



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 7 OF 2020

KENNETH OCHIENG OPOLO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in S.O.A case No.27 of 2019 of the Principal Magistrate's Court at Ndhwa by Hon. V.K. Kiplagat-Resident Magistrate)

JUDGMENT

1. Kenneth Ochieng Opolo, the appellant herein, was convicted of the offence of rape contrary to section 7 of the Sexual Offences Act No.3 of 2006. He was also convicted of the offence of stealing in a dwelling house contrary to section 279 (b) of the Penal Code.
2. The particulars were that on the 27th September 2019 at [particulars withheld] village, Ndhwa sub location within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of ENJ without her consent. On the same day and place, he stole 10 kilogrammes of groundnuts valued at Kshs. 1650/= the property of ENJ from her dwelling house.
3. The appellant was sentenced to serve ten years' imprisonment for the offence in count one and to serve five years' imprisonment. The sentences were ordered to run concurrently. He has appealed against the conviction and the sentence.
4. He was represented by Robert Ochieng, learned counsel. He raised the following grounds of appeal:
 - a) The learned trial magistrate misdirected himself on several issues of law and fact.
 - b) The learned trial magistrate erred in law of evidence, procedure and practice in deciding the case against the appellant.
 - c) The learned trial magistrate erred in law of evidence in deciding the case against the weight of the evidence.
5. The appeal was opposed by the state through Mr. Ochengo Justus, learned counsel on the following grounds:
 - a) The medical evidence proved penetration.
 - b) The alibi defence was an afterthought.
 - c) The conviction and sentence were proper.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. Section 7 of the Sexual Offences Act provides:

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.
8. Before a court can convict an accused person for an offence under this section, the prosecution must prove that the offence as envisaged under section 3 in addition to the fact that the offence was committed within the view of a family member, a child or a person with mental

disabilities.

9. The ingredients of the offence of rape are provided in section 3 of the Sexual Offences Act which states as follows:

A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

10. The complainant (PW2) and PW1 testified that she was taken out of the house from where she was raped. If we assume that there was rape, then it was not within the view of PW1 who was a minor and a family member of the complainant. It was therefore erroneous for the prosecution to charge the appellant under section 7 of the Sexual Offences Act.

11. An identification parade is conducted in instances where a witness or a number of them indicate to the investigating officer that though the suspect was not known to them before, if he/she can see him, he/she can be able to identify him/her. This is followed by a description of the culprit which may guide the investigating officer to arrest the suspect before subjecting him/her to an identification parade. In the instant case, an identification was not necessary for the evidence on record not only establishes that the complainant and the appellant were relatives, but that they near each other for over two years.

12. Ordinarily, when an intruder enters a dark house, he does not turn the spotlight he has towards himself unless under some inevitable circumstances. PW1 did not testify of such circumstances and it is therefore doubtful whether she recognized the person she alleged was the appellant.

13. The incident allegedly took place at about 2 a.m. The complainant must have been roused from deep sleep. She testified that she found a man holding her neck. This must have terrified her greatly. In her evidence she said she recognized him while outside where he was raping her. While reporting to the police she said she was raped by an unknown person. In court she said she did not disclose the identity of the appellant for he had warned her that he was going to kill her if she did. This is self-defeating for it does not explain what she expected the police to do with her report. This also contradicted the report made by her husband on the same day she was raped and gave the name of the appellant as the assailant. Since he was not at home at the time of the alleged rape, the complainant must have told him who the culprit was. This raises doubts as to where she informed the police her assailant was unknown to her.

14. The evidence of the complainant and that of PW1 is at variance in material aspects. The complainant testified that when she was being dragged out, she shouted loudly before the appellant hit her on the face and threatened to stab her. This was however absent in the evidence of PW1 who claimed to have heard everything that happened. The evidence of this two witnesses is suspect. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

These two witnesses are unworthy of belief. The learned trial magistrate ought not to have placed reliance in their evidence. Without their evidence, the prosecution case is hollow. It is immaterial that the alibi defence of the appellant was clearly an afterthought; he had no onus of proving his innocence.

15. From the foregoing analysis of the evidence on record, I find that the prosecution case cannot stand. I quash the conviction on both counts and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE