REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal Nos.114 And 115 Of 2011

(Consolidated)

BETWEEN

WILLIAM SIMBA ……..…..……. 1ST APPELLANT

DENNIS OKEMWA ……..……. 2ND APPELLANT

AND

REPUBLIC …… RESPONDENT

(Being an appeal from original conviction and sentence of the CM's court at Kisii in Criminal

Case No.1679 of 2010 dated and delivered on3rd June 2011 by Hon. P.L. Shinyada, RM)

JUDGMENT

Introduction

1. The 1st appellant herein, William Simba was the second accused in Kisii RM Criminal case No.1679 of 2010. He was charged jointly with Dennis Okemwa who was 1st accused in lower court and now 2nd appellant. They were charged in count I with Gang defilement contrary to **section 40** of the **Sexual Offences Act No.3 of 2006**. The particulars being that each of the accused persons on 17th October 2010 at [particulars withheld] in Kisii Central District, within Kisii with the common intention committed an offence of gang defilement to D.N a girl aged 7 years by causing his penis to penetrate the vagina of the said D.N.
2. In the alternative count they were charged with indecent Act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that each of the accused persons on the same day and place committed an indecent act with D.N a child aged 7 years by rubbing his penis against her vagina.

3. The appellants pleaded not guilty to both counts. The case therefore went to trial during which the prosecution called 6 witnesses.

The Facts and the Evidence

4. The facts and the evidence emerge from the testimonies of the 6 witnesses. PW1, the complainant

herein who gave unsworn evidence stated that she was in nursery school and was aged 7 years. On the day in question, she was coming from the posho mill when she met the 2 appellants. William Simba offered to carry her flour for her while Dennis Okemwa carried her. The 2 appellants took her into a napier plantation where the 2nd appellant (Dennis) removed her pants. The 1st appellant (William) put the flour down on the ground and the two of them removed their trousers and started defiling the complainant in turns. Each of the 2 appellants inserted their penis into her vagina. When the complainant started crying Dennis covered her mouth. William also inserted his penis into the complainant's anus. Dennis threatened to kill the complainant if she told anyone about what the 2 appellants were doing to her. During the hearing, the complainant broke down and cried.

5. After the ordeal, the complainant got up and walked home. She was bleeding on reaching home, the complainant reported her ordeal to her uncle, one A.O (not called as a witness) who took the complainant to hospital at Ibeno and thereafter, the matter was reported to the police at Gesonso.

6. The complainant was examined by Dennis Omurwa, a clinical officer at Kisii Level 5 Hospital on 03/11/2010. Dennis Omurwa testified as PW5. According to this witness (Omurwa), the complainant was aged between 6-8 years. On examination, he made the following findings: there was redness and tenderness of vaginal orifice; no tear or bruise was noted; the hymen was intact and no discharge was noted. An HIV test done on the complainant was negative and syphilis test was also negative and that no sperms, pus cells and epithelial cells were seen.

7. Omurwa explained that presence of cells confirms inflammation while pus cells would indicate a urinary tract infection and can be sexually transmitted. He also confirmed that there was mild sexual penetration with mild (physical) genitalia injury because the hymen was intact. The P3 form duly filled and signed by Omurwa was produced as **P. Exhibit 1**.

8. Omurwa also testified that he examined the 2 appellants. William was examined under Ref. No.74086/10. He was found to be aged between 25-27 years. He had no physical injuries on the external genitalia but a test of urinalysis revealed pus cells and epithelial cells. The report on William was produced as **P. Exhibit 2**.

9. Dennis was examined under Ref. No.74085/10 on 17th October 2010. He was aged between 18-20 years. Denis had no physical injuries to his external genitalia and the laboratory examination specimens also revealed nothing. The P3 form in respect of Dennis was produced as **P. Exhibit 3**.

10. In his further evidence, Omurwa stated that he was not the one who treated the complainant, though in preparing the report, he relied on earlier treatment notes, the post rape care form and physical examination. The post rape care form serial number 9594 was filled at the hospital by one Faith Ogeto. The post rape care form was produced as **P. Exhibit 4a-c**.

11. The complainant's grandmother, M.N who testified as PW3 and the one who used to stay with the complainant, only learnt of the tragedy that had befallen her granddaughter after the event. She was however able to identify the complainant's stained panty – **PMF1-1**. She also stated that Dennis was like her son while William was her grandson. PW3 also testified that after her return, she checked the complainant's vagina and found it was gaping.

12. The complainant's mother, G.K testified as PW2. She confirmed that the complainant was her daughter and that she was aged 7 years, having been born in the year 2003. She also confirmed to the court that she was not present when the incident occurred. She saw the complainant some 3 days after the incident and on checking her private parts, she found they were not normal.

13. PW4 was Number 2008060583 APC Jared Maina Lubanga of Ibeno AP Post. He testified that on 17th October 2010 the 2 appellants were taken to the AP Post on allegations that they had defiled a minor. The people who took the appellants to the AP post also surrendered the complainant's underpants. The complainant was checked by APC Wilter Odero who confirmed that the

complainant had been defiled. The 2 appellants were detained at the cells until the following day when they were taken to Keumbu police station,. He recorded his statement at Keumbu police station.

14. The report of the incident made to Keumbu Police Station was received by No.89371 PC Wilson Lekakeny who testified as PW6. He narrated how he had received both Dennis and William from the officers at AP Post Ibeno Chief's Camp. After talking the report, PW6 escorted the complainant and the 2 appellants to Kisii Level 5 Hospital for treatment. He also later recorded their statements. He also visited the scene of the alleged crime. He produced the complainant's panty as **P. Exhibit 1**. He issued P3 forms to the complainant as well as to the appellants. The P3 forms were duly produced as exhibits by Omurwa.

The Appellants' case

15. At the close of the prosecution's case, the trial court ruled that the two appellants had a case to answer. Dennis who was the 1st accused gave sworn evidence and told the court that he was a peasant farmer. He stated further that though he was aware of the charges facing him, he did not commit the alleged offence. It was his testimony that the case against him was a fabrication. He stated that community policing people are the ones who lured him to his arrest. He therefore asked the trial court to acquit him.

16. William also gave sworn evidence in which he told the court that he was a painter by profession. He stated that on 17th October 2010, he woke up early in the morning and went to work. He returned home at about 7.00 a.m. when a neighbour called him and asked him to escort him (neighbour) to go and pick up a visitor. William, his neighbour and two other persons went up to Nyanturago but as they were taking tea, cops appeared and arrested him. He was taken to Keumbu police station. Next day he was taken to hospital before being arraigned in court. William stated further that the charges facing him were strange to him. He asked the trial court to acquit him.

The Judgment of the Trial Court

17. After carefully considering all the evidence that was laid before it, the trial court made a finding that the prosecution had proved its case beyond any reasonable doubt against the two appellants in that they had caused their penises to penetrate the complainant's vagina as they defiled her in turns. The trial court therefore found the appellants guilty of gang rape and convicted them accordingly. The trial court left the alternative charge of indecent act with a child in abeyance upon the appellants being convicted of the principal charge.

18. Upon conviction each appellant was sentenced to serve 30 years imprisonment.

The Appellants' Appeal

19. Upon conviction and sentence, each appellant was aggrieved by the entire judgment of the trial court. They filed their separate appeals being CRA Numbers 114 and 115 of 2011. The respective petitions of appeal contain the following paraphrased grounds of appeal:-

1. *That the learned trial magistrate erred in both law and fact in failing to appreciate that the prosecution did not prove its case beyond any reasonable doubt against the appellants.*
2. *That the learned trial magistrate erred in law and fact in failing to make a finding that the appellants were not positively identified as the perpetrators of the alleged crime.*
3. *That the learned trial magistrate erred in both law and fact in convicting the appellant on the basis of hearsay and contradictory evidence.*

20. The appellants also filed supplementary grounds of appeal in which they averred that the amended charge sheet on which the conviction was based was defective; that the prosecution failed to call

vital witnesses for their case and finally that the complainant's evidence was at cross-purposes with the medical evidence. Each appellant therefore prayed that the conviction be quashed and the sentence of 30 years' imprisonment be set aside.

First Appellant Court

21. The appellants are before me on a first appeal. On this appeal, this court is essentially re-hearing the case, albeit without the privilege of seeing and hearing the witnesses who gave evidence in the court below. This therefore means that this court has to exercise great caution in deciding whether or not to overturn the findings of the trial court. This court must carefully reconsider and evaluate the evidence afresh and come up with its own findings in the matter. If it is established during the analysis and evaluation of the evidence that the trial court misapprehended the law or applied the wrong principles of the law in reaching its decisions, then this court will interfere with the findings of the trial court. If any complaint by the appellants hinges on a finding based on the demeanour of any of the witnesses, then such a decision is better left undisturbed. Authorities on the duty of a first appellate court abound and cases such as **Pandya –vs- R[1957] EA 336**; **Ruwala –vs- R[1957] EA 570**; **Peters –vs- Sunday Post [1958] EA 424** and **Okeno –vs- Republic [1972] EA 32** stand out.

Arguments during hearing of the Appeal

22. It appears form the record that the two appeals herein were not consolidated. However at the hearing hereof, each appellant furnished the court with their written submissions.

Arguments by the Appellants

23. The 1st appellant, William, submitted that the charge sheet as amended was defective in that it does not contain the words **"one after the other"** or **"in turns"** in describing the manner in which the offence of gang rape was committed. He submitted that the wording of the charge does not therefore lend itself to any practical sense since the appellants could not each have either penetrated the complainant's vagina with their penises or rubbed their penises at one and the same time against the complainant's vagina. He urged the court to allow the appeal on the basis of this badly framed charge sheet. With regard to the exhibits and contradictory evidence, William submitted that the [blood] stained panty produced in evidence did not tally with the complainant's evidence who told the court that she did not wear her panty after the incident. William referred the court to page 4 line 31 of the proceedings. The relevant line is line 2 on page 5 of the typed proceedings where the complainant stated as follows:- **"The panty is in court – PMF1. I never put it on again after the incident."**

24. William also contends that Omurwa's testimony clearly showed that there were no bruises on the complainant's genitalia upon examination, and that in the circumstances, the bleeding referred to by the complainant must have been imaginary. Reference was made to page 10 lines 17-18 of the proceedings where Omurwa stated in part during examination in chief:- - **"--- no tear or bruise noted, hymen was intact; no discharge noted ---"**

25. William also questioned the length of time taken between the date of the alleged incident, which was 17th October 2010 and the date when the complainant was taken to Omurwa for examination on 3rd November 2010; it was William's contention that during the 16 or 20 days' lapse, something must have happened that fabricated this case against him.

26. Thirdly, William submitted that the evidence of his alleged arrest on 17th October 2010 is not clear, that it is not clear who arrested him and that in the absence of evidence from persons who allegedly arrested him, this court should make a finding in his favour.

27. Finally, William submitted that he was arrested and arraigned in court long before investigations

into the complaint against him were completed. He averred that this conduct on the part of the State was contrary to criminal procedure which requires investigations to precede arrest and arraignment in court. On the basis of the above arguments, William urged this court to allow his appeal, quash the conviction and set aside the sentence.

28. The 2nd appellant, Dennis also filed his written submissions in which he contended that the learned trial magistrate erred by not making a finding that the prosecution never proved its case against him beyond any reasonable doubt. He pointed out that though the prosecution, through PW4, alleged to have re-arrested him from members of the public no member of the public was called to testify to that fact. He contended that the court's failure in this regard was a contravention of **Article 50 (2)** and **(3)** of the **Constitution of Kenya 2010** namely the appellant's right to a fair trial and his right to information in a language that he understands.

29. On the second ground of appeal, Dennis submitted that since the complainant was a child of tender years, her evidence should be treated with caution, especially where there is no corroboration and where such evidence forms the basis of a conviction as happened in this case.

30. Dennis also contended, while making submissions on ground three of the appeal that the learned trial magistrate erred in law and fact in basing her findings of guilt on the evidence of a single identifying witness. That such evidence by the complainant should have been tested with the greatest care. Dennis also took issue with the trial court's reliance on the medical evidence adduced by Omurwa which evidence, according to Dennis clearly exonerated the appellants from the alleged crime of gang rape or any rape at all as the complainant's hymen was intact; no spermatozoa was found and there were no bruises on the complainant's genitalia.

31. Dennis also submitted that the learned trial magistrate erred in law and fact in not complying with **section 329** of the **Criminal Procedure Code**. That section deals with evidence for arriving at a proper sentence. In other words, Dennis alleges that the learned trial court did not hear any mitigation from him before passing sentence.

32. Finally, Dennis faulted the learned trial magistrate for allegedly rejecting his alibi defence without assigning any reason and thereby contravening **section 169 (1)** of the **Criminal Procedure Code** on content of a judgment. Dennis submitted that all the above failures on the part of the trial court resulted in miscarriage of justice. He prays that the appeal be allowed, the conviction quashed and the sentence set aside.

Arguments on behalf of the Respondent

33. Mr. Majale, in opposing the appeals submitted that the proviso to **section 124** of the **Evidence Act, Cap 80 Laws of Kenya** clearly stipulates that the evidence of a victim in a sexual offence need not be corroborated if the trial court is satisfied that such evidence is good evidence. That in the instant case, the trial court, having taken the complainant through a voire dire examination was satisfied that her evidence was good evidence, having established that the complainant understood the importance of telling the truth.

34. Counsel also submitted that since the complainant knew each appellant by name and gave the names to the court, there was no doubt that they committed the offence as charged. Counsel also submitted that Omurwa's evidence clearly showed that the complainant had been defiled especially so because the medical examination on William revealed that he had pus and epithelia cells similar to those found in the complainant's vagina.

35. Regarding the alleged defective amended charge sheet, counsel submitted that nothing turns on this complaint because each appellant pleaded afresh to the amended charge sheet without raising a finger.

36. Counsel also submitted that the trial court fully complied with the provisions of **section 169** of the

Criminal Procedure Code with regard to content of judgment. He urged the court to find that the appeal lacks merit and to dismiss it in its entirety.

37. In reply both appellants submitted that the medical evidence by Omurwa runs counter to the complainant's allegations of gang rape.

Issues for determination

38. I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the trial court's judgment. I have also considered the rival submissions very carefully as can be seen from the details set out hereinabove. From the above analysis, the issues that arise for determination are the following:-

1. *Was the amended charge sheet charging the appellants with gang rape defective?*
2. *Was there sufficient evidence upon which to convict the appellants of gang rape?*
3. *Was the failure by the prosecution to call eye witnesses fatal to the prosecution's case?*
4. *Did the trial court fail to consider the appellants' defence of alibi?*
5. *Should this court interfere with the sentence imposed upon the appellants by the trial court?*

Analysis and Findings

39. It is not in dispute that initially the appellants herein were charged with the offence of rape. However, soon after the testimony of PW6, No.89371 PC Wilson Lekakeny, the prosecutor, Inspector Mitau applied to amend the charge from one of simple rape to gang rape. Each of the appellants told the court that they had no objection to the application to amend. The prosecutor then presented the amended charge sheet to the trial court. The trial court read out and explained the amended charge to the appellants and asked them whether they admitted or denied the truth of every element thereof. They each denied the allegations by stating in Kiswahili **"Ni uwongo"** and a plea of not guilty was entered in respect of each appellant.

40. The trial court also asked the appellants whether they wished to recall any of the witnesses; but the answer given to the court by William and Dennis respectively was a no. The case was adjourned on that day after the amendment because the prosecution did not have another witness to call for the day. When the case resumed on 29th March 2011, the prosecution called one No.88821 PC Gerishom Mbugua of Nyakoe Patrol base as PW7, but no sooner had the witness started testifying than the prosecution realized his evidence was for another case – being Cr. Case 1667 of 2010. The prosecution applied to have the evidence by PW7 disregarded. The application was allowed. Thereafter, the prosecution failed to produce any other witness(es) and had to close its case on 5th April 2011.

41. **Section (1)** of the **Criminal Procedure Code** provides that where at any stage of trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.

42. Further **section 214 (2)** provides:-

> **"Where a charge is so altered, the court must call upon the accused person to plead to the altered charge."**
>
> **Section 214 (11)**
>
> **"The accused has a right to demand that any or all the witnesses who had already testified be recalled and give their evidence afresh or be further cross-examined by him or his advocate and the prosecution has the right to re-examine such**

witness on matters arising out of further cross-examination."

43. From the record of proceedings, the prosecution had not closed its case by the time it asked for the charge sheet to be amended. The trial court acted in accordance with the provisions of **Section 214** of **Criminal Procedure Code** when the charges were read afresh to the appellants in a language they understood and thereafter the appellants were given an opportunity to recall any of the witnesses who had already testified. The trial proceeded on the indication by the appellants that they did not wish to recall any of the witnesses.

44. The new charge read as follows:-

Statement of offence

*Gang rape contrary to **section 10** of the **Sexual Offences Act No.3 of 2006**.*

Particulars of offence (main charges)

1. *Dennis Okemwa on the 17th day of October 2010 at [particulars withheld] in Kisii District within Kisii County with common intention committed an offence of gang defilement to D.N a child aged 7 years.*
2. *William Simba on the 17th day of October 2010 at [particulars withheld] in Kisii District within Kisii County with common intention committed an offence of gang defilement to D.N child aged 7 years.*

Alternative charge of Indecent Act with a child contrary to **section 11 (1) of the Sexual Offences Act 3 of 2006**.

1. *Dennis Okemwa on the 17th day of October 2010 at [particulars withheld] in Kisii Central District within Kisii County committed an indecent Act with D.N a child aged 7 years by rubbing his penis against her vagina.*
2. *William Simba on the 17th day of October 2006 at [particulars withheld] in Kisii District within Kisii County committed an indecent act with a child namely D.N a child aged 7 years by rubbing his penis against her vagina.*

45. The 1st appellant avers that the charge sheet does not indicate whether both of them did the act at once and at the same time or did so one after another.
46. The ingredients of gang rape as correctly pointed out by the trial court are:-

- *There must be more than one person*
- *People must all have a common intention*
- *The said intention must be put into action – which is the act of penetration*

47. In **Kilome –vs- Republic [1990] KLR 194** it was held that:-

> **"The paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge."**

It was also held that the responsibility for the correctness of a charge lies squarely on the prosecution, not the court.

48. **Section 10** of the **Sexual Offences Act** under which the 2 appellants were charged with gang rape provides as follows:-

> **"10. Any person who commits the offence of rape or defilement under this Act with**

another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

49. In the instant case, the appellants' complaint is that the charge sheet complained of did not contain the words **"one after the other,"** or **"in turns."** In my humble view, and in light of the persuasive authority in **Kilome –vs- Republic** (above), the omission of these words did not cause any prejudice to the appellants in putting up their respective defences. It is clear from the complainant's testimony that the appellants defiled her in turns as can be seen from part of her testimony when she stated:-

> **"Accused 1 is called Dennis Okemwa, accused 2 is called William Simba. They stay at Kirwa. William offered to carry the flour from me. Dennis then carried me. They took me into nappier grass plantation. Dennis removed my pants. William put the flour down. They both removed their trousers. They started doing bad things to me in turns. Dennis was the first one. He removed his penis and inserted it into my vagina. I was lying down. I felt pain. William also removed his penis and he was behind me. He inserted his penis into my anus and vagina when Dennis has done. I felt pain. I started crying. Dennis covered my mouth and threatened me that if I told anyone they kill me."**

50. PW2 and PW3 both confirmed that they also knew the appellants as they were their neighbours.

51. The next issue for determination is whether there was sufficient evidence upon which to convict the appellants. Omurwa told the trial court on genital examination of the complainant: - **"there was redness of vaginal orifice that was tender; no tear or bruise noted, hymen was intact; no discharge noted ….. pus cells were seen and epithelial cells. They are cells that confirm an inflammation; pus cells indicate a urinary tract infection and can be sexually transmitted because it is a bacterial infection ….. there was physical (mild) genitalia injury because of intact hymen."**

52. Omurwa's further testimony was that an examination of William revealed no physical injury to his genitalia and no pus or epithelial cells. On the other hand, examination of Dennis revealed both pus and epithelial cells. These findings were not strange because from the complainant's evidence, William inserted his penis into her anus most of the time while Dennis inserted his penis into her vagina.

53. From the evidence adduced by the prosecution's witnesses above, the complainant was consistent in her testimony and gave detailed evidence on how the appellants who were her neighbours lured her into the napier grass plantation and repeatedly defiled her. The complainant was so confident that she clearly referred to the appellants by name. In as much as she is the only eye witness to the gang rape the proviso to **section 124** of the **Evidence Act** states:-

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceeding, the court is satisfied that the alleged victim is telling the truth."**

The learned trial magistrate in appreciating the above provisions of the law held:

> **"….. I do find that the evidence of the child and that of the doctor were sufficient enough and it was corroborated. Indeed the Evidence Act under section 124 permits the court to receive the evidence of the child if that is the only evidence available and convict an accused person if it is satisfied that the child is telling the**

truth. I am so satisfied."

54. The third issue for determination is whether the prosecution's failure to call the complainant's uncle who took her to hospital after the incident was fatal to the prosecution's case. Regarding this issue, the learned trial magistrate noted as follows in part of her judgment:-

> **"though whoever saw the child first after the incident did not testify in this case, the court was given sufficient explanation by the investigating officer that the said witness having committed offence ran off to Nairobi and could not be traced. In this case it was not the prosecution's making that the witness could not be found, neither was it the complainant. Efforts had been made to trace him in vain."**

55. In any event, this court is satisfied that the prosecution did not have to call every possible witness to prove the allegations against the appellants. A fact can be proved by any number of witnesses, and if that number is one, so be it. I am myself satisfied that the allegations against the appellants were proved beyond any reasonable doubt, the failure by the prosecution to call the complainant's uncle notwithstanding.
56. Fourthly and concerning allegations that the trial court failed to consider the appellants' alibi defence, I again refer to the trial magistrate's judgment where she said the following:-

> **"All in all I do find the testimonies of all the prosecution witnesses as**
>
> **having been corroborative. I find no trace of any truth in the testimonies of the accused and the same has not shaken the prosecution case in any way. The accused merely denied that they did not defile the child but I am convicted otherwise."**

The above statements by the trial court clearly show that the court considered the appellants' alibi defences but found the same wanting. I have myself considered the same and find no merit in the defences.

57. Lastly is the issue as to whether this court should interfere with the sentence of 30 years meted to each of the appellants.
58. In the case of **Sayeka –vs- Republic [1989] KLR 306**, it was held *inter alia;*

> **"…. the appellate court will not ordinarily interfere with the discretion**
>
> **exercised by the lower court unless it is evident that the lower court has acted upon some wrong principle, or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case…."**

59. Further in the case of **Stephen Ondieki Nyakundi –vs- Republic CA No.91 of 2005** (unreported) the Court of Appeal held: **"that the court can only interfere with the sentence if it is shown to be unlawful…."**
60. Further, **Section** 7 of the **Sexual Offences Act** provides that **"should a person be convicted of gang rape he is liable upon conviction to imprisonment for a term of not less than 15 years but which may be enhanced to imprisonment for life."** The trial magistrate gave each of the appellants 30 years imprisonment and I see no reason for interfering with that sentence, as it has not been established that the trial court acted on wrong principles or that the sentence is unlawful.
61. The upshot of what I have said above is that this appeal is unwarranted for lack of merit and I accordingly dismiss the same in its entirety. Right of Appeal within 14 days.

Dated and delivered at Kisii this 11th day of October, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Both present in person for Appellants

Miss Cheruiyot for Respondent

Mr. Bibu - Court Clerk