



No. 2920

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NOS. 163 & 164 OF 2010

CONSOLIDATED

JOSEPH KONGA BABU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**(Being an appeal from the original conviction and sentence of the Principal Magistrate's court
at Ogembo, Hon. L.M. Nafula in Criminal Case No. 73 of 2008 dated on 6th August, 2010).**

PETERSON ARASA ARASA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**(Being an appeal from the original conviction and sentence of the Principal Magistrate's court
at Ogembo, Hon. L.M. Nafula in Criminal Case No. 73 of 2008 dated on 6th August, 2010).**

JUDGMENT

These two appeals were consolidated for ease of hearing and as they arose from the same trial in the subordinate court. The appellants were arraigned before the subordinate court to answer to the charge of gang rape contrary to **section 10** of the Sexual Offences Act. It was alleged that on 7th January, 2008 in Gucha District within Nyanza Province in the association gang raped. **G.B.M** They all denied the offence prompting the case to go to full trial.

The prosecution case in brief was that on 27th January, 2008, **(PW1)** was asleep in her house with her young children and brother in-law when she was awakened by knocks on the door by people who claimed to be police officers from Nyangusu police station. She lit a tin lamp and opened the door only to come face to face with the appellants. They ordered her to sit down and she obliged. At that point, the 2nd appellant held her brother in-law **N.B. (PW3)** and put off the light. The two took **PW1** out of the house and demanded from her kshs.2000/- so as to forgive her. She told them that she had no money but could get it from her father in-law, **F.B.M. (PW4)**. They could not hear of this,

instead they dragged her for a distance of about 150 metres from her house into a maize plantation and raped her in turns. They each raped her twice before taking her to a place called **E[...]** where they dumped her. At dawn she started walking home. On the way she learnt that the appellants had been arrested and taken to the area Assistant Chief's office. She later sought and received treatment at Nyacheki before reporting the matter at Nyangusu police station where she was issued with a P3 form which was duly filled by **J.M(PW2)**, a clinical officer attached to Gucha District Hospital. Upon examination of the complainant he noted that she had been raped and there was penetration. She had lacerations on her labia minora and her hymen had been torn. She had vaginal discharge and sperm analysis revealed presence of spermatozoa.

After PW1 had been taken away, PW3 ran and alerted his father, PW4 who in turn woke up his children and mobilized neighbours who set out in search of the appellants in their respective homes. At about 2p.m. the appellants were arrested as they returned to their homes. They were frog matched to the area assistant chief's office and were later handed over to **P.C. Benson Ndura (PW5)** of Nyangusu police station who re-arrested them and later charged them with the offence.

Put on their defence, the appellants elected to give sworn evidence and called two witnesses each. They all denied the charge and claimed it was trumped up by the complainant with whom they had differences. Otherwise they all put up alibi defences.

In the end however, the learned magistrate found that the prosecution had proved its case against the appellants, convicted them and sentenced each one of them to fifteen(15) years imprisonment.

Each of the appellants was aggrieved by the conviction and sentence. They therefore lodged the instant appeals which as already stated have been consolidated. They all advanced similar grounds of appeal to wit, that the prosecution witnesses were members of the same family, prosecution evidence was contradictory, failure by the trial magistrate to consider the fact that the case was a fabrication and that their alibi defences were not given due consideration.

When the appeal came before me for plenary hearing on 30th June, 2011, the appellant elected to present written submissions in support of their appeal. I have carefully read and considered them.

The state did not however, oppose the appeal. **Mr. Gitonga**, learned State Counsel in conceding to the appeal submitted that the charge as framed was defective. That each appellant ought to have been charged separately.

Having perused the charge sheet as laid, I am satisfied that it is fatally defective and flawed. The appellants were charged with jointly gang raping the complainant. It is not possible for two or more people to jointly rape a victim at the same time. It is only possible for one to do so singularly and separately. In the circumstances of this case therefore each appellant ought to have been charged separately with the offence as it is not possible to jointly rape a victim at the same time.

Thus, the state was right in conceding to the appeal on that ground. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellants should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 23rd September, 2011.

ASIKE – MAKHANDIA
JUDGE