



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

**CRIMINAL APPEAL NUMBER 2 OF 2016**

**CORAM: S. M. GITHINJI**

**(From original conviction and sentence in criminal case number 1795 of 2015 of the Principal Magistrate’s Court at Kapenguria)**

SAMSON LOREMA .....1<sup>ST</sup> APPELLANT  
 JACKSON YEGO .....2<sup>ND</sup> APPELLANT  
 SAMSON LOREMA .....3<sup>RD</sup> APPELLANT

**VERSUS**

REPUBLIC ..... RESPONDENT

**JUDGEMENT**

The three appellants herein were convicted and sentenced to serve each a jail term of 15 years for an offence of **gang rape, contrary to section 10 of the Sexual Offence Act No. 3 of 2006.**

They were correctly charged in the same charge sheet, with each appellant’s offence carried in its own count.

The particulars of the offence are that on the 16<sup>th</sup> day of October, 2015 at [particulars withheld] Location within West Pokot County, each appellant jointly in association with the other two, unlawfully and intentionally caused his penis to penetrate the vagina of C. L.

The evidence that led to appellant’s conviction is that on 16.10.2015 at about 6pm the appellants attacked the complainant; a woman aged 65 years and raped her. One of them was from water point. They held her at the back, and fell her down. Yego, the 2<sup>nd</sup> accused person was the first to attack her. He held her by the shoulders, boxed her and fell her down. They held her by the neck not to allow her scream. The other two joined him. She was not in her inner wear, which made them easily access her. The second accused was the first one to enter her, then the rest followed. They held her from then up till next day in the morning raping her. She screamed but no one was close by to help her at all. She was thereafter assisted by passerby. She reported to the police and named the three who attached and raped her. They were Lorema, Yego and another. She had known them before then. She had taken alcohol that day with them. They had started drinking later in that day evening when the sun was going down. She did not stay with them for long at the drinking place. She used to drink with them from time to time. They are her neighbours. She had known them for long. On cross-examination by David Mnangat she said she knew him well as a son from her neighbourhood and were used to calling him Kadenge.

PW-2 is a son to the complainant. His evidence is that on 16.10.2015 at 10.00pm he was heading home. He heard his mum scream. He was not aware she was the one. He proceeded near. He saw Kadenge, the 1<sup>st</sup> accused holding PW-1 by the skirt. He did not see the other two accused persons. Kadenge did not see him. PW-1 was uttering something which was not clear. Kadenge was on top of her. He had lowered his trouser. PW-2 did not want to see more as his mum was involved. He was embarrassed. He went and called KPR. He showed them the scene. PW-1 said Kadenge was not alone but with the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. They were then all arrested.

PW-3 is the KPR who was reported to by PW-2. He did not give the time he was called by PW-2 on 16.10.2016 but stated that it was going dark. The report given by PW-2 was that his mother was raped by people. He rushed to the scene and found 1<sup>st</sup> accused having been arrested of the offence of rape. He was at the AP's office. He assisted in having the other two accused arrested.

The complainant was examined on 17.10.2015 at [particulars withheld] Hospital. She had tears and stains on her clothing's. She was sober and in fair general condition. Her head had visible scratch marks on the neck, dorsal part and upper hands had bruises on both hands. She had bruises on her left foot approximately 23 hours old. Probable weapon used was blunt object. The degree of injury was assessed as harm. She did not have any vaginal discharge, though she had pus cells in urine, revealed by lab test. All other parameters were negative. The P-3 form was filled to that effect.

The 1<sup>st</sup> accused person in his defence gave sworn testimony. He alleged that the offence is not correct. On 15.10.2015 he was at home up till 1.00pm. He then went to Mutempur Centre where he met some people who urged him to go with them to the AP area. He obliged as he had nothing to fear. At AP Camp the complainant pointed to him as one of the persons who attacked and raped her. He was placed in cells till 10pm. KPR went with 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, on similar allegations. He was then charged.

The second accused person in his unsworn testimony stated that he did not know the complainant. The offence is not true. On 15.10.2015 he was at home. After he slept some people went and arrested him. He was taken to the AP area. He was later escorted to Kapenguria Police Station where he was charged with the offence.

The 3<sup>rd</sup> accused person also gave unsworn testimony. He said he did not know the complainant. The offence is not true. On 16.10.2015 he was at his work station when KPR officers went and arrested him. He joined the rest of the accused persons at Mtempur AP Camp. The following day they were taken to Kapenguria Police Station and charged with the offence.

The three appellants filed common grounds of appeal which are as follows:-

1. They pleaded not guilty at the trial
2. They were not taken for medical examination to show whether they had carnal knowledge with the complainant
3. Vital prosecution witnesses did not give evidence.
4. Their defense was rejected without cogent reasons.
5. Their conviction was not based on a properly investigated case by the prosecution side.

The state opposed the appeals on various grounds. The main ones are that the evidence of PW-1 and PW-2 is of recognition of the appellants of which is more reliable than of identification. They relied on the case of ***Dominic Ochieng Odoyo versus Republic Criminal Appeal number 84 of 2014***. The state also alleges that the evidence of PW-1 is corroborated by the evidence of pW2 and of PW-4, the Clinical officer, making it reliable.

Mr. Mark also alleged in his submissions that there is no evidence that complainant was drunk though she takes beer. The clinical officer found that she was sober and in sound conditions. He urged this court to uphold conviction and to dismiss the appeal.

As I was seriously evaluating the evidence in this matter, I noted that the devil is actually in the details. Before I get to that I wish to comment on the way the evidence was recorded by the trial court, especially of PW-1. The names of the witnesses appear to have been given before the witnesses in the case were sworn. In my view it is better for a witness to state her or his name under oath to avoid impersonation, rather than the way the magistrate did it. For PW-1 the first three statements seems to have been given by someone else, probably the prosecutor, rather than the witness. It is not recorded in the first person. It is as follows:-

**“I have the national identity card in court. Shows she was born in 1950. She is about 65 years old.”** From there is when the witness started her evidence by saying, **“I am a farmer”** the first three statements which are indicated to be part of her evidence on oath are not correct. Such should not happen. Getting back to the details in the evidence of PW-1, it is indicated that she said, **“They raped me having attacked me.”** Rape is a legal technical word of which if used by a witness, the prosecutor and the court have a duty to ascertain what actually was done to her or him in order to find out whether it fits the legal description of rape as an offence. Her further explanation is still not very clear. She stated, **“I do not put inner wear. That is why the accessed me with ease. Accused 2 was the first one to enter me then the rest followed”**. One would question given the ingredients for the offence of rape, where she was entered and with what. When this is not clear, one cannot safely conclude that the offence committed was gang rape. She alleged that she named the three assailants to the police, but in court only named them as Lorema, Yego and another. The use of another suggests she either did not know his name or had forgotten it. She went further to state she had taken alcohol that day with the accused persons. She did not state the kind of beer she had taken and how much of it. She neither stated whether she was drunk or not. On cross-examination by the 1<sup>st</sup> accused person she said they knew him as Kadenge. However, she never disclosed that name in her evidence-in-chief and the charge sheet does not carry that name as “aka or alias”.

The evidence of PW-2 who was said to have found “Kadenge” in the act also has some glaring problems. He said it was at 10.00pm of which was at night. Though claimed he saw Kadenge holding PW-1 by the skirt while on top of her with his trousers lowered, he did not state where he found them and how the environment was. More so he did not state the source of light which enabled him see at night of which is mandatory given such circumstances. PW-1 did not also state that during the act the other two left, leaving Kadenge behind. One therefore wonders where the other two were when PW-2 got to the scene if at all they were involved in the commission of the offence, or if at all the offence committed was of gang rape. It does not also look realistic to me that PW-2 found his own mother being raped by one unarmed person, who did not even see him, and instead of helping her by attacking the rapist or screaming for help he just moves slowly, without disturbing the unlawfully act, to report to KPR officers. It is odd to an extent of making it doubtful. From his evidence there is nothing which indicates strongly that it was rape and not consensual sex. He said he heard his mum scream but did not describe the scream to be that of someone in distress. When he went near he saw Kadenge holding the complainant by the skirt. The complainant was uttering what was not clear. Kadenge was on top of the complainant. He had his trousers lowered. He then said he did not want to see since it was his mum. He indicated of no struggle and most likely is why he did not offer instant help right there and then because he was not certain that it was a rape.

The evidence of PW-4 is not clear that the complainant was penetrated of which is a crucial ingredient for rape. It was noted the patient had tears and stains on her clothings. The clothes which had tears and stains were not described. Was it a dress, blouse, skirt, biker or inner wear? If inner wear, it can be suggestive of rape or attempted rape, while the rest could even suggest an assault of which the witness suggested when he said in his evidence-in-chief, “Allegedly assaulted by persons known to her.”

Injuries noted were visible scratch marks on the neck, dorsal part and upper hands had bruises on both hands. She also had bruises on her left foot approximately 23 hours old. She had no vaginal discharge

although she had pus cells in urine, revealed by the lab test.

What is noticeable from the above finding is that the said injuries would be more consistent with an assault incident rather than a case of rape, or more so gang rape. Nothing was noted on the thighs, and the genital organ. Surely a lady aged 65 years cannot be gang raped by three men from 6.00pm till dawn as she alleged, and have nothing to show it in and at the areas surrounding the genitalia.

The time the incident took place and for how long is also not clear. PW-1 said she was attacked at 6.00pm. She further stated they held her from then up till next day in the morning raping her. PW-2 said he got to the scene at 10.00pm and found only Kadenge on top of PW-1. PW-3 a KPR said it was going dark when he was called by PW-2 and informed that PW-2's mother was raped by people. If it was getting dark it must have been before 8.00pm. The report he received suggest the offence could have been fabricated. It was that his mother was raped by people. PW-1 had according to his evidence noticed his mother being raped by one person, Kadenge and not people. He left the act going on and could not have reported as if it had already happened and ended. The 2<sup>nd</sup> and 3<sup>rd</sup> accuseds were not arrested together with the 1<sup>st</sup> accused. Actually none was with the other during arrest. One wonders when they parted ways from the scene.

Given the above lacunas in the prosecution case it is logically questionable whether the complainant was sober enough to register what actually happened to her, how and who were involve. The evidence suggests she could have disagreed with her drinking partners, who are the three appellants, had an altercation of which was exaggerated to gang rape so as to fix them properly.

In the case of *Sekitoliko versus Uganda [1967] E.A. 531*, the court held that the prosecution has the duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case.

I concede that the defence by the accused persons are weak, but they have no legal duty to fill the gaps in the prosecution case. They deserved the benefit of doubts arising from the prosecution case. I do resolve the doubts in their favour. I accordingly therefore allow the appeal, quash the conviction and the sentence accorded to each one of them. They should therefore be set free unless otherwise lawfully held.

Judgment is read and signed in the open court in the presence of Mark Nabuyumbu the state prosecutor and all the three appellants, this 14<sup>th</sup> day of March, 2017.

**S. M. GITHINJI**

**JUDGE**

**14.3.2017**