



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 41, 42, & 43 of 2006**

**DZANGO KARISA**

**CHENGO BAGALA**

**GEOFFREY CHALE.....APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

The three appellants were charged jointly on 10<sup>th</sup> May 2004 with the offence of rape contrary to Section 140 of the Penal Code. The particulars of the offence were that the three, Dzango Karisa Tsuma, Geoffrey Chale Yawa and Chengo Bagala Ngazi on the 30<sup>th</sup> day of December 2002 at around 5.00 a.m. in Kwale District of the Coast Province; jointly` had unlawful carnal knowledge of N M. In the alternative they were charged with the offence of indecent assault on a female contrary to Section 144 (1) of the Penal Code, that they indecently assaulted one N.M by touching her private parts namely vagina.

The second count was grievous harm contrary to Section 234 of the Penal Code, that they did grievous harm to N.M.

The plaintiffs upon hearing were convicted of the offence of rape in count 1 and the offence of grievous harm under Count 2. The trial court sentenced each of them to twelve (12) years imprisonment on the first count and to two (2) years on the second count. The sentences were to run concurrently.

Being aggrieved with the said conviction and sentence the appellants lodged their appeals respectively to the High Court. At the hearing the said 3 appeals were consolidated and heard as one appeal.

The Respondent represented by Mr. Ondari opposed the appeal. The Appellant filed written submissions which they relied upon.

In the trial court, the Accused were listed as follows:-

Accused 1: - Dzango Karisa Tsuma

Accused 2: - Geoffrey Chale Yawa

Accused 3: - Chengu Bagala Ngazi

In the consolidated appeals, they were listed as follows:

Appellant No. 1 (Appeal No. 41/2006 )- Dzango Karisa Tsuma

Appellant No. 2 (Appeal No. 42/2006) – Chengo Bagala Ngazi

I have carefully considered the respective grounds of appeal, the proceedings, judgment. Written submissions by the Appellants and the oral response by the Respondent.

I have analyzed and reviewed the evidence presented before the trial court.

The complainant an adult female testified that on the morning of 30<sup>th</sup> December 2002 she was with her boyfriend outside a house at 3 a.m. She had gone to the homestead the previous day to console a bereaved family. She had been accompanied by two people, Ole Mwaka and one Chamtu. Mwaka was a female and Chamtu a male.

She said that the three accused chased her boyfriend away and attacked her. She said that she knew all the three persons before the said day. That they strangled and dumb-folded her. She could not scream. They then dragged her away for a long distance into the bush. She said that the 1<sup>st</sup> Accused then raped her. He had assaulted before raping her. She said that the 1<sup>st</sup> accused had removed her pants by tearing it apart. She said that the 2<sup>nd</sup> accused tore her skirt and blouse. She was then raped by the third accused Chengo after which the 2<sup>nd</sup> accused Chale followed.

P.W.1 the complainant said that she could not scream as they had threatened to kill her. They then left her. She said that they had taken a long time to rape her. After the incident she could not stand and remained at the scene for two hours. She then returned to the funeral and notified her friends as to what had happened.

The matter was reported to the police and then she went to a clinic and was then taken to Mariakani Hospital. She was admitted for one day. /she was given P3 forms to fill,

P.w.6 was the Clinical Officer who received the complainant at the Coast Provincial General Hospital. He had been requested by the police to attend to the complainant and to fill the P.3 Form. Upon examination of the complainant he found that her clothes were torn. Her pant was blood stained. She complained of pain of right shoulder, neck and was bleeding and could not walk properly due to pain. She had pain on her right cheek and had bruises. One upper tooth was shaking and bleeding. The inner side of her thighs had clotted blood stains. The complainant had been taken to the clinical officer within 8 hours of the incident on the same day.

On examination of her private parts, she had blood. Inner side of the thighs had clotted blood stains. She had no ruptured or torn labii. However the hymen had been broken and stained with blood. Vaginal walls were bruised and bleeding. Blood was noted flowing from vaginal orifice. Vaginal swabs taken demonstrated the presence of spermatozoa. They were however dead. He concluded that she had been raped. That the young girl was psychologically disturbed and mentally affected.

On cross-examination he averred that the hymen was broken at the time of rape and not before that.

From the aforesaid evidence, I find that the learned Honourable Magistrate was correct in finding that the three accused persons had attacked and raped the complainant. She knew each of them. She had known then for a long time. The third accused Chengo was even related to her as he also confirmed. The complainant was able to recognize the three accused as there was sufficient light coming from nearby disco lights when they kidnapped and dragged her away into the bush. They took her and carried her away from a homestead where they were seen by P.W.2.

P.W.2 confirmed that she was at the scene at the material time. Having gone to the funeral with the complainant, she saw the first accused get hold of the complainant. It was dark but there were disco lights outside the house. The 3<sup>rd</sup> accused then lifted the complainant and with the help of the second accused, Chale dumb folded her. They forcibly carried her away. She saw the complainant struggling to secure her freedom by throwing her legs about. P.W.2, rushed to inform others that the complainant had been forcibly carried away into the forest by the three.

The complainant returned at daybreak when she told PW2 that she had been raped by the 3 accused. She was naked and PW2 handed her a lessa. P.W.2 saw the 3 accused who she knew.

I do find that the evidence of PW 1 was properly and effectively corroborated by the evidence of PW 2 and PW 6, the Clinical Officer. The 3 accused persons were properly identified. I agree with Mr. Ondari that this was not a case of identification but one of actual recognition. The three accused were people closely known by the complainant and PW 2. Their evidence was definite and reliable. It was not shaken in cross-examination.

I do find that the trial magistrate correctly and properly found that the complainant had been raped and so raped by 3 appellants herein acting jointly and in concert with each other.

The medical examination was done within a reasonable time and the doctor's findings found that PW 1 had been raped. The injuries were still fresh. The girl was still bleeding, in shock and traumatized.

I do hereby find that the conviction of each of the appellant was proper, supported by strong and corroborated evidence and sound in law. I cannot fault the convictions in any way. In respect of count two the medical report speaks for itself. PW 1 was assaulted and sustained serious injuries to her cheek, mouth, tooth and neck. They were sustained during the rape ordeal by the three accused.

Conviction in respect of Count 2 was also based on sufficient proof and application of the law.

With regard to sentence, I think that the appellants are quite lucky that they did not get stiffer sentences considering the maximum sentence then and now. They used force to take away a harmless young girl deep into the forest in the night. They were three apparently strong men. They dumb-folded her and carried her. She could not scream. She was taken into the forest and in the dark gang raped by the three men. One can imagine the terror, fear and trauma this young innocent girl must have gone through.

What the three appellants did was bestial, cruel and inhuman. They deserved a stiffer sentence. They are lucky, they were convicted and sentenced before the Sexual Offences Act was passed.

As a result, there is no basis to interfere with the sentences. The second Appellant in his appeal raises a constitutional issue that he was held by the Police beyond 24 hours before being arraigned in court in breach of Section 72 (3), 2 (b) of the Constitution. He has asked this court to declare that the proceedings were null and void on the ground. He was arrested on 30.12.02 but charged on 6.01.03 – 7 days later.

I have considered the point. I agree with Mr. Ondari that the second Appellant did not raise this constitutional issue within a reasonable time at the trial to enable the Respondent effectively respond. The Respondent have been denied the opportunity to respond by possibly calling for an affidavit from the relevant police station to explain any delay. Secondly, I think that to raise such a constitutional issue could in effect require an order for additional evidence on appeal if the fact is disputed. The second appellant did not apply for leave to submit additional evidence and it can be questionable whether he can raise evidentiary issues through his submissions. In any case the Court of Appeal in the case of C.A. No. 214 of 2005 DOMINIC MWALIMU MUTIE –VS- REPUBLIC submitted by Mr. Ondari, the Court of appeal held that such constitutional question must be raised at the earliest opportunity and not at the date of hearing of the appeal. It does not ipso factor give rise to the right of acquittal.

This court has considered that 30<sup>th</sup> December 2002 was just a day before the eve of the end of the year. I take judicial notice that the said days of 30<sup>th</sup>/31<sup>st</sup> December are busy festive days and the 1<sup>st</sup> January is always a public holiday. I think that considering all on the face of it and in the absence of any other evidence, and considering that the doctor had to prepare the P3 form and his medical report, it is quite reasonable that the said Appellant was arraigned in court within 7 days of arrest. The court has also considered that the 1<sup>st</sup> Accused had gone underground and had not been arrested by 6.01.03.

I do hereby dismiss the constitutional point/objection taken by the second Appellant.

The net result is that I do hereby dismiss the appellants appeal herein.

Delivered and dated at Mombasa on this 16<sup>th</sup> day of November 2009.

**M.K. IBRAHIM**

**J U D G E**

**court**

Right of appeal within 14 days.