



IN THE HIGH COURT

AT HOMABAY

CRIMINAL APPEAL NO. 31 OF 2013

BETWEEN

JARED ODHIAMBO OUYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Homabay Criminal Case No.1214

of 2012 by Hon. S. Ongeru Ag P.M. on 27th September 2013)

JUDGMENT

1. In the subordinate court, **JARED ODHIAMBO OUYA** faced two charges. The first charge was rape contrary to **section 3(1)(a)(b) and (3)** of the *Sexual Offences Act, 2006*. According to the charge, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CAD without her consent on 5th November 2012 at Sena Village in Wakinga Sub Location in Mfangano Island East Location in Mbita District of Homabay County. The appellant also faced an alternative charge of committing an indecent act with an adult contrary to **section 11(A)** of the *Sexual Offences Act* grounded on the same facts as the principal charge.

2. After a trial where the prosecution called five witnesses to prove its case, the appellant was convicted on the principal charge of rape and sentenced to fifteen years imprisonment. He now appeals against both the conviction and the sentence.

3. The complainant, PW1, testified that on the night of 5th November 2012 she heard someone knocking her door at 2.30 a.m. She saw the appellant and told him she was sick but he insisted on having sexual intercourse with her. She stated that she feared he would attack her. After having intercourse with her, he continued to sleep in the house until the next morning when he was found by her brother-in law next morning. He was arrested and taken to Mbita Police Station. She was taken to Sena Health Centre and thereafter to Mbita Hospital where she was issued with a P3 form. She testified that she usually saw him.

4. PW 2, a houseboy employed to take care of the homestead, testified that PW 1 came home that night, cooked her food and went to sleep. PW 2 went to PW 1's house in the morning where he heard a man talking. He was surprised and called on PW 1 to open the door. PW 1 opened the door and asked PW 2 why he had not responded to her cry that she was being raped. He found the appellant sleeping on the sofa. PW 1 showed PW 2 a hole in the mud wall which he had used to gain entrance. The appellant attempted to run away but he was caught and arrested.

5. PW 3, a brother to PW 1 and a fisherman, testified that on 5th November 2012, at about 1.00 am, he heard screams from his sister house but he assumed she was just making noise as she was fond of doing so as she was mentally challenged. The next morning PW 2 called him to help catch the appellant who was running away. He stated that together with PW 2 and members of the public they arrested the appellant. PW 1 asked him why he did not respond to her screams. He also confirmed that he saw a hole in the mud wall which the appellant had used to gain entry into the house.

6. PW 4, a police officer at Mbita Police Station, stated that on 5th November 2012 at 9.00 am while he was at Sena Patrol Base, the appellant was frog marched to the base by members of the public. They also came with the complainant. The complainant and PW 2 narrated to him what happened whereupon he was arrested. He confirmed that PW 1 was taken to Sena Health Centre and thereafter Mbita District Hospital. He also visited the complainant's home where he was shown the hole in the wall. He produced of the photographs house, the sofa set which he produced in evidence. He also produced a psychiatrist report which showed that the PW 1 has a mental condition.

7. PW 5, a medical doctor at Mbita Hospital, testified that he examined PW 1 after 16 days. He examined the treatment notes from Sena Health Center. His own examination did not reveal any visible injuries, there was no discharge or blood from her body organs. He could not ascertain whether there was penetration in view of the lapse of time. He prepared the P3 form which he produced together with treatment notes. He testified that the specimen collected at Sena Health Centre was of no value as it was not examined on time.

8. When put on his defence, the appellant gave a sworn statement in which he denied the charges. He stated that he did not know the complainant and that on the material day he was fishing at night and when he went to his house in the morning, he was arrested by two men. He states that he had differed with the chairman of the Beach Management Unit who is the brother of the complainant hence the charges were bone of a grudge.

9. After analyzing the evidence, the learned magistrate concluded that the appellant had committed the felonious act and that his defence was lacking in merit. He proceeded to convict the appellant.

10. The appellant contests the conviction on several grounds which may be summarized as follows; that there was no eye witness who came or was called to testify, that there was no credible evidence upon which the conviction could be based and that the charges against him were based on a grudge and on false allegations. The appellant supplemented his ground of appeal with written submissions. The State supports the appeal on the basis that the evidence established the offence for which the appellant was charged.

11. As this is a first appeal, the court is called upon to conduct an independent evaluation of the evidence and reach its own conclusions having regard to the fact that it neither saw nor heard the witnesses testify. (See **Okeno v Republic [1973] EA**).

12. Under **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

13. In the present case, the identity of the appellant is not in doubt. Although he arrived in PW 1's house at 2.30 am, he was in the house until the next morning. He was found by PW 2 and PW 3 and taken to the Police Patrol Base when he tried to run away. The chain of events from the time he was seen at PW

1's house to the time he was arrested remained unbroken. PW 1 also testified that she had seen the appellant previously. It is in light of this evidence that the appellant's defence, that he was in his house when two men came and arrested him, was properly dismissed as was inconsistent with the evidence of PW 1, PW 2 and PW 3.

14. The appellant's testimony suggested that the BMU Chairman who was PW1's brother had a grudge against him yet he did not put such a question to PW 3, a fisherman who would have had such knowledge.

15. It was the duty of the prosecution to prove the act of intercourse and that fact of lack of consent beyond reasonable doubt. The evidence of PW 1, PW 2 and PW 3 put the appellant in PW 1's house. The testimony of PW 1 that she was forced to sleep with the appellant was clear and consistent. She reported the sexual act to PW 2 and PW 3 the next morning confirms the consistency of her testimony.

16. As to whether the act of intercourse was without PW1's consent, the learned magistrate found that PW1's consented to the sexual act because of fear and the fact that her vagina had lacerations proved forcible intercourse. In his written submissions, the appellant contends the fact the examination by the doctor did not reveal any penetration and that the treatment notes could not be relied upon as the maker thereof was not called. I agree with the appellant's submission that PW 4 could not produce the treatment notes as no basis was laid to produce them. In the circumstances, the only medical evidence was that of PW 5 who examined PW 1 and did not see any evidence of forcible sexual intercourse. As regards this point, I would quote the case of ***Kassim Ali v Republic Criminal App No. 84 of 2005 (Mombasa)*** where the Court of Appeal held that, "[T]he absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence."

17. The medical evidence could not prove whether or not the intercourse was without the consent of PW 1. What then is the evidence of lack of consent? PW 1 testified that she was forced to have sex out of fear. Consent given in fear is not consent and the learned magistrate was right to conclude that there was no consent in this respect. PW 2 heard her scream which tends to show that the intercourse was without consent. The evidence that she informed PW 2 and PW 3 of the rape in the morning is consistent with her testimony of being raped by the appellant. Another piece of evidence that was relied upon to show that the intercourse was non-consensual is evidence of the alleged entry into the complainant's house. PW 1, PW 2, PW 3 and PW 4 all testified that there was a hole dug out in PW 1's wall which the appellant used to gain entry. PW 4 produced the photograph of the wall.

18. Upon evaluation of evidence, I find that the appellant had sexual intercourse with PW 1 without her consent.

19. According to the record, before taking the evidence of PW 1, the learned magistrate observed that, "*The witness appears mentally challenged, she will give unsworn evidence.*" PW 1 gave unsworn evidence. This approach by the learned magistrate was contrary to the law and procedure. Under **section 151** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, "*every witness in a criminal trial shall be examined on oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.*" **Section 125** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provides;

1. All persons shall be competent to testify unless the court considers that they are prevented from undertaking the questions put to them, or from giving rational answers to those questions, by tender of extreme old age, disease (whether of body or mind) or any similar cause.

2. A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers.

20. The effect of the provisions I have cited is that every adult is a competent unless, by reason of infirmity, he or she is prevented from understanding the questions put to them and giving rational

answers. There was no evidence that PW 1 was mentally challenged to the extent that she could not understand the proceedings. The investigating officer produced a report showing that PW 1 suffered from schizophrenia. The prosecution did not lay any basis for the production of the report. Its relevance to the proceedings facing the accused was not also established. Since the maker thereof was not called, it was inadmissible. In the event the issue competence of the complainant to testify was raised, it was the duty of the learned magistrate to conduct a *voire dire* to determine whether or not she could the question and give rational answers. As it turned out the evidence given by PW 1 was clear and consistent. There is no indication that she was suffering from mental incapacity at the material time. Notwithstanding, the failure of the learned magistrate to swear the PW 1, I do not find any prejudice occasioned to the appellant. He was given the opportunity to cross examine PW 1 and he indeed examined her.

21. Having evaluated all the evidence, I have no doubt that the conviction was sound. Under **section 3(3)** of the ***Sexual Offences Act, 2006***, the minimum sentence for rape is 10 years imprisonment and a maximum sentence of life imprisonment. The appellant was sentenced to 15 years imprisonment. In light of the facts, I do not find the sentence harsh or excessive.

22. The conviction and sentence are affirmed and the appeal dismissed.

DATED and DELIVERED at HOMABAY this 26th day of June 2014.

D.S. MAJANJA

JUDGE

Appellant in person

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