IN THE COURT OF APPEAL AT KISUMU
(CORAM: MUSINGA (P), KIAGE & ODUNGA, JJ.A.) CRIMINAL APPEAL NO. 221 OF 2020

BETWEEN

GERISHON SIMIYU MUMBWANI……1ST APPELLANT CYRIS SIKUKU SIMIYU……2ND APPELLANT

AND REPUBLIC

……

RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma (**S. N Riechi, J.**) delivered on 25th November 2020*
in
***HCCRA Nos. 21 & 22 of 2018*)**
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JUDGMENT OF COURT

1. The appellants, ***Gerishon Simiyu Mumbwani***, and ***Cyris Sikuku Simiyu*** were, on 18th May 2018, convicted by the Kimilili Principal Magistrate's Court in Criminal Case No. 1685 of 2013 of the offence of gang defilement contrary to section 10 of the ***Sexual Offences Act*** (the Act). They were sentenced to 20 years' imprisonment. The particulars were that on diverse dates between 27th day of December 2013 and 29th day of December 2013 at [particulars withheld] Village within Bungoma County, they intentionally caused

their penis to penetrate the vagina of LI, a child aged 13 years.

2. Dissatisfied with the said verdict, they filed an appeal before Bungoma High Court in Criminal Appeal Nos. 21 and 22 of 2018. Those appeals, which were consolidated, were dismissed and it is from that decision that this appeal arises.

3. The prosecution's case was that on 26th December 2013, PW1, then aged 13 years, had gone to visit a friend, Whitney. The following day, in the evening, when she was returning home, the 1st appellant emerged from their home, got hold of her and pulled her into a house locking it from outside before leaving. Later on, 1st appellant returned with food accompanied by the 2nd the appellant. After the three ate, the 1st appellant forcefully had sex with her. This act was repeated by the appellant the following night under the watch of the 2nd appellant, whose attempt to have sex with PW1 on 27th and 28th December 2013 was rebuffed by PW1. However, on 29th December 2013, she was not successful in fending off the 2nd appellant's overtures and the 2nd

appellant forcefully had sex with her. During this period, the appellants threatened to harm her with a panga, every time she pleaded with her to be let go.

4. On 29th December 2013, PW1 heard a knock on the door and upon realising that they were police officers who were knocking, and despite the appellants urging her to hide, opened the door and the three were all picked up. She spent that night in the chief's office, while the appellants were placed in the cells. She was later escorted to Naitiri hospital after which she was taken to Mbakalu police station where she recorded her statement. It was her evidence that prior to the incident, she had seen the appellants at Naitiri market. She however had no permission from her parents to visit her friend and admitted that during that period, she was not in good terms with her mother.

5. PW2, ***PC Isaac Omaria***, then based at Naitiri Administration Police Camp, was on duty on 29th December 2013 when, at 11:45 am, PW1's father reported that PW1 has disappeared on 26th December 2013 from their home.

The following day, he received information from an informer that PW1 was being held in a house in Naitiri. Upon proceeding to the house, they found PW1 and the appellants seated on the bed, all in their underpants. From that house they recovered three used condoms and PW1's blood-stained clothes. They arrested all the three and escorted them to Naitiri AP camp where PW1's mother identified her as her daughter, after which she was escorted to the hospital.

6. PW2's evidence was corroborated by PW4, ***APC Naboth Onyango***, who accompanied PW2 to the house. It was however his evidence that there was resistance in opening the door and they had to force it open. According to him, PW1 informed them that the clothes she had belonged to the appellants' sister, who had escorted her and the 1st appellant when she was waylaid by him. She removed her clothes from a place inside the house.

7. PW3, ***Michael Okumarut***, a clinical officer, examined PW1 and the appellants on 30th December 2013. The complainant was brought with history of having been

defiled by 2 known persons on 28th and 29th December 2013. On examining PW1's private parts, her labia minora was found to be "hyperanic" with mucus discharge, her hymen was absent, while epithelia cells were discovered in the urine. As for the appellants, their genitalia were normal. He filled in the P3 form for complainant and the appellants and produced them in court.

8. The case was investigated by PW5, ***PC Ben Keisara***, who was on 30th December, 2013 at Mbakalo Police Station. At

2.40 am PW2 and PW4 brought the appellants in the company of PW1 with a report that the appellants had gang defiled PW1. He recorded statements from PW1 and other witnesses and issued the three with P3 forms and escorted them to Naitiri Sub- County Hospital, where they were examined and the forms filled in. He also took possession of the used condoms and PW1's clothes which were recovered in the appellants' house as well as PW1's original birth certificate before charging the appellants with the offence.

9. At the close of the prosecution case each appellant was placed on his defence. DW1, the 1st appellant, opted to

give

unsworn evidence and called one witness. He testified that on 29th December 2013, three policemen passed by their house during the day and later at night, they returned accompanied by the complainant alleging that they had defiled her, allegations which were untrue. They were taken to Naitiri AP Camp and the next morning they were escorted to Mbakalo Police station, before being arraigned in court. According to him, there was a grudge between his family and that of PW1's family arising from a land dispute, hence the frame up.

10. On his part, the 2nd appellant, a mason, recalled, in his unsworn evidence, that on 29th December 2013 he had come home in Kitale from where he was working with Western Seed Company Ltd in Kambi ya Mawe, in Nakuru. He reached Kitale at 9.00 pm but arrived home at 10.00pm, having taken a motor cycle at Kiminini. Some people came to their homestead and introduced themselves as policemen. They entered the house and inspected it, claiming that they had found the girl who they were looking for. The police officers asked for money in exchange for

assisting his brother and when they hesitated, they were arrested and taken to Naitiri AP Camp. The next day they were escorted to Naitiri Hospital and then Mbakalo Police Station. Later, they were arraigned in court. He did not see the girl they were accused of defiling.

11. DW3, ***Isaac Nismaia Mahino***, then a *boda boda* (motor cycle) rider, testified that he knew both the appellants. On 29th December 2013, the 2nd appellant, his customer, called him from home to go and pick him from Kiminini and take him home, which he did. He did not know where the 2nd appellant was coming from but later heard that he had been arrested.

12. The learned trial magistrate, after warning himself against relying on the uncorroborated evidence of a minor, found: that from there was a detailed and truthful account given by PW1, that the appellants were known to PW1 prior to the incident hence there was no possibility of mistaken identity; that PW1 was found with the appellants by PW2 and PW4, and used condoms were recovered from the house in which they were; that the evidence of PW5 was consistent with

that of PW1 that she was defiled; that the appellants' defence failed to displace the evidence of PW1 and that of the other prosecution witnesses; and that the allegation by the 1st appellant that he was framed due to a family dispute was totally incredible as there was no suggestion to PW1 that she may have been coached to lie and frame any of the appellants; that the 2nd appellant's allegation that he had just travelled home before arrest was equally unbelievable since it was not raised in cross examination; that the evidence of PW1 placed him at the scene from 27th December 2013 and he was found with PW1 and the 1st appellant; that the prosecution proved beyond reasonable doubt that the appellants, acting in association with each other, intentionally and separately caused their penis to penetrate the vagina of PW1, a girl aged 13 years. He found them guilty, convicted them and sentenced them to 20 years' imprisonment each.

13. Being dissatisfied with the conviction and sentence the appellant appealed to the High Court, citing the grounds that the trial magistrate erred: in failing to inform the

appellants of their rights in section 200 of ***Criminal Procedure Code***; in convicting the 1st appellant while no evidence of penetration was produced against him; in failing to call the informer who was a crucial witness in the case as a witness; in failing to comply with the provisions of section 124 of the ***Evidence Act;*** in failing to avail the appellant's sister to testify; in relying on suspicion as opposed to evidence, yet PW2 and PW3 demonstrated that they never found the appellants at the scene; by overlooking the evidence of DW3; in failing to find that the offence was not proved beyond reasonable doubt; in failing to find that there were a lot of contradictions in the prosecution evidence, particularly in the evidence of PW2 and PW4; and in failing to consider the appellants' mitigation.

14. The learned Judge, appreciating his duty as a first appellate court as set out in ***Okeno v Republic [1972] EA 32*** and ***Kiilu & Another v Republic [2005]1 KLR 174,*** and while making reference to section 10 of the Sexual Offences Act which defines the offence of gang

defilement, found that there was overwhelming evidence, both oral and

documentary, that the complainant was 13 years old, hence a child under the ***Children Act;*** that there was sufficient opportunity for the complainant to properly identify her assailants; and that both from the oral evidence and the documentary evidence it was clear that there was penetration of the complainant's genital organs with a male genital organ since there was infection in her genitalia.

15. As regards the sentence, the learned Judge found that the sentence of 20 years' imprisonment, considering age of a minor was within the law. Accordingly, he found that the appellants were properly convicted and the sentence was not excessive in the circumstances and dismissed the appeal.

16. Dissatisfied with that judgement, the appellant contends before us that:

> ***1. The two courts below failed to find that there were contradictions and inconsistencies in the evidence of PW1, PW2 and PW4.***
> ***2. The two courts below failed to find that the evidence of PW1 was not corroborated.***
> ***3. That the prosecution failed to call crucial witnesses in the case such as Whitney, the informer and the***

appellant's sister to confirm the allegations and testify.

4. ***That the sentence imposed by the trial magistrate was excessive.***
5. ***That the two courts below erred failing to find that the offence was not proved beyond reasonable doubt.***
6. ***The two courts below failed to evaluate the appellants' alibi defences.***

17. When the appeal came up for virtual hearing on 2nd September 2025, the appellants appeared in person from Kitale Annex Prison, while learned prosecution counsel, ***Ms. Matere,*** appeared for the respondent. Both the appellants and Ms Matere relied on their filed written submissions which they briefly highlighted.

18. In support of his appeal, the 1st appellant questioned why PW1's friend, Whitney, was not called to testify and submitted: that from the evidence, there was a possibility that PW1 voluntarily agreed to go with him; that he was 16 years at the time of his arrest and only attained the age of

18 years in the course of the trial; that he was therefore discriminated against merely because he was a boy; that whereas only one condom was recovered, which itself was not subjected to tests, both of them were charged with

gang

defilement; and that the court should consider the fact that he was underage at the time of the alleged offence.

19. The 2nd appellant submitted: that there was no evidence of penetration since PW1 had spent another night in her friend's home; that the complainant did not mention the 2nd appellant as having waylaid her; that since the allegations against the 2nd appellant are alleged to have taken place on 29th December 2013, there was no evidence of defilement against him before that date; that there were contradictions between the evidence of PW1 and her mother regarding the conduct of PW1 and considering that PW1 was not in good terms with her mother, she could not be believed; that there were contradictions regarding whether only one condom was used or three condoms were used, and whether or not the door was open at the time the police went to the appellants' house; that the 2nd appellant's evidence that he was away was not considered and that had it been considered and believed, the only charge that ought to have been laid against him was that of child prostitution, if the complainant was found to have been in his house; that the

appellant was convicted on the basis of the evidence of a single untrustworthy witness; that there was no DNA evidence connecting the 2nd appellant to the offence; that there was no evidence to prove the age of the complainant since the complainant's birth was registered after the matter was already in court; and that from the evidence of the complainant's mother, the complainant must have been an adult since she was used to leaving the house.

20. In opposing the appeal, the respondent submitted: that there was sufficient evidence on record to support the conviction and sentence on the charge of gang defilement as was held in ***Fappyton Mutuku Ngui v R [2012] eKLR*** and ***Elly Otieno Alose v R [2019] eKLR***; that the evidence of

PW1 and PW3 confirmed that there was penetration; that the age of PW1 was proved by the birth certificate produced by PW5 which proved that she was 13 years at the time of the offence; that PW1 gave a detailed account on how the incident unfolded and that she was with the appellants for

3 days and nights and had seen the appellants at Naitiri

before that day; that PW1 was found in the appellants’

house from where she was rescued; that there was evidence of association between the appellants in defiling PW1, hence gang defilement was proved; that under section 124 of the ***Evidence Act,*** conviction could be found without corroboration; that on the authority of the case of ***R v Joshua Githuki Mwangi [2024] KESC 34***, the sentence

was lawful.

21. We have considered the grounds of appeal and the evidence on record, as well as the respective submissions filed by the appellants and respondent. Our duty as a second appellate court is to consider only issues of law as opposed to the facts which have been considered by the two courts below. See ***section 361(1) (a)*** of the ***Criminal Procedure Code*** and ***Daniel Kyalo Muema v Republic [2009] eKLR.***

22. In our view, the appellants' appeal broadly revolves around three issues: whether the case against them was proved beyond reasonable doubt; whether their defences were given due consideration; and whether the sentence imposed upon them was deserved.

23. The appellant was charged with “gang defilement contrary to section 10 of the ***Sexual Offences Act***”. The marginal notes to section 10 of the Act, however, does not make reference to “gang defilement”. What is referred to is “gang rape”. However, the body of the section seems to make reference to an offence commonly referred to as “gang rape” by providing that:

> ***“Any person who commits the offence of rape or defilement under this Act in association 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.”***

24. From the above section, the ingredients of gang rape, and we presume gang defilement as well, are rape or defilement under the Act; committed in association with another or others; or committed when the accused is in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in the presence of an accused person, as long as the accused had common

intention with those who defiled the complainant, renders the accused as much guilty under section 10 as much as those who actually defiled the victim. In those circumstances, it matters not that the accused may not be convicted under section 8 of the Act. We shall come back to this issue when considering the sentence prescribed under section 10 as opposed to those under section 8 of the Act later in this judgement.

25. It is trite that for an offence of defilement, under section 8 of the Act, to be sustained, there must be proof: that the victim was a minor; that there was penetration of the victim's genital organs with the genital organs of another person; and that the accused person was the one who penetrated the victim's genital organs. See ***Shitula v Republic [2025] KECA 12 (KLR).***

26. The evidence on record is that PW1 was 13 years of age. This was supported by the birth certificate which was exhibited. It does not matter that the certificate was obtained after the proceedings commenced. What matters is that at the hearing, it was proved that PW1 was a minor at the time

the defilement was committed. While, from the evidence of PW1, her conduct could be construed to have tended towards truancy, when it comes to the offences under section 8 of the Act, the conduct of the victim, unless it amounts to a defence under section 8(5) thereof, does not excuse the conduct of the accused, particularly where the sentence is mandatory in nature. The appellants' submissions that PW1 may have volunteered to go along with the 1st appellant does not therefore matter.

27. On the issue of penetration, there was evidence from PW1 as well as PW5 that there was mucus discharge in PW1's private parts, her hymen was absent, while epithelia cells were discovered in the urine. PW4 also stated that her clothes were blood stained. We agree with the two courts below that there was evidence of penetration of PW1's genitalia.

28. As for the identity of the appellants, PW1 stated that she knew them prior to the incident. The evidence of PW2 and PW4 placed the appellants at the scene. While there were allegations that there existed animosity on the part of the

family of the appellants and that of PW1, it is noteworthy that the appellants were convicted on the evidence of PW1 as opposed to that of her family, since her parents did not testify when the trial was commenced de novo. There was no evidence that the charges against the appellants were motivated by the alleged animosity. In any case, animosity, *per se*, is not ground for disbelieving the evidence of a witness. While it may, together with the other available evidence, be evidence of the motive for the complaint, its existence is not necessarily fatal to the prosecution case where an offence is proved to have been committed. In this case, apart from mere allegations of bad blood, there was no tangible evidence showing that PW1's evidence was motivated by the desire to nail the appellants.

29. It is true that PW1's friend, the appellants' sister and the informer were not called as witnesses. However, there was no evidence that PW1's friend witnessed the episode in order for her evidence to have been of any meaningful use. Similarly, we are not aware of the nature of the evidence that the informer could have been given, had she been

called, apart from saying that she knew where PW1 was being held. The appellants' sister, according to PW4, was with the 1st appellant when PW1 was accosted by the 1st appellant and PW1 was found wearing her clothes. Save for that we are not aware of the evidence that she would have given and whether it would have been useful to either the defence or the prosecution. Based on what we have stated above, we do not find the evidence adduced by the prosecution to have been barely sufficient to sustain the charge. The law is that there is no particular number of witnesses who are required for proof of any fact, unless the law so requires, and that the prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it be shown that the prosecution was influenced by some oblique motive. See ***Mwangi v R [1984] KLR 595.***

30. The appellants referred to inconsistencies between the evidence of PW1 and her mother. However, when the trial commenced de novo, PW1's mother, who had testified earlier on did not testify. Accordingly, her earlier evidence was worthless and any inconsistence in that evidence was immaterial to the outcome of the case. In any case, we reiterate that the allegation that PW1 was a truant was not material to the offence with which the appellants were charged. Regarding the inconsistencies in the evidence of PW2 and PW4, it is our view that they did not materially affect the outcome of the case.

31. On the defence by the appellants, the same were considered in detail by the trial court and were found to be unbelievable. That was a finding of fact which we cannot interfere with at this stage unless it is shown to us that such findings were not based on the evidence on record. In this case, we find that the findings by the trial court, as regards the appellants' defences were supported by the evidence on record.

32. Regarding the sentence, the minimum sentence prescribed in section 10 of the Act is 15 years. The appellants sought for forgiveness and the prosecution submitted that they ought to be treated as first offenders. There were no aggravating circumstances that justified the imposition of a sentence in excess of the prescribed minimum. We hold that in cases where a minimum sentence is prescribed, any deviation therefrom ought to be explained by the trial court, otherwise the enhancement of the sentence would be arbitrary, yet an accused person is entitled to the least prescribed punishment. Although it was submitted that the 1st appellant was 16 years at the time of the offence, from the P3 forms on record, the 1st and 2nd appellants' respective ages were indicated as 18 and 22 years. In the premises, there is no basis upon which we can find that the 1st appellant was a minor at the time the offence was committed.

33. Although we agree that PW1's evidence as to who committed the defilement was not corroborated, under the proviso to section 124 of the ***Evidence Act***, it is now well settled that

courts are not hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years, if it is satisfied that the child is truthful. In this case, the trial court was satisfied that PW1 was a truthful witness. In ***Omuroni v Republic (2002) 2 EA 508*** it was held that:

> ***"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive."***

34. We note in passing that whereas the sentences under section 8 of the Act are graduated and are anywhere between 10 years to life imprisonment, depending on the age bracket of the victim, some age brackets calling for mandatory sentences, under section 10 of the Act, the trial court has discretion to impose any sentence between 15 years to life sentence. We say no more on that issue.

35. In the premises, while we dismiss the appellants' appeal on conviction, we set aside the sentence of 20 years' imprisonment imposed on them and substitute therefor a sentence of 15 years' imprisonment for each of the

appellants. Since the appellants were out on bond during the trial, the said sentences shall run from the date of their conviction by the trial court, on 15th May 2018.

Dated and delivered at Kisumu this 30th day of January, 2026.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR