



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO 47 OF 2013

SAMSON APOPONG.....
APPELLANT

VS

REPUBLIC.....RESPON
DENT

(Appeal from the Judgment of the Senior Resident Magistrate, Kapenguria dated 3rd April 2013 in Criminal Case No 101 of 2012)

JUDGMENT

Introduction

The Appellant, SAMSON APOPONG was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the night of 29th /30th January 2012 at *[particulars withheld]* Village within West Pokot County, the Appellant in association with Abdalla Osman Simiyu and David Peraa Chemaswet caused his penis to penetrate the vagina of D B A, a girl aged 10 years. The Appellant and his co-accused faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006.

The facts of the case as recorded by the trial court are that on 29th January 2011, the Complainant, D B A was going home from a funeral when the Appellant caught up with her, gave her alcohol and defiled her. The Complainant fell unconscious and later found herself in hospital. The Complainant was examined at Kapenguria District Hospital and found to have a tear measuring approximately 3 cm from her vagina extending towards the anus area. She also had stains and discharge on her thighs. The Appellant denied the charges stating that he had assisted in carrying the Complainant who was too tired to walk but had not defiled her. The Appellant and his co-accused were tried at the Senior Principal Magistrate’s Court at Kapenguria. Abdalla Osman Simiyu and David Peraa Chemaswet were acquitted but the Appellant was convicted and sentenced to life imprisonment.

The Appellant’s Appeal

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal in which he raised the following Grounds of Appeal:

- a. That the learned trial Magistrate erred in convicting the Appellant yet the ingredients of gang rape

- and/or defilement were not established ;
- b. That the learned trial Magistrate erred in law and fact in convicting the Appellant yet charges were not proved beyond reasonable doubt ;
 - c. That the learned Magistrate erred in law and fact in convicting the Appellant on un-corroborated evidence;
 - d. That the learned trial Magistrate erred in law and fact in convicting the Appellant without considering and reconciling all the evidence adduced;
 - e. That the findings of the trial Magistrate were against the weight of the evidence adduced;
 - f. That the learned trial Magistrate erred in law and fact by concluding that the Appellant had been positively identified while all the facts taken together pointed to the contrary;
 - g. That the learned trial Magistrate erred in law and fact by disregarding the Appellant's defence without assigning any reasons therefor;
 - h. That the learned trial Magistrate erred in law and fact by failing to appreciate that all the witnesses were drunk on the material night;
 - i. That the learned trial Magistrate failed to appreciate all the facts before her;
 - j. That the learned trial Magistrate erred in law and fact by failing to give reasons on which she based her findings only using generalities.

The Appeal was heard on 17th October 2013 with Mr. Ingosi appearing for the Appellant and Mr. Kimanzi for the State. Counsel for the Appellant submitted that the ingredients of gang rape as set out in Section 10 of Sexual Offences Act were not established since the Appellant's co-accused were all acquitted. Further, the section under which the Appellant was convicted was not disclosed as required under Section 169(2) of the Criminal Procedure Code. It was not clear whether the trial court proceeded on the strength of Section 186 of the Criminal Procedure Code to convict the Appellant for a charge with which he was not charged.

Assuming the Appellant was convicted of defilement under Section 8(1) and (2) of the Sexual Offences Act, the offence was not proved since there was no evidence of penetration and the age of the Complainant was not established. Moreover, the Court did not give reasons as to why it believed the uncorroborated evidence of the Claimant as required under Section 124 of the Evidence Act. The time of the alleged offence being midnight compromised positive identification. Additionally, the testimony by the Complainant was inconsistent and contradictory since at some point she told the trial court that she saw the Appellant for the first time in the morning.

Opposition by the State

Mr. Kimanzi, learned Counsel for the State opposed the appeal and invited the Court to make a finding on the correct interpretation of Section 10 of the Sexual Offences Act specifically on whether acquittal of some accused persons defeats the charge against all the accused persons.

On the probative value of the testimony of the Complainant, Counsel submitted that the trial court duly conducted a *voir dire* examination and found the child fit to testify on oath. Even more, her evidence was corroborated by PW 3 and PW 4 who confirmed that the Appellant left with the Complainant. This was further confirmed by the Appellant's witness (DW 2) who told the trial court that the Appellant carried the Complainant.

Finding and Determination

The first issue for determination in this appeal is whether the acquittal of the Appellant's co-accused automatically defeated the charge of gang rape against the Appellant.

Section 10 of the Sexual Offences Act provides that:

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

My reading of this provision indicates that in an offence of gang rape, there must be more than one assailant who act in association with a common intention even though not all of them may carry out the actual rape or defilement. It seems to me therefore that in this case since the Appellant's co-accused were acquitted, they could not be said to have been in association with him and the charge of gang rape could not therefore stand.

A perusal of the judgment by the learned trial Magistrate suggests that this may have been in view since from the record, it is not clear for what offence the Appellant was eventually convicted. Although the law allows conviction for an alternative offence in sexual offences, Section 169(2) of the Criminal Procedure Code requires the court to specify under which section an accused person is convicted. That said, I find that there remains many unanswered questions as to the role played by the Appellant in the misfortune that befell the Complainant. In the circumstances, I am satisfied that this is a proper case for retrial which is hereby ordered.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2013

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT KITALE THIS 7TH DAY OF NOVEMBER 2013

J.R KARANJA

JUDGE

In the Presence of:

.....Appellant

.....Respondent