



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO 23 OF 2016**

**BETWEEN**

**J O O..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the decision by P. MAYOVA (SRM) in Homa Bay*

*CMCRC NO. 53 of 2014 on 29<sup>th</sup> May 2015)*

**JUDGMENT**

1. The appellant (**J O O**) was convicted on a charge of rape contrary to section 3(1) (a) (b) of the Sexual Offences Act and sentenced to life imprisonment. The particulars of the charge were that on 12<sup>th</sup> January 2014 at about 9.00pm, within Homa Bay county, the appellant did commit an act which caused penetration with his male genital organ (penis) in the genital organ (vagina) of one **B A O**, a woman aged 25 years without her consent. He had denied the charge and four prosecution witnesses were called to prove the charge.

2. **B A O (PW1)** described to the trial court how earlier in the day she had been ferried to [**particulars withheld**] market centre using a boda boda, and they had agreed that the rider would later come back to pick her and drop her home. However he delayed and when she called him, he informed her that his motor cycle had a puncture but advised her to wait as he would come for her. When it got to 6pm, she felt insecure and went to the nearby AP Camp where she felt it would be safe to wait.

3. At the AP camp, she found **APC CYRUS ANYERA (PW2)** and another person, so after explaining her predicament and that she wanted to go to **Onjijo**, the other person said he too hailed from **Onjinjo**, and he had a motorcycle. They negotiated and agreed at a price of Ksh 100/-. They left the camp, being 4 persons on the motorcycle, but before they could get to Kach Centre, the rider stopped his motor-cycle and announced that he had run out of fuel. The rider sent one of the passengers to go and get fuel, then made a call for a reliever to come for them-while the threesome begun walking but on the way, the rider branched off to the bush to answer a call of nature. The rider told the other male passenger to go carry on with his journey, and **PW1** got alarmed and asked to be taken back to the police post. Suddenly someone blocked her mouth with a sweater and warned her not to scream. She realized it was the same rider who had now emerged from the bush and whom she identified and recognized as the appellant. .

4. She pleaded with him not to harm her, explaining that she had undergone a cesarean section operation for a still birth and the wound had not healed. The appellant knocked her on the left side which had the

surgical scar and pulled her to the bush. He tore away her garments even as she pleaded with him and rejected his attempts to kiss her, and forcefully had sex with her, saying they could only talk once he was through. She walked and eventually got to some shops and found a man seated at the verandah. After narrating her ordeal, he gave her a phone number to call the police, and as fate would have it, the officer was the same one who had assigned her to the appellant for the boda boda rider.

5. **APC CYRUS ANYERA (PW2)** confirmed that PW 1 had been to the AP Camp saying she needed means to get to Onjinjo area and he indeed saw the appellant leave with her on his motor-cycle after they had agreed on a fare of Ksh 100/-. He also confirmed that 20 minutes later he received a call from a lady who was crying saying that she had been raped by the rider of the motor cycle who had picked her-it was PW1. Since he knew the appellant because he was a police informer and even knew his home, he was able to trace him, arrest him, and have both the appellant and Pw1 medically examined.

6. PW2 told the trial court that he noted that PW1 appeared to be in pain. He visited the scene the next day which was within a bush and noticed that the grass and small shrubs been flattened. On cross examination he stated:

**“You left with the lady from the camp, you promised to take her to her destination”**

7. The investigating officer **PW3 (PC MAURICE OKUMU)** received the appellant from the administration police officers who narrated to him PW1’s ordeal with the appellant and it resonated with what PW1 had told him. He took possession of her pair of trousers which had a tear at the front and her under pant which had some stains and he produced them in court as exhibit bit. He visited the scene and noticed foot marks and evidence of a struggle in the bush. **DR CHARLES DULO (PW4)** who examined **PW1** only few hours after the rape saw bruises on her vulva and traces of sperms on the examining finger. He stated:

**“...she wore a pair of black trouser, at a right angle the trouser had a tear ....there were tears on the blouse...blood stains on the clothes... and abdomen had tenderness on the right iliac and supra pubic area...”**

8. **PW4** also produced the P3 form in respect of the appellant who had been examined by **DR OCHOLA** on 13/01/2014 found the glans of his penis and urethra were inflamed suggesting a forced entry

9. In his sworn testimony, the appellant stated that since he was selling illicit brew, the police had placed a bribe of Ksh 500 from him every month. He was unable to comply with that demand and PW2 had warned him that since he had failed to take the money to him, he would do something nasty to him in revenge. This is created a grudge between him and the police and eventually led to his arrest. He insisted that he did not know PW1 nor had he met her at the AP camp or ferry her on his motor cycle.

10. The trial magistrate considered whether PW1 was able to identify her attacker and pointed out that although she did not know the appellant before, she was able to recognize him as she had been in his company for about 30 minutes- he had ferried her and she had sat next to him. The appellant had an argument with her and she was able to recognize his voice as he raped her and it was his voice that she heard all along as he raped her. Further PW1 had dealt with only 3 men that night i.e. the man with a bandage who had left to get fuel for the motorcycle end the, leaving the appellant ant the disabled man. According to the appellant, the man who raped her was not disabled, so that only left the appellant as the suspect PW1 informed the trial court that when the appellant was apprehended he still wore the same gumboots and jeans trousers she had seen him in.

11. The trial court considered the appellants defence but rejected it saying that PW1 and PW2 corroborated each other on some key aspects as to what transpired at the camp, and PW2 knew the appellant very well and clarified that he had no grudge with the appellant. The trial magistrate found that the complainant was an adult woman of sound mind and he had no reason to doubt her evidence as she had no grudge with the appellant who was then a stranger to her and her evidence regarding the sexual assault was corroborated by the medical evidence and confirmed there had been penetration.

12. The appellant contested the findings on grounds that the trial magistrate failed to weigh the evidence adduced in court and reached a harsh and excessive decision. That in any event the charge was not proved beyond reasonable doubt. He also lamented that his defence was rejected without any cogent reason.

13. The appellant submitted in writing that he was not positively identified and was mistakenly arrested and charged. He challenged the opportunity for identification saying the person who raped the complainant emerged from the shadows under the cover of darkness and she did not recognize his face but simply believed it was the rider. He also contested the sentence on grounds that it was illegal as the offence did not carry a life sentence.

14. In opposing the appeal **MR OLUOCH** on behalf of the State submitted that PW1 had the opportunity of seeing and talking to the appellant when both were at the AP camp. Thereafter the appellant gave her a ride on his motorcycle but he stopped on the way and defiled her. She desperately pleaded with the appellant that she had recently undergone a Caesarian section operation, but he ignored her pleas. Counsel pointed out PW1's evidence regarding identification where she stated:

***"I would recognize his looks, we spoke when he was about to rape me, when raping me and after."***

15. **MR OLUOCH** argued that the identification was watertight and materially corroborated by the evidence of PW2 and the medical evidence confirmed rape.

16. As for the sentence, **MR OLUOCH** submitted that the sentence was proper and well merited pointing out that the offence attracts a 10 year sentence but there is a proviso that the sentence may be enhanced and in passing the enhanced sentence the trial magistrate considered that:

17. The appellant was HIV positive at the time of the offence and probably passed on the virus to the complainant

18. The plea by the complainant that she had recently undergone a Caesarian section operation and was in pain and could not endure sexual intercourse only exacerbated her problems.

19. There was no dispute that the complainant was forced to have sex against her will shortly after she left the AP camp. She had a chance to see, talk to and identify the appellant while still at the AP camp. In any event the appellant was well known to PW2 who in fact saw him leaving with the complainant and another man as his pillion passengers. As the trial magistrate noted, PW1 spent a considerable amount of time with the appellant. He then stage managed a fuel crisis and an urgent need for a long call of nature- in so doing he managed to shake off the other male passengers whom he had ferried.

20. The trial magistrate logically observed that the other two male passenger had definite marks which ruled them out from being the likely culprits- one had a bandage and the other was disabled- none of these features were attributed to the person who defiled PW1. Indeed the evidence of PW1 and PW2 squarely placed the appellant at the scene. The appellant was also examined within hours of the incident and the Dr found that the physical appearance of his male organ suggested there had been forceful penetration-which resonated with what PW1 described. I find no basis upon which to fault the trial magistrate's decision and I find that the conviction was safe and it is upheld.

21. As regards the sentence section 3 (3) of the Sexual Offences Act No 3 of 2006

**3 (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.**

22. The trial magistrate considered two major factors- the fact that the appellant had by forcefully having sex with the complainant exposed her to the risk of HIV infection due to his compromised status, and the double pain PW1 had to endure having only recently undergone surgery. These were real and merited

observations and I am satisfied that the situation called for enhancement of sentence. I decline to interfere with the sentence which is hereby confirmed.

23. The upshot is that the appeal is dismissed.

**Delivered and dated this 31<sup>st</sup> day of January 2017 at Homa Bay**

**H.A.OMONDI**

**JUDGE**