



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 239 OF 2011

DAVID ONCHIEKU OYARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This is a criminal appeal by **David Onchieku Oyaro**, the appellant herein. He was charged at SRM Court at OGEMBO in Criminal Case No. 809 of 2011. An offence of **rape contrary to Section 3(1) (a) of Sexual offences Act No. 3 of 2006**. The particulars thereof being that on 4th day of June, 2010 at [particulars withheld] Sublocation in Kenyena District within Nyanza province, intentionally and unlawfully caused his penis to penetrate to vagina of **M M O** without her consent. He pleaded “Not guilty”. The trial ensued after evaluation of the evidence adduced the appellant was convicted and sentenced to 15 years imprisonment.

2. The appellant being aggrieved and dissatisfied with both the conviction and sentence has filed his appeal against both conviction and sentence. His grounds of appeal are as follows:-

1) That appellant’s age of 70 years with school fees responsibilities and 332 being diabetic, should be released to go back to my children.

3. The Respondent, through the learned counsel, Ms Clara opposes the appeal and state as follows:

1) The appellant duped the complainant who was in unfamiliar town that he would offer her accommodation. He had nonconsensual intercourse with the complainant.

2) During this unlawful act, the appellant threatened the complainant with harmony hers, this activity proceeded on while the complainant’s young children were also in the same room.

3) PW1- the clinical officer confirmed that the complainant had injuries on her genitalia and non motile spermatozoa, these was also a whitish discharge showing that there was an infection.

4) PW2- the complainant positively identified the appellant as the person who lured the complainant into an empty house and subsequently locked her in and raped her the whole night she was able to identify the appellant positively because she was with him for (9) hours.

5) PW2’s testimony was that she could not scream or raise any alarm because there was a maasai sworn on the bed, this located moreon the part of the complainant not only for her life but also for the lifes of her three children.

6) *On being released by the appellant, the complainant reported the matter to PW3. This was corroborated by PW3.*

7) *After conviction, in mitigation the appellant had this to say: “ I wish to inform the court that it is good that the truth has come out in the court’s decision”- he did not show any remorse. The respondent thus urged the court not to interfere with both conviction and sentence.*

4. As to whether there was sufficient evidence to support the conviction, this court, as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify see **Pandya vs- R [1957] E.A. R 333.**

5. Having read the proceedings for myself, all the evidence as adduced and have evaluated the same, I have reached an independent decision, that the conviction and the sentence was properly arrived at.

6. Accordingly, the appeal filed on 24th October, 2011 be and is hereby dismissed.

Dated, Signed and delivered at KISII this 29th day of May, 2015.

HON. C.B. NAGILLAH,

JUDGE

In the presence of:-

Appellant in person

(absent) for the respondent

Samuel Omuga - Court Clerk.