her sister M W. She left her sister's home at 7.00 p.m. and proceeded home. On arrival she found her mother who was angry that she had returned home very late beyond 4.00 p.m. She returned to her sister's home and after explaining to her sister what had transpired between herself and her mother, her sister took her back to her mother. However, her mother refused to let her in and she remained in the house until 11.00 p.m. It was while outside the house she saw one Chinedu come out from her brother's house which neighbour's theirs. Chinedu asked her what she was doing outside the house and he requested her to accompany him to his house which was about 15 minutes' walk. She was known to Chinedu who used to visit her brother. On arrival in his house, Chinedu asked her to accompany him to a bar where he needed to see somebody. Both proceeded to Uncle Sam's Club in Githurai 44. She recalled that Chinedu did not meet the person he intended to see in the pub. They left the pub at 3.30 a.m. and went to his house where they arrived at 4.00 a.m. That is where she found two men. One of whom was the 2nd accused who was not known to her before.

PW1 further testified that Chinedu prepared mattresses for them to sleep on the floor. After sometime one of the men left. That is when Chinedu started defiling her after 30 minutes the other man took his turn for another 30 minutes. At 7.00 a.m. Chinedu left the house. She then slept for another two hours and did not raise any alarm. Her testimony was that the 2nd accused told her not to leave the house. She

wore her clothes after the 2nd accused finished defiling her. At about 8.00 a.m. her Head Teacher one C went to the house accompanied by Teacher D. That is when the 2nd accused accompanied them to the school where she met her mother and other teachers. Her sister joined them later. They were later escorted to Kiamumbi Police Station where the matter was reported. Thereafter they were referred to St. Frontiers Hospital for examination. She was counseled and examined and tests done. She thereafter recorded her statement.

PW2, D N K a teacher at *[particulars withheld]* Academy testified that on the 25th March, 2013 he received a report on the absence of the complainant. At her desk PW2 saw some notes referring to a Nigerian who was troubling her. There was also a cell phone Number. He called the number and was answered by somebody with a Nigerian accent. He pretended that he was a police officer and asked him whether he knew where the complainant was. Both agreed to meet at Uncle Sam's Pub from where he directed him to where the complainant was. They found the complainant in the house of the 2nd accused. The 2nd accused too was in the house.

According to PW2 the 2nd accused was lying on a mattress on the floor with his trousers lowered to the knee level. The complainant was also on the mattress half naked with a short and a cosset on top. PW2 ordered the 2nd accused to accompany him to school. The man who took him to the 2nd accused's house also accompanied him. At the school they found the complainant's mother. Thereafter the matter was reported at Kiamumbi Police Station.

PW3, M W N and the mother to the complainant while corroborating the evidence of PW1 confirmed that indeed the complainant had returned home later. She beat her and she ran away. On the following day she went to the school to find out whether she had reported to the school. That is where the headmaster told her that he knew of a telephone No. on PW1's exercise book. When the number was called it was answered by a Nigerian. PW3 went and met the Nigerian and after sometime, returned to school with PW1 and the 2nd accused. PW1 disclosed to her mother that both the 2nd accused and the man who answered PW3's call had defiled her.

PW4, M W N and an older sister to PW1 confirmed that PW1 visited her on the material date after she left church and after supper at about 7.00 p.m. she released her to go back to their home. When PW1 arrived home, she was chased away by her mother and she returned to her house after ten minutes while crying. She even tested her mother to say that she was with the daughter. PW1 told PW4 that she had been beaten by her mother. She (PW4) took her back home but only escorted her up to the gate because according to her she had differences with her mother. Her further testimony was that before she returned to her house, she remained at PW3's gate until 9.00 p.m. awaiting PW3 to open for PW1. When the gate was not opened she went back to her house. It was until the following day at 10.00 a.m. that PW3 called her to enquire from her if she had seen PW1. PW3 proceeded to PW1's school and that is where after sometime PW1 was brought to school in the company of her teachers and the 2nd accused. The matter was thereafter reported to Kiamumbi Police Station.

PW5, Dr. Maundu Joseph attached to Nairobi Area Police Department produced the P3 form in respect of PW1. He testified that PW1 was escorted for examination on the 20th April, 2013 by Sergeant Wambui. It was alleged that she had been gang raped on 24th April, 2013 at 11.00 a.m. He testified that she had no physical injuries on her genitalia. Her hymen was torn and had normal white discharge. He concluded that she had been infected. She had been treated at a Clinic called Medicines San Frontiers. In cross-examination PW5 stated that he could not tell when the hymen was broken. He stated that the discharge could have been caused either by fungal or bacterial infection. He stated that one can ascertain a torn hymen up-to a period of one month. He insisted that PW1 had no injuries in her genitalia and there was no evidence of blood stains.

PW6, Irene Gori Nyangwachi a Clinical Officer with Medicine San Frontiers testified that PW1 was seen at their clinic on 25th March, 2015 in the company of her mother. She had no physical injury on her genitalia which is to say that the vagina had no visible injuries. There was no tear, her clothes had no

bloodstains, she had discharge that was not smelly. The hymen was annular pink with tear at 6 o'clock and central.

In cross-examination she stated that the tear was not old and there was no presence of spermatozoa.

PW7, A W K a student in standard eight at *[particulars withheld]*

Academy confirmed that she knew PW1 as a classmate. She confirmed that she identified PW1's exercise book which bore telephone No. *[particulars withheld]* belonging to the man the school headmaster called and directed him to the house PW1 was in.

PW8, Police Constable Dennis Owino testified that he was directed to arrest a suspect by the name Chukwudi Offure Chukwo Lavinus whom he identified as the 1st accused. He arrested him at a barber shop in Zimmerman.

PW9, Corporal Woman Beatrice Mwangi investigated the case and summed up the evidence of all the prosecution witnesses.

PW10, A M O also a pupil at *[particulars withheld]* Academy in class eight confirmed that she was a classmate to PW1. And that on 25th March, 2013 PW1 did not turn up in school.

The appellant gave an unsworn statement of the offence. He denied committing the offence. He stated that he was arrested on 25th March, 2013 and escorted to Kiamumbi Police Station where he was informed of the offence he would be charged with. He was shocked that he was being charged with gang rape yet he never committed the offence. He poked holes in the evidence of the complainant who he said gave utter lies that he participated in the gang rape. He stated that the complainant had indicated in her statement that between the people who defiled her was one Chinedu Desmond yet none of the accused was known by that name. He also stated that the Doctor's report and his evidence showed that there had been no injury in her genitalia. There was also no spermatozoa which was an indication that the complainant had not been defiled. He urged the court to allow the appeal.

I have evaluated the evidence on record first and foremost, this court must be certain that the appellant is one of the persons who gang raped the complainant. From PW1's evidence she was clear in her mind that she was gang raped by a Mr. Chinedu and the 2nd accused. The said Mr. Chinedu left the house of the 2nd accused at about 7.00 a.m. PW1 made a report with the police that one of the persons who defiled her was Chinedu.

PW8 who was tasked to arrest the second suspect other than the 2nd accused, testified that he arrested a man by the name Chukwudi. In court he identified the 1st accused as Chukwudi. He did not testify in court that he had been informed that the said Chukwudi was one and the same as Chinedu.

After the testimony of PW1 who severally referred to Chinedu and who in court pointed at the 1st accused as Chinedu, the prosecutor at that point automatically ought to have amended the charge sheet so as to also refer the 1st accused as Chinedu. Furthermore, this Chinedu was well known to the brother of PW1. In the alternative therefore, to erase any doubts that the appellant was the Chinedu PW1 was referring to, PW1's brother ought to have testified so as to make a clarification on that aspect. This was never to be casting doubts whether indeed the appellant herein is also the Chinedu that PW1 was referring to.

On evaluating the evidence of both PW5 and 6, I have no doubt in my mind that the complainant was defiled. I say so because from PW6's evidence the Clinical Officer who treated her, she testified that the hymen had a tear with minor lacerations and the tear was not old. The examination was done on 25th March, 2013 which was just a day after PW1 went missing from her home. Such tear was no doubt evidence of penetration which is a key element in the offence of defilement. In my view therefore, had the appellant been properly identified the proper offence for which he ought to have been convicted with was defilement. Be that as it may, I am convinced that with the apparent discrepancies on his identification,

there is doubt as to whether he participated in the gang rape. I will therefore give him a benefit of doubt.

As to the age of the complainant, although no documentary evidence was tendered in court, it is my view that her age would have been proved by her oral evidence and that of her mother. Although she testified that she was 14 years whereas her mother testified that she was 12 years, both were unanimous that she was born in 1999. She was therefore 14 years as at the time of the offence. That age well matches with a child who is in standard eight.

On the whole, I find that the prosecution did not prove beyond all reasonable doubt that the appellant was one of the persons who gang raped the complainant. I therefore quash the conviction in his respect and set aside the ten years sentence. I order that he be and is hereby set free. However, he shall be escorted to the immigration department for purposes of repatriation to his country. In making this order I have given regard to the fact that he too indicated that he is willing to be repatriated to his mother country as requested by the prosecution.

It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of July, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Appellant in person.

.....for the respondent.