REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 39 OF 2015

BETWEEN

HEZRON OGOLA ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Ochieng, Ag. SPM dated 6th March 2015 at the Principal's Magistrates Court at Maseno in Criminal Case No. 481 of 2014)

JUDGMENT

1. The appellant **HEZRON OGOLA ODHIAMBO** was charged with the offence of rape contrary to **section 3(1)(a)** and **(c)** of the ***Sexual Offences Act***. The particulars of the charge were that on 1st May 2014 at 2.00am at Korwenje Village, West Kotieno Sub-location in Kisumu West District within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of PAO by use of force, intimidation and threats.

2. The appellant also faced an additional count of causing malicious damage to property contrary to **section 339(1)** as read with **section 339(2)(a)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars were that on the night of 30th April 2014 and 1st May 2014 at Korwenje Village in West Kotieno Sub-location, Kisumu West District within Kisumu County, he, jointly with others not before the court, willfully and unlawfully destroyed the dwelling house of EOA by means of cutting down the iron roof top valued at Kshs. 10,000/- the property of EOA.

3. The appellant was convicted on both counts and sentenced to serve 10 years' imprisonment on count 1 and 6 months' imprisonment on count 2 with both sentences running consecutively. The appellant now appeals against both conviction and sentence.

4. In the petition of appeal dated 13th March 2015, the appellant attacked the judgment on the ground that the evidence was illogical, inconsistent, inaccurate and incredible and unable to sustain a conviction and as such the prosecution failed to prove its case beyond reasonable doubt. The appellant further contended that the trial magistrate failed to analyse the evidence relating to the second count. He complained that the trial magistrate disregarded his defence and in particular he failed to consider that there was a land dispute between the appellant's and complainant's family.

5. In his oral and written submissions, Mr Omondi, learned counsel for the appellant, re-emphasised the grounds of appeal set out in the petition and submitted that the motive of the offence was not established. He submitted that according to the testimony of PAO (PW 1), the incident took about 2 hours which is

not possible if she was attacked by a gang. He attacked the conduct of EOA (PW 2), PW 1's husband, as being inconsistent with that of a husband as he did not report the incident as soon as possible. He pointed to the fact that the medical evidence could not support the offence particularly because the appellant was not examined. Counsel also submitted that the evidence of identification was contradictory in nature and could not be relied upon to support the conviction.

6. Ms Osoro, learned counsel for the respondent, opposed the appeal and submitted that this was a case of recognition rather than identification of a stranger as both PW 1 and PW 2 knew the accused. As regards the rape, counsel submitted that penetration was proved and corroborated by medical testimony. On the whole counsel submitted that the prosecution proved all elements of the offence and the appellant was properly convicted.

7. As this is a first appeal, the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction bearing in mind that I did not see or hear the witnesses (see ***Njoroge v Republic*** **[1987] KLR 19**). In order to deal with this obligation, I now proceed to set out the evidence as it emerged at the trial.

8. The prosecution called 4 witnesses. PAO (PW 1) recalled that on the night of 31st April 2014 and 1st May 2014, the appellant in the company of some unknown people came to her house, where she was asleep with her husband (PW 2), and began tearing down the iron sheets roof in order to gain entry. They both screamed and raised alarm. When one of the assailants threatened to kill PW 2, PW 2 pretended he was going to open the door but escaped through the window. After breaking the door, one of the assailants, whom PW 1 identified as the appellant, entered the house with a panga in hand and told the other assailants to wait outside. He also told PW 1 that he wanted to take her to a safe place.

9. The appellant then escorted PW 1 with her child to his house where he forcibly had sexual intercourse with her until daybreak. When she left the appellant's house, the appellant followed her with a panga issuing threats to kill her husband. She met her husband at home whereupon they went to report the matter Kombewa Police Station whereupon PW 1 was referred to hospital for examination and treatment.

10. PW 2 recalled that on the material night, while he was asleep with PW 1, he was awoken by a knock on the door and the appellant threatening to kill him. He started raising alarm but no one responded. He told them he would open the door by went left through the window. He collapsed while on the run. When he was woken up by a neighbour, he went to look for PW 1 and his child. He saw PW 1 running from the appellant's house crying with the appellant following her with a panga. She told him that she had been raped by the appellant. They went to see the Chief who directed them to Kombewa Police Station.

11. PW 4, a clinical officer at Kombewa, testified that he examined the PW 1 on 1st May 2014. After recording her sexual history, he confirmed that there were bruises at the labia and her hymen was not intact and there was a discharge. The investigating officer, PW 5, recalled that on 1st May 2015, PW 1 and PW 2 reported to Kombewa Police Station that they had been attacked by a gang and that PW 1 had been raped by the appellant. After the report was made, he went to the complainants' home and confirmed that the house was damaged. He testified that on the same day, he arrested the appellant at Korwenje.

12. The appellant elected to give sworn testimony when put on his defence. He denied the offence and confirmed that PW 2 was his first cousin. He told the court that there was a land dispute between his family and that of PW 2. He told that court on the night of 30th April 2014, he had come from Nairobi and at about 10.00pm, he was at a bar where PW 2 saw him but refused to talk to him. He went home and slept until the next day without incident and was therefore shocked when he was arrested by the police in company of PW 2.

13. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the ***Sexual Offences Act, 2006***;

> *A person commits the offence termed rape if*

(a) He or she intentionally or unlawfully commits an act which causes penetration with his or 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.

14. The first issue for consideration is whether there was penetration obtained with force and threats of intimidation. The testimony of PW 1 was clear and consistent on the fact that she was subjected to sexual intercourse without her consent. The appellant took her from her house under the ruse of protection, while armed with a panga, only to subject her to sexual intercourse under the threat of force and intimidation.

15. Under the proviso of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** the court may convict a person of a sexual offence without corroboration where the court believes the complainant. Although the testimony of PW 1 did not require corroboration, there was in fact, sufficient evidence to support her testimony. On the very next morning she was seen running away from the appellant's home with the appellant chasing her with a panga. She told PW 2 what happened at the first opportunity. PW 4 examined PW 1 in the morning and confirmed that she had bruises on her labia consistent with sexual intercourse. Counsel for the appellant challenged the medical evidence on the ground that the appellant should have been tested to confirm whether he had syphilis which PW 1 was found to have. In my view, this was unnecessary as there was sufficient evidence to establish rape.

16. As to the issue of identity of the assailant, I agree with the respondent that this was a case of recognition rather than identification of a stranger. Even in cases of recognition, the guidance given by the Court of Appeal has been that the trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction to avoid cases of mistaken identity (see ***Wamunga v Republic*** **[1989] KLR 424** and ***Anjononi & Others v Republic*** **[1980] KLR 59**). The same test is applied to voice recognition (see ***Karani v Republic*** **[1985] KLR 290**).

17. Both PW 1 and PW 2 knew the appellant who confirmed as much in his defence. PW 1 and PW 2 heard his voice during the attack and when he gained entrance. PW 1 told the court that the light was on and given the confined space of the room, she was able to see him. Moreover, the appellant took her to his house and subjected her to sexual intercourse. Both PW 1 and PW 2 named the appellant when they reported to the police and he was arrested at about 10.00am on that morning within the vicinity of the offence.

18. The appellant contended that the evidence was inconsistent and incredible. First, as regards, the time frame of the attack, I do not find this material in the sense that I doubt that PW 1 and PW 2 would have timed or looked at the watches to confirm the time. What is clear is that the attack took place. This is confirmed by the testimony of PW 5 who went to the complainants' home and found that iron sheet damaged. The iron sheet could only have been cut by the appellant and his accomplices. PW 1 and PW 2 explained that it had been raining that night hence the neighbours may not have responded to the alarm. Because the threats to kill was directed at PW 2, he ran away and in all probability did not expect that his cousin would rape his wife. Nevertheless, in the morning after regaining consciousness, he went looking for his wife and reported the matter to the police station. The sequence of events is also consistent and ended with the appellant's arrest within the short span of time.

19. The appellant presented an alibi in his defence. The alibi was not suggested to PW 1, PW 2 and PW 5 in cross examination. When an alibi is proffered before the commencement of the trial, the prosecution is obliged to investigate it but since the appellant had not given any notice that he would raise it and it was being set up after the close of the prosecution's case, it was open to the trial court to weigh it against the prosecution evidence already tendered (see ***Wangombe v Republic*** **[1976 – 80] KLR 1683**). Weighed against the prosecution evidence, I find the alibi an afterthought and a sham. Likewise, I find the defence of a grudge lacking in merit in light of the clear testimony of PW 1 and PW 2.

20. The totality of this evidence is that there is no possibility of mistaken identity nor falsity in the charges against the appellant. I find and hold that it is the appellant who committed the felonious acts and was properly convicted on both counts. I affirm the conviction

21. On the issue of the sentence imposed by the subordinate court, the general principle is that an appellate court can only interfere with the sentence if it is manifestly harsh or excessive or that the magistrate took into account irrelevant factors or failed to take into account relevant factors (see ***Macharia v Republic*** **[2003]KLR 115**). In this case, the trial magistrate erred in imposing consecutive sentences when the offences arose out of the same facts or transaction (see ***Sentencing Policy Guidelines, 2016*** **para. 7.13**).

22. I therefore set aside the consecutive sentence and substitute the same with 10 year imprisonment on Count 1 and 6 months imprisonment on Count 2 both sentences to run concurrently.

23. Save to the extent of the sentence, the appeal is dismissed.

DATED and DELIVERED at KISUMU this 27th day of October 2016.

D.S. MAJANJA

JUDGE

Mr Omondi instructed by Omondi, Waweru and Company Advocates for the appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.