



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO 6 OF 2013

ZAKAYO SHAMBA ALIAS SOJA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate, Kitale dated 3rd January 2013 in Criminal Case No 1765 of 2012)

JUDGMENT

Introduction

The Appellant, ZAKAYO SHAMBA ALIAS SOJA was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the night of 9th July 2012 at Kitale Municipality in Trans Nzoia he intentionally and unlawfully caused his penis to penetrate the vagina of M A O without her consent.

The Appellant faced an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No 3 of 2006, the particulars being that on the night of 9th July 2012 at Kitale Municipality in Trans Nzoia County he intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of C A O.

The facts of the case as recorded by the trial court are that on 9th July 2012 at 8.00 p.m, the Complainant who was reported to be of ostensible mental instability, was sent by her mother, M A to buy kerosene. As she was going back home, the Appellant whom she knew as "Soldier" called her and as she approached he grabbed her, led her to a nearby shed and raped her.

The Complainant reported the incident to her mother who took her for examination at Kitale District Hospital. Upon examination, the Complainant's hymen was found to be torn and old looking. The Complainant was also found to be mentally disoriented. The Appellant denied the charges and was tried at the Chief Magistrate's Court at Kitale. He was convicted on the alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No 3 of 2006 and sentenced to 10 years' imprisonment.

The Appellant's Appeal

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 4th February 2013, raising the following Grounds of Appeal:

- a. That the learned trial Magistrate erred in law and fact by convicting the Appellant in the absence of proof of the Complainant's age;
- b. That the learned trial Magistrate erred in law and fact by convicting the Appellant on contradictory and inconsistent evidence;
- c. That the learned trial Magistrate erred in law and fact by convicting the Appellant on the strength of a single witness;
- d. That the Prosecution failed to call psychiatric evidence to prove the Complainant's mental status;
- e. That learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant.

The Appeal was heard on 17th October 2013 with the Appellant appearing in person and Mr. Konga appearing for the State. The Appellant relied on his written submissions and asked the Court to take notice that there was an existing grudge between himself and the Complainant's mother. The Appellant took issue with errors on the charge sheet touching on the name and identify of the Complainant. He submitted that these errors made it impossible for him to understand the actual charge against him.

Opposition by the State

Mr. Konga learned State Counsel opposed the Appeal. He submitted that the Complainant's evidence was corroborated by the evidence of the Clinical Officer and the burden of proof was not shifted to the Appellant.

Finding and Determination

The Appellant had initially been charged with rape of a person with mental disability contrary to Section 7 of the Sexual Offences Act No 3 of 2006 which was substituted with the charges for which he was eventually tried. According to the trial Magistrate, it was not clear why the Prosecution opted to substitute the charges since in the observation of the court, the Complainant appeared to labour under some form of mental disability.

The trial court further noted that the charge sheet as substituted on 29th November 2012 was defective. Specifically, in the main charge the Complainant was indicated as M A O while in the alternative charge, the Complainant was C A O. From the evidence on record, the Complainant went by the name C A O.

This is a first appeal and I am therefore guided by the encapsulation of the duty of a first appellate court set out by the Court of Appeal in the case of *Okeno Vs Republic [1972] EA 32* in the following terms:

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; 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, (See Peters v. Sunday Post, [1958] EA 424.)”

My own analysis of the evidence adduced before the trial court, indicates that apart from the evidence of PW 2, which in my view was compromised by her mental state at the time, there was no other evidence linking the Appellant to the offence for which he was convicted. All PW3 saw was PW 2 emerging from a shed next to which the Appellant was standing. Moreover, the only information revealed by the Medical Examination Report was that the hymen of PW 2 was torn and old looking. Then there was a

complete mix of names which put the identity of the Complainant in doubt.

The judgment by the trial court demonstrates that the court was alive to all the weaknesses in the Prosecution case but while acquitting him on the main charge, convicted him on the alternative charge. I do not think it was safe to convict even on the alternative charge. The conviction is therefore quashed, the sentence set aside and the Appellant set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT NAIROBI THIS 1ST 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**