



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO.111 OF 2011
WILBONE OKOTH OBONYO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was charged and convicted for 15 years for the offence of Rape contrary to section 7 of the sexual offences Act. Being dissatisfied with the conviction and sentence he preferred this appeal.

2. The grounds of Appeal are as follows;

1. There were glaring gaps, inconsistencies and contradictions in the Prosecution case.

2. There was no medical evidence linking the offence to the appellant.

3. The rights of the appellant were violated as he was kept in police custody contrary to Article 72(3)(b) of the Constitution.

3. The state opposed the appeal on grounds that the same has no merit, it has no chance of succeeding, the case was proved beyond any reasonable doubt and the conviction and sentence were lawful.

4. At the hearing of the appeal the appellant made no submissions save asking for reduction of the sentence as he is a 1st offender.

5. The State on its part in objecting to the appeal submitted that the appellant was recognized by the Complainant and witnesses who found him naked at the scene as they were all neighbours. Further Medical Evidence corroborated the injuries sustained by the Complainant as she struggled, and there were injuries on the Complainant's sexual organ confirming penetration. The State also submitted that the conviction and sentence was lawful and ought to be upheld.

6. This is the first appellate Court and it must consider the evidence afresh, analyse and examine the same so as to arrive at its own independent opinion. See ***Kiilu & Another Vs R 2005 IKLR(a) 174.***

7. The particulars of the case were that on the 16th of October 2010 at [particulars withheld] market, Bukembe location in Bungoma South District the Appellant had sex with the Complainant without her consent.

8. This being a Criminal Case the onus of proving the same squarely lies on the Prosecution. See

Woolimington Vs D.P.P. (1935) C.A.

9. Rape has been defined to be where one intentionally and unlawfully penetrates another forcefully without consent or by means of threat and intimidation. **PW1 EWW** recalled that on the 16th of October 2010 while asleep in her house, she woke up after being hit on the head, was told to keep quiet and the person demanded for a radio, phone and money. He then ordered her to remove her clothes, he slapped her, removed her blouse and ordered her to hold him tightly. She held him tightly and screamed. She held him and struggled with him as she continued screaming, the person attempted to escape but she held onto him.

The children heard and they screamed attracting neighbours. The person bit her on the mouth as they struggled outside the house. The neighbours came. She further stated that while struggling on the bed with the appellant he penetrated her. **“He entered and I pushed him. He would penetrate and out.”** He was completely naked. The neighbours arrested him while naked and took him in the same condition to the police station. The Complainant had a cut on her left ear, left hand, lower lip, left breast and right side of the hip. She was hospitalized for 2 nights.

PW2 JWW and **PW3 BNS** were neighbours of PW1 they went to the scene upon hearing screams at about 1.30a.m. PW2 found two people on the ground struggling, the man was naked and the lady held on to him. The man attempted to escape, there was moonlight and people arrived holding torches. PW2 held the man who was identified by other people and PW1 told them that the naked man had raped her. **PW3** also found them down struggling with PW1 holding onto the man.

PW4 Dr. Cleophas Wekesa Okubasu of Bungoma district hospital examined PW1 and admitted her. She had been beaten and raped. She had a bruise on the left ear and a human bite on her lower lip. She also had bruises on her chest and right hip, and her vagina although no spermatozoa was found.

10. The above evidence in my considered opinion corroborates the evidence of PW1 that the appellant attacked her and forcefully penetrated her vagina. Further the appellant was found naked at the scene of crime.

11. The Prosecution through its witnesses proved the offence of rape. Indeed at the hearing of the appeal the appellant did not canvass any of the grounds of Appeal and I take it that he dropped all his grounds.

12. The appellant seem to suggest that the sentence was excessive and ought to be reduced. In this regard I do concur with the State that the sentence meted was within the Law. In the circumstances I do not see why I should interfere with the same. I decline to do so. Consequently the appeal is therefore dismissed.

DATED and DELIVERED at BUNGOMA this 27th day of April, 2017

ALI-ARONI

JUDGE