



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 51 OF 2014

BETWEEN

DANINGTON OBACHI OKONG'O..... APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 818 of 2013 at the Chief Magistrate's Court at Homa Bay, Hon. S. O. Ongeru, Ag. PM dated 8th August 2014)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to **sections 3(1)(a) and (c) and (3)** of the ***Sexual Offences Act, 2006***. The particulars were that on 25th July 2013 at [Particulars Withheld] Hospital in Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of BAO without her consent. Based on the same facts he faced a charge of committing an indecent act with an adult contrary to **section 11(A)** of the ***Sexual Offences Act***. He pleaded not guilty and a trial ensued where the prosecution called 7 witnesses. He was convicted on the principal charge and was sentenced to 15 years imprisonment.
2. PW 1, the complainant, testified that she had been admitted to the TB Isolation Ward at the [Particulars Withheld] Hospital. On 25th July 2013, the appellant, who was a prisoner, was working at the hospital and offered to assist her to carry some water to the toilet as she was too weak. He assisted her and when they got into the toilet, he refused to leave and instead proceeded to have sexual intercourse with her. She stated that she was in a lot of pain and could not make noise. She finally struggled and the appellant ran away. She immediately reported to the nurse who caused the three prisoners who were working there to be assembled and she picked him out. She was issued with the P3 form.
3. PW 2, a male nurse at the isolation ward, testified that PW 1 reported her ordeal to her and told her that it was a prisoner who had run away. He called the prison warden who assembled the prisoners whereupon PW 1 identified the appellant as the person who raped her. PW 3, a cleaner at the TB Ward testified that PW 1 informed her that she had been raped by a prisoner. She also gave PW 2 the information and she was present when the PW 1 identified that accused at a parade of the prisoners.
4. PW 4, a male prison warden, testified that on 25th July 2013 at about 12.50 pm, he had escorted 4 prisoners to the [Particulars Withheld] Hospital and the appellant was one of them. He recalled that he was informed that a prisoner had raped a patient. He rounded up the 4 prisoners and PW 1 identified the appellant as the person who raped her. PW 5, a female prison warden, confirmed that

- on the material day, 4 prisoners were escorted to the hospital and the appellant was among them. She was informed of the rape and was present when PW 1 identified the appellant as the person who raped her.
5. PW 6, a doctor at the hospital, testified that PW 1 was a patient at the hospital and that he examined her on 25th July 2013. He confirmed that there was forceful penetration of her vagina. He observed that the external genitalia and cervix were normal but there was presence of blood on the posterior part of the cervix and semen on the pubic hair. He also examined that appellant and found dry semen on his penis. He concluded that there was penetration.
 6. PW 7, the investigating officer, testified that the incident was reported by the superintendant of the Homa Bay District Hospital. He confirmed that PW 1 had been admitted to the hospital and that the appellant was a convict who had raped PW 1 at the hospital.
 7. When put on his defence, the accused gave an unsworn statement, in which he denied that he raped PW 1. He stated that on 25th July 2014, he had been taken to the hospital for physiotherapy with 1 officer and 3 remandees. He remained with PW 5 and after a while he and PW 4 took medicine to the vehicle whereupon one of the other remandees informed them that a patient had been raped by a convict. He saw a woman crying and he was informed that he had raped someone. He then asked PW 4 to take his back to prison to avoid fracas. He stated that he was taken back to the prison and was examined 2 days later at the hospital. He stated that at all times he was with PW 4 and could not have committed the offence.
 8. The learned magistrate was convinced that the prosecution had established the offence of rape and convicted him. In the petition filed on 18th August 2014, the appellant challenges the conviction on the following grounds; that the conviction relied upon a faulty and unprofessional identification parade conducted by unauthorized staff at an unauthorized institution contrary to the police standing orders; that penetration was not established, that there was no proper investigation to support the conviction. In his written submissions, he reiterated that the identification parade was contrary to the law and that it was not possible for him to have raped PW 1 as he was under the watch of PW 4 and PW 5.
 9. Mr Oluoch, learned counsel for the respondent, supported the conviction. He argued that the appellant was in prison uniform, that the incident happened in broad daylight and PW 1 clearly recognized him among the other prisoners hence there was no opportunity for mistaken identity. He also pointed to the fact that when asked to plead to the charge and the facts were read to him, he stated that, *“Yes, I had sex with the complainant but it was consensual.”*
 10. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as to whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify (see ***Pandya v Republic [1957] EA 336*** and ***Kariuki Karanja v Republic [1986] KLR 190***).
 11. I have re-appraised the evidence on record and I find the account of PW 1 clear and convincing regarding the events of 25th July 2013. Her testimony was not shaken by cross-examination. The consistency of her testimony was confirmed by PW 3 whom she informed immediately after the incident. PW 2 who was also informed of the incident by PW 3 immediately after, testified that he saw her in a distressed state following the rape. Her testimony was corroborated by the medical evidence of PW 6 who examined her after the incident and found that there had indeed been penetration of her vagina.
 12. The totality of the evidence is that there was penetration. An important element of the offence of rape is lack of consent to the sexual act. In this case, the testimony of PW 1 is also clear that she did not give her consent. She tried to resist his actions but she was sick and too weak.
 13. The identity of the appellant was also proved by the prosecution. The incident occurred in broad

daylight and the appellant was in prison uniform and was one of only four prisoners at the hospital. The time it took for the appellant to assault PW 1 was sufficient for positive identification hence PW 1 was able to pick the appellant out as the person who assaulted so soon after the incident. PW 1 recognized the appellant hence it was not necessary to conduct an identification parade in the manner prescribed by the **Force Standing Orders** as this was identification by recognition. It was held in the case of **Ajode v Republic [2004] 2 KLR 81** that;

Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.

The Court of Appeal cited with approval **Githinji v Republic [1970] EA 231** where it was held that, “Once a witness knows who the suspect is, an identification parade is valueless.”

14. The appellant did not deny that he was a prisoner in uniform at the hospital at the material time and when he was examined by PW 6 examined him so soon after the incident he found dry semen on his penis. His defence was a sham particularly in light of the earlier admission that he had consensual sex with the appellant. His contention that he was at all times under the watch of PW 4 and PW 5 hence he could not have committed the offence was disproved by the prosecution witnesses. I agree with the finding of the learned magistrate that it is clear that PW 4 and PW 5 were shuttling escorting prisoners to different sections of the hospital when the appellant took advantage of the situation to rape the complainant.
15. All in all I am satisfied that the prosecution proved the case against the appellant beyond reasonable doubt. I affirm the conviction.
16. As regards the sentence, the minimum sentence under **section 3(3)** of the **Sexual Offences Act**, the minimum sentence is 10 years imprisonment and the maximum is life imprisonment. The learned magistrate took into account the fact that the appellant raped a sick woman suffering from TB. I do not find any error in the sentence and I affirm it.
17. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 28th day of April 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.