REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.53 OF 2017

RENNY OMONDI AKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Sexual Offences Act case No.28 of 2016 of the SPM's court at Kendu Bay dated 23.11.2017 – Hon. J.P. Nandi, SRM)

JUDGMENT

[1] The appellant, **RENNY OMONDI AKUMU,** was charged before the Senior Resident Magistrate at Oyugis with rape, contrary to **Section 3 (1)** as read with **Section 3 (3)** of the **Sexual Offences Act**, in that on the 10th November 2016 in Homa Bay County, he intentionally and unlawfully had carnal knowledge with EA, without her consent.

[2] There was an alternative count of indecent act with an adult, contrary to **Section 11A** of the **Sexual Offences act**, in that on the 10th November 2016 he intentionally and unlawfully rubbed his male sexual organ into the female sexual organ of EA without her consent.

[3] After a full trial, the appellant was convicted on the main count and sentenced to fifteen (15) years imprisonment.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal on the basis of the grounds contained in the amended petition of appeal dated 22nd January 2018.

[4] Learned Counsel, **MR. ONGOSO AYOMA**, appeared for the appellant at the hearing of the appeal and fully relied on his written submissions filed herein on 17th January, 2019.

The Learned Prosecution Counsel, **MR. OLUOCH (S/ADPP)**, appeared for the State/Respondent and opposed the appeal by orally submitting that, the appellant, after having raped the complainant (PW1) for the first time in a bush, forced her to board a motor cycle and took her to his house where he intimated to her that they were now friends and introduced himself as **"Renny."**

[5] The learned prosecution counsel, further submitted that the appellant gave the complainant his mobile phone number and after asking his friends to leave the scene, he continued to rape the complainant and on the following day escorted her upto a church.

It was contended by the learned prosecution counsel that the identification of the appellant was reliable and undisputed.

[6] That, PW4, indicated that he and others were blocked from accessing the place where the appellant and complainant were but he (PW4) saw and recognized the appellant thereby placing him at the scene of the offence. That, the evidence by PW4 corroborated that of the complainant and in any event **Section 124** of the **Evidence Act** applied such that the appellant was convicted on the sole evidence of the complainant.

The learned prosecution counsel, urged this court to dismiss the appeal for want of merit.

[7] In response, learned counsel, MR. ONGOSO, submitted that **Section 124** of the **Evidence Act** notwithstanding, corroboration of the complainant's evidence by the medical report was vital as the two factors have to be considered in tandem. The offence of rape was therefore not corroborated and if the complainant met the appellant for the first time, how come she referred to him by the name **"Renny".**

Learned counsel, further submitted that the complainant and accused were people known to one another and that PW4 never identified the appellant in court. His evidence was also contradictory and reliable.

Learned Counsel, urged this court to allow the appeal.

[8] The grounds of appeal have been given due consideration by this court in the light of the rival submissions. The duty conferred upon the court at this stage was to re-consider the evidence availed at the trial court and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses as was held in the case of **REPUBLIC –VS- OKENO [1972] KLR 32**.

[9] In that regard, the evidence by the prosecution through the complainant, **EAO (PW1)**, a Clinical officer, **DIERO HARUN AJWANG (PW2)**, the Investigating Officer, **SGT. PHILIP KIPTUIYA (PW3)** and a secondary school student, **SAM ODHIAMBO (PW4)**, was considered against that of the appellant in his defence which was essentially a denial and an indication that he was arrested for no apparent reason by some motor cycle taxi operators (boda boda) who found him hiding in a certain house.

[10] Basically, the main issue that presented itself for determination by the trial court was whether the offence of rape was committed against the complainant and if so, whether the appellant was the person responsible for it.

The burden to establish the foregoing lay with the prosecution and according to the trial court it was discharged by the prosecution in both law and fact.

[11] With regard to the actual act of rape, it is this court's opinion that the evidence by the complainant (PW1) was sufficient and credible enough in establishing the material ingredients of the offence in terms of **Section 3 (1)** of the **Sexual Offences Act**. She testified that she was forced into a bushy area against her wish and forcefully made to have sex with her tormentor. The act of rape was in the circumstances complete and her evidence in that regard was never disputed or disproved by any from the defence or even within the prosecution.

[12] What therefore remained as the basic issue for determination was whether the appellant was positively identified as the offender.

The sole evidence of identification came from the complainant. She stated that when she met the appellant in the first instance, it was 2.00 a.m. He was in the company of the others while she was also in the company of Sam (PW4) and another person called Defao. The group exchanged greetings but the appellant insisted to know her (complainant's) name. She declined to disclose her name and this resulted in the appellant slapping and intimidating her with a panga before asking his colleagues to deal with her colleagues. He then took her into a bushy area and forcefully had sex with her against her will. Later, he forced her onto his motor cycle and took her to his house.

[13] The complainant went further to state that at the accused's house, the accused became friendly to her to the extent that they exchanged phone numbers and told her that his name was **"Renny"**.

He, nonetheless, continued to have sex with her without her consent and at 6.00 a.m. he escorted her on his motor cycle upto a church near her home.

From all the foregoing, it was evidence that the complainant nor Sam (PW4) may not have been able to positively identify the appellant in the first instance due to the none existent of favourable circumstances for identification as it was in the hours of darkness. It was 2.00 a.m., but neither the complainant nor Sam (PW4) talked of there being any form of light at the scene to enable them see and properly identify the appellant.

[14] However, at a later stage, the complainant and the accused were together in his house for a considerable period of time, hitherto against her wish. It was then that the opportunity to clearly identify the appellant arose and by the time they parted ways after 6.00 a.m., she had already identified him by face and name in favourable circumstances.

[15] Undoubtedly, the complainant's evidence of identification against the appellant was credible and reliable. It proved beyond reasonable doubt that he was the actual person who tormented and sexually abused the complainant. The trial court's finding that he was properly identified by the complainant in his house and when he escorted her to a church near her home was therefore correct.

[16] It is for all the foregoing reasons that all the grounds of appeal preferred by the appellant and his submissions in respect thereof cannot be sustained by this court and are hereby overruled.

In the end result, this appeal is lacking in merit and is thus dismissed in its entirety.

J.R. KARANJAH

JUDGE

28.02.2019

[Delivered and signed this 28th day of February, 2019].