



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 10 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 238 OF 2011)

BETWEEN

SIONGO SAMWEL CHACHA..... APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1045 of 2009 at Senior Resident Magistrate's Court at Kehancha, Hon. J. R. Ndururi, SRM dated on 25th May 2010

JUDGMENT

1. In the subordinate court, **SIONGO SAMWEL CHACHA** was charged with the offence of gang defilement contrary to **section 10** of the ***Sexual Offences Act, 2006***. The charge against the appellant and his co-accused was as follows;

On 15th July 2009 at [Particulars Withheld], Bukira West Location in Kuria District [he and the 2nd accused] intentionally and unlawfully caused the penetration of the genital organs of LR, a girl aged 14 years.

2. During the trial, the 2nd accused jumped bail hence the case proceeded against the appellant only. He was convicted and sentenced to serve 15 years imprisonment. He now appeals against the conviction and sentence on the following grounds:-
 1. *That the learned trial magistrate erred in law and in fact by failing to appreciate the defective charge sheet.*
 2. *That the learned trial magistrate erred in law and in fact by failing to note that charges were framed out of a grudge.*
 3. *That the learned trial magistrate erred in law and in fact by failing to appreciate the medical evidence which disconnected the appellant from the alleged offence*
 4. *That the learned trial magistrate erred in law and in fact when he relied on hearsay evidence and afterthought evidence from the prosecution*
 5. *That the learned trial magistrate erred in law and in fact when he relied on uncorroborated prosecution's evidence.*
 6. *That the trial magistrate erred in law and in fact when he failed to appreciate that the investigation was poorly done.*
7. *That the trial magistrate erred in law and fact by failing to appreciate the appellant's strong case.*

3. The appellant supplemented the grounds of appeal with written submissions in which he reiterated the grounds. Ms Owenga, learned counsel for the State, opposed the appeal and submitted that the prosecution all the elements of the charge of gang defilement. She argued that the complainant's testimony was precise and not shaken on cross-examination. She noted that the identity of the appellant was established by the appellant in circumstances that favoured positive identification. In summary, she stated that the prosecution case was watertight.
4. The appellant's grounds of appeal call for an appreciation of the evidence before the trial court. PW 1, the complainant testified that on 15th July 2009 at about 7.30 pm she was waylaid by two people as she left her homestead to go to the shop. One of them held her throat and the other threatened her with a panga. One of the accused persons spotted a torch on her face and pushed her to the ground while the other dragged her for about 50 metres. She testified that the area was well lit with security light and she was able to see one of the assailants who was dark and had a gap in the teeth wearing a black jacket and the other one wearing a reddish jacket. The two persons had sexual intercourse with her in turns. They threatened to cut her if she screamed. After the ordeal, they left her to walk home bleeding and crying.
5. PW 1 informed her mother of the ordeal and was taken to Isebania Sub-District Hospital by her cousin, PW 4. At the hospital at about 8 pm, she saw her assailants whereupon she became hysterical. She recognised one of the assailants from the jacket he was wearing. She was examined by PW 2, a registered clinical officer, who found a tear and laceration on her labia minora. The laboratory examination revealed spermatozoa in the vagina. He also assessed her age as 15 years.
6. PW 3, the complainant's uncle, confirmed that on the material date he sent PW 1 to the shop at about 7.30 pm. She later came back crying with a lot of difficulty in walking and informed him that she had been defiled by two men. PW 4, a son to PW 3, was at home on that particular day, he took PW 1 to hospital. PW 4 testified that when PW 1 saw the two accused in hospital, she started screaming and shouting that it was the two accused who defiled her.
7. PW 5, a police officer, testified that on the material night, he was walking home in plain clothes when he was confronted by two people who were armed with pangas. He was told to lie down but while he pretended to, he pulled out his gun and ordered them to lie down. Members of the public nearby came to his assistance and the two were tied up and later taken to Isebania Police Station. He later learnt that a girl had been defiled near where he had encountered the two persons. He and PW 7, the investigating officer, went to the scene where defilement took place and confirmed it was about 50 metres from where the two men confronted him. PW 7 went to the scene and prepared a sketch map which showed that the scene was about 150 meters from the complainant's gate and that there was a big security light close to the scene and that the light could reach about 50 metres away. He also recovered the complainant's underpants. PW 7 also received blood stained underwear belonging to the accused, prepared an exhibit memo form for the items of clothing together with blood samples and forwarded them to the Government Chemist. He produced the Government Chemist's report which showed that the complainant has taken part in sexual activity with a group O secretor who could have been the 2nd accused. The Government Analyst also concluded that the bloodstains on the complainant's clothes matched the blood sample of the complainant hence they could have come from the complainant after injury.
8. PW6, a police officer, testified that she conducted an identification parade for both accused and in each case, the complainant identified the accused.
9. PW 9, the OCS of Isebania Police Station, testified that when PW 5 informed him that he had arrested two suspects, he organized for a police driver to collect the suspects. He was also called by the area councillor who informed him that a certain girl had been defiled. When he went to the police station, he found the two accused and after examining their clothing, he noted blood stains on their underwear and private parts. He asked PW 9 to escort them to the hospital for examination. PW 9 testified that he escorted the two accused to the Isabania Sub-District Hospital. He stated that when the complainant saw the two accused, she started screaming and saying that it

is the two of them who defiled her.

10. The appellant was put on his defence. He gave an unsworn statement in which he stated that on 15th July 2009, he was going home when he met police officers on patrol who arrested him. He denied that he knew the complainant or that he defiled her as alleged.
11. Considering the evidence, the learned magistrate was satisfied that the prosecution had proved its case and subsequently convicted the accused. The grounds set out by the appellant call upon the court to re-evaluate the evidence afresh and reach its independent conclusions having regard to the fact that it never heard or saw the witnesses testify. This is the task of the first appellate court as elucidated in **Okeno v Republic [1973]EA 32** as follows;

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

12. The appellant contends that the charge against him was defective. The side note to **section 10** of the **Sexual Offence Act** reads, "Gang rape" and it provides as follows;

10. Any person who commits the offence of rape or defilement under this Act in association with another or others, or any other 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 by which may be enhanced to imprisonment for life.

13. The offence of gang rape entails proof of rape or defilement under circumstances where it is committed in association with more than one person. A person is said to have committed an act of defilement under **section 8(1)** of the **Sexual Offences Act** when the person commits an act which causes penetration with a child. "Penetration" under **section 2** of the **Act**, means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person." Although the charge as framed refers the gang defilement, the essential elements for which the appellant was charged was defilement in association with the 2nd accused. The particulars of the charge were within the ambit of **section 10** of the **Act**. The appellant had sufficient notice of the particulars of the offence against him. I therefore do not find any defect in the charge.
14. As regards the elements of the offence, the fact that PW 1 was defiled was confirmed by the evidence of PW 3 and PW 4 who saw PW 1 so soon after the incident while PW 2 who examined PW 1 confirmed that penetration had taken place. Likewise, the age of the complainant was proved by her testimony and production of the baptismal card and the age assessment conducted by PW 2. It is also not in doubt that the complainant was sexually assaulted by two persons with a common intention to defile her.
15. The critical issue for consideration the court below and in this appeal is whether the appellant was identified as one of the two persons who defiled PW1 on the night of 15th July 2009. Where the prosecution relies on identification to implicate the accused in circumstances such as those prevailing in this case, the court must warn itself of the dangers inherent in wrongful identification and must be satisfied from the totality of circumstances that the complainant positively identified the accused. This principle has been emphasized in several cases. In **Francis Kariuki Njiru & 7 others v Republic Cr. Appeal No. 6 of 2001 (UR)** the Court of Appeal stated as follows, "The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of

error. The surrounding circumstances must be considered.”

16. The learned magistrate found that PW 1 positively identified the appellant at the scene where there was a security light which could light up to 50 metres away as confirmed by PW 7. She saw the accused wearing jackets which she identified. PW 5 independently arrested them within the vicinity after PW 1 had been defiled. The learned magistrate also relied on the government chemist report which confirmed that the seminal stains on the complainant's clothes matched the blood group of the 2nd accused. He accepted the evidence that when the accused were taken to hospital, the complainant saw them and she became wild and screamed. They were also identified at the identification parade.
17. I have scrutinized the evidence of PW 1. Her evidence was clear and consistent and her testimony demonstrated that the conditions obtaining were favourable to positive identification of the accused. The place where the place took place was well lit with the security light, the probable length of time and the fact that the complainant was able to give a description of the jackets the accused were wearing leads to unassailable evidence of identification. The testimony of PW 5 tied the accused to the scene.
18. The evidence of PW 1 need not be corroborated to found a conviction in light of the proviso of the **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** which states as follows; *“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 proceedings the court is satisfied that the alleged victim is telling the truth.”* But as I have outlined in the previous paragraph, the testimony of PW 1 was clearly corroborated by other material evidence.
19. The prosecution case was also fortified by the fact that when PW 1, who had never seen the appellant before, became hysterical when she saw them at the hospital. The behaviour of PW 1 was confirmed by PW 3, PW 4 and PW 9. Once it was apparent that the complainant had seen the appellant in police custody at the hospital on 15th July 2009 and had identified them, the identification parade conducted by PW 6 was useless as the complainant had already seen them earlier in the day. In **Amos Gituma v Republic NYR CA Cr. App. No. 319 of 2006[2008] eKLR**, the Court of Appeal noted as follows, *“We, however, observe that there were serious errors relating to the manner the identification parades were conducted since PW2 admitted that he was either shown or somehow saw the appellant prior to the identification parade. This was a serious error as it cast doubt on the value of the identification parade. Since this was not a case of recognition, the manner in which identification parades were conducted was most crucial.”*
20. The appellant contests the fact that the learned magistrate admitted the government chemist report which implicated without calling the maker thereof. The Government Chemist's report was produced by PW 7 and relied upon as the basis of conviction. The Government Chemist's report was admitted under **section 77(1)** of the **Evidence Act** which states;
 77. (1) *In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
 - (2) *The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
 - (3) *When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

21. **Section 77** of the *Evidence Act* entitles the court to admit in evidence a report or document prepared by a Government Analyst, Medical Practitioner or any ballistic expert, Document examiner or Geologist, upon any person, matter or thing submitted to him for examination or analysis after presuming that the signature thereon is genuine and that the signature and office thereon indicated is authentic. Under this provision, the report was properly admitted without calling the maker and could be relied upon to support the conviction.
22. The government Analysts report confirmed that the 2nd accused engaged in some form of sexual activity with PW 1. Although it did not implicate the appellant directly, it tends to corroborate the testimony of PW 1 that she was defiled by one of the persons arrested and that she was telling the truth about the incident.
23. The thrust of the appellant defence was to deny the offence and imply that he was framed. Having considered the entire evidence, the appellant defence is weak tea and cannot in any way dent the prosecution evidence. Even if the evidence of the Government Chemist and identification parade is eliminated the entire prosecution evidence leaves no doubt that the appellant was one of the two people who committed the felonious act. He was properly convicted and I therefore affirm the conviction.
24. The minimum sentence under **section 10** of the *Sexual Offences Act* is 15 years imprisonment. The sentence imposed was the minimum provided by the law and it is also affirmed.
25. The conviction and sentence are affirmed. The appeal dismissed.

DATED and DELIVERED at MIGORI this 24th day of October 2014.

D.S. MAJANJA

JUDGE

Appellant in person

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.