Case Number:	Criminal Appeal 27 of 2016
Date Delivered:	10 Jul 2017
Case Class:	Criminal
Court:	High Court at Malindi
Case Action:	Judgment
Judge:	Said Juma Chitembwe
Citation:	Jumaa Malunja Lugo v Republic [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Dismissed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 27 OF 2016

JUMAA MALUNJA LUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was charged with the offence of gang rape Contrary to section 10 of the Sexual Offences Act number 3 of 2006.

The particulars of the offence were that the appellant, on 26.12.2013 at around 1.00am at Bamba township, Bamba location in Ganze District within Kilifi County having common intention in association with Kitsao Katana Lugo and Jumaa Fondo Birya intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of JKK, a girl aged 13 years without her consent.

The appellant also faced a count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that the appellant on 26.12.2013 at the same place and time assaulted L K thereby occasioning him actual bodily harm.

The trial Court substituted the charge of gang rape to that of defilement Contrary to Section 8(1)(3) of the Sexual Offences Act and sentenced the appellant to serve twenty (20) years imprisonment.

The grounds of appeal are that:

1. The conviction and sentence is unsafe as the charge of defilement was not proved beyond reasonable doubt.

2. The prosecution case was due to fabrication between the complainant's mother and the appellant.

3. The prosecution case was not properly investigated.

4. Members of public who allegedly participated in the arrest of the appellant did not testify to clear the doubt on the appellant's arrest.

5. The appellant's reasonable defence was not considered.

Mr. Muranje, Counsel for the appellant submitted that the appellant was initially charged with gang rape under section 10 of the Sexual Offences Act. The trial Court substituted the charge at conviction to defilement. The substitution was effected under section 184 of the Criminal Procedure Code. It is submitted that the substitution was a complete error. Section 184 deals with rape and not defilement. Under the transitional Provisions of the Sexual Offences Act, Section 144, 145, 147 and 148 of the Penal Code were repealed. The trial Court therefore did not have authority Under Section 184 to substitute the charge.

Mr. Muranje further submit that crucial exhibits such as P3 form and age assessment report were not produced. The investigating officer simply referred to the documents but did not produce them. Without the production of the P3 form, penetration was not proved. The age bracket of the complainant was also not proved. Counsel further submit that the prosecution evidence was full of inconsistencies. There is inconsistencies as to who followed the complainant from the disco place, who among the three accused had a knife and who assaulted L K with a stick and who between PW1 and PW4 was taken or ran to the forest. Further, there were many independent witnesses who were not called to testify. Neighbours and those who were at the disco are alleged to have gone to the scene but were not called to testify.

The state opposed the appeal. It is submitted that the appellant defiled the complainant. PW1, PW2, PW3 and PW4 were on their way home from a disco when they were accosted by the appellant and his colleagues PW1 was defiled by the appellant. Medical evidence established that PW1 was defiled. Clothes belonging to the victim were produced. The appellant's evidence was considered by the trial Court. The victim's age was proved, Section 179 of the Criminal Procedure Code was applicable. The charge of gang rape carries a minimum sentence of 15 years but can be enhanced to life imprisonment. The offence of defilement Under section 8(1)(3) carries a minimum sentence of twenty years imprisonment.

This is a first appeal and this Court is duly bound to analyse the evidence adduced before the trial Court and make its own conclusion. Before the trial Court eight witnesses testified for the prosecution. PW1, JKK was one of the complainants. She testified that she was 13 years old. On 26.12.2013 she went to a disco and was with PW2, PW3 and PW4. At about 1.00am they decided to go home. Three people followed them from behind. She did not know them. The appellant hit PW2, L with a piece of wood. They started running. PW3 (H) ran on the opposite direction. The appellant caught up with her. He took her to the forest, pushed her on the ground and defiled her. He warned her not to tell anyone. PW1 ran home and told her mother that she had been defiled. PW2 and PW3 knew the appellant and his two colleagues. She told her uncle that PW4 was also being chased and had fallen down. PW1 was taken to hospital, treated and later the matter was reported to the Police station.

PW2, L K testified that he was 14 years old. On the material night they attended a disco at [particulars withheld] village. He was with PW1, PW3 and PW4. At 1.00am they decided to go home. On the way the appellant and his colleagues followed them. He knew all of them as they came from the same area. He had seen the appellant and his two co-accused at the disco place. The appellant wanted PW1 and PW4 (girls) to join them but the girls refused. The appellant hit him with a piece of wood across his chest and he fell down. He stood up and ran away. He went to PW4's home and informed people what had happened. They went back to the scene and met PW4 who told them that she had been defiled. They later found PW1 who had gone to her home and she told them that she had also been defiled. The following day PW2 took Police officers to the appellant's home and he was arrested. PW2 was taken to hospital and was treated.

PW3, H T was 14 years old and a class 7 pupil. He was at the disco place on 26.12.2013. At around 1.00am they decided to go home. He was with PW1, PW2 and PW4. On their way, three people whom he knew followed them. He had seen the appellant and one of his colleagues at the disco place. While walking home, the appellant hit PW2 using a stick. PW2 ran away. PW3 ran away and went upto a dam where he could see the first accused before the trial Court holding PW4. He ran to the disco place and sought assistance. He went to the scene with members of the public. They recovered a shirt belonging to the first accused. They met PW4 who told them that she had been raped. The matter was reported to the Police. PW1 also told them that she had been raped. His further evidence is that the appellant had a knife. It took him 15 minutes to run to the disco place and go back to the scene.

PW4 LPK was aged 14 years old and a form 1 student. She was born on 11.3.2000. On 26.12.2013 she went to a disco with PW1, PW2 and PW4. On their way home at about 1.00am they were followed by three people. There was moonlight. He knew all the three boys. The first accused hit PW2 with a stick. PW3 ran towards the disco

place. She ran along the path towards her home. The first and second accused before the trial Court caught up with her and they defiled her. They tied her face using first accused's shirt. After about 20 minutes she heard people talking and the defilers ran away. They forgot the 1st accused's shirt at the scene and it was taken to the Police. PW4 was taken to hospital and treated.

PW4 K S K is PW1's mother. On 26.12.2013 she was asleep at about 1.30am when PW1 went home crying. She told her that she had been defiled in the forest. The matter was reported to the Police. PW5, M K is the mother to PW4. She was informed about the incident that night by her in law R M. They went to look for PW4 and found her crying. She told them that she had been defiled. PW4 was taken to hospital and a report was made to the police.

PW5 Dr. BUSRA AHMED was based at the Kilifi County hospital. He filled P3 form for PW2 who had bruises on his chest. He assessed the injuries as harm. He also filled P3 forms for PW1 and PW4. It is his evidence that both PW1 and PW4 had bruises on their inner thighs and were defiled.

PW6 Sergeant FRANCIS RONO was stationed at the Bamba Police station. He investigated the case. The case was reported on 26.12.2013. He took over the investigations from corporal Walumbwa who was on transfer to Kisumu Police station.

In his sworn defence, the appellant testified that he was 23 years old. On 26.12.2012 he went to the disco place. Her later went to sleep. His colleague, the 2nd accused was to sleep at his place that night. The 2nd accused left the disco place earlier but he did not find him at his place. The 2nd accused later that night joined him. In the morning, the police went to his home and arrested him. He is a boda boda operator. He knows the complainants. He denied assaulting PW2 or defiling PW1.

The main issue for determination is whether PW1 was defiled and if so whether it was the appellant who defiled her. The trial Court acquitted the appellant's two co-accused. These two accused had been charged with the offence of gang rape in relation to PW4. Counsel for the appellant submit that crucial witnesses were not called to testify. These include members of the public. The evidence shows that PW3 ran to the disco place and informed people about the attack. He went back to the scene with members of public. They met PW4 who told them that she had been defiled. Although the members of public did not testify, crucial witnesses testified. PW2 and PW3 were with the complainants. These were the Crucial witnesses. The members of public did not witness the acts of defilement. Their evidence would be what PW1 and PW4 told them. I do find that, that ground of appeal fails.

The next issue relates to the production of the exhibits. The appellant maintains that the exhibits were not produced. PW8 did not at any time indicate that he was producing the exhibits. The record of the trial court shows that PW1's clothes were identified by PW1 and marked for identification. PW1 also testified that she was taken to hospital for treatment. PW2 also testified that he was issued with a P3 form. When the investigating officer testified, he mentioned all the exhibits that were recovered. The trial court listed the exhibits as number 1 to number 8. PW5, Dr. Busra produced P3 form for PW1 that was marked as prosecution exhibit 9(a). A post Rape care form was produced as Pexh 9(b). This was for PW1. PW1's age assessment form was produced as P.exhibit 10.

Although PW8 did not indicate that he wished to produce the exhibits, it is clear that the exhibits were taken to the Court for production. The trial Court is the one recording the proceedings. The manner in which the proceedings are recorded depend on the particular Judicial officer. The trial Magistrate marked the documents as produced exhibits. The witness does not as of necessity need to indicate that he/she wishes to produce the documents. The trial Court captures the evidence as well as the actions of the witness. If the witness is telling the Court that he had brought the exhibits to the court and the court captures them as exhibits, then the trial Court's record would be proper. Given the records of the trial Court, I do find that all the exhibits were properly produced before the trial

court. The ground of appeal that the exhibits were not produced is disallowed.

The last issue relates to the substitution of the charge from gang rape to defilement. The offence of defilement is committed when the victim of the Sexual Offence is below the age of 18 years. Counsel for the appellant maintains that the trial Court misapplied Section 184 of the Criminal Procedure Code. It is submitted that Sections 144,145, 148 and 166 of the Penal code were repealed by the Sexual offences Act. According to the appellant's Counsel, Section 184 of the Criminal Procedure Act enabled the Courts to convict someone charged with the offence of rape to substitute the charge and convict such a person with the offences under the above repealed sections.

Section 184 of the Criminal Procedure Code states as follows:

"Where a person is charged with rape and the Court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual offences Act, he may be convicted of that offence although he was not charged with it."

There is Section 186 of the Criminal Procedure Act which provides that if one is charged with the offence of defilement of a girl under the ages of 14 years old but that offence is not proved, if the evidence proves an offence Under the Sexual Offences Act, such a person can be convicted of that offence although he was not charged with it.

It is clear that section 184 of the Criminal Procedure Act does not make reference to the repealed Sections. It refers to offences created under the Sexual offences Act. It is equally clear that Section 184 of the Criminal Procedure Code does not make reference to conviction of the accused with a lesser offence. The Section does not use the word "substitute".

The plain meaning of section 184 and 186 of the Criminal procedure Act is that the Court can convict the accused with ***any other offence*** created under the Sexual Offences Act. In essence therefore if one is charged with rape but the evidence proves an offence of defilement, he can be convicted with the offence of defilement even if the offence of defilement carries a more severe punishment. Sections 184 and 186 of the Criminal Procedure Code falls under the part titled "***Convictions for offences other than those charged***". It was therefore proper for the trial court to invoke the provisions of Section 184 of the Criminal Procedure Code.

I observed that the charge sheet made reference to Act number 3 of 2007. The definition of gang rape Under Section 2(1) of the Sexual Offences Act was deleted and replaced with a different definition. This was done through act No.7 of 2007 (statute Law (Miscellaneous Amendments) Act. Under this Act, a gang is defined as two or more person. The same definition is given under Section 2(1) of the Sexual Offences Act. However, what was repealed was the definition of gang rape. The offence of gang rape is therefore committed by more than one person. The drafters of the charge sheet made reference to the year 2007 instead of 2006. The correct citation of the Act is Number 3 of 2006. I do find that there was no miscarriage of justice. The appellant knew that he was charged with the offence of gang rape Contrary to Section 10 of the Sexual Offences Act.

The evidence on record shows that PW1 was only defiled by one person. It is PW4 who alledged to have been raped by two people. Section 10 of the Sexual Offences Act provides for the offence of gang rape. The punishment for gang rape Under Section 10 is a minimum of 15 years imprisonment but it can be enhanced to life imprisonment. It is proved by the evidence that PW1 was below 18 years. There is age assessment report dated 9.1.2014 indicating that PW1 was 15 years that time. The offence occurred on 26.12.2013. PW1 told the court that she was defiled by only one person. That person was positively identified by PW2, PW3 and PW4. The defence evidence indicate that the appellant was at the disco. PW2, PW3 and PW4 knew him. They saw him as one of those who followed them. The discrepancies in evidence as to who assaulted PW2 with a stick is not fatal. PW2 saw the appellant assaulting him with the stick.

The trial Court found that PW1 was defiled by only one person. The Court convicted the appellant on the offence of defilement Under Section 8(1)(3) of the Sexual Offences Act. The conviction was based on Section 184 and not 179 of the Criminal Procedure Code. It is not a conviction of the appellant on a minor proved charge as stipulated Under Section 179 of the Criminal Procedure Code. The appellant cannot claim that the punishment of twenty (20) years imprisonment is unfair as he could have been sentenced to 15 years Under section 10 of the Sexual Offence Act. The 15 years sentence can be enhanced to life imprisonment. Further, there was no gang rape of PW1. PW1 was simply defiled.

From the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The discrepancies in the prosecution evidence were noted by the trial Court and that is why the appellant's co-accused were acquitted. The evidence on record proved that the appellant defiled PW1.

In the end, I do find that the appeal lacks merit and is hereby disallowed.

Dated and Signed at Marsabit this…day of … 2017

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered at Malindi this 10TH day of JULY, 2017

WELDON KORIR

JUDGE