



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CRIMINAL APPEAL NO. 144 OF 2013

R O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*[From original conviction and sentence in Principal Magistrate's Court
at Ukwala Criminal Case No. 192 of 2011 Before Hon. E.K. Mwaita]*

J U D G M E N T

The appellant was charged with the following counts:

Count I: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: On the 24th day of April 2011 at [particulars withheld] Sub location in Ugunja District within Siaya County, Robbed D O M of 9 kilograms of maize flour and one basket all valued at Kshs. 500/= and at or immediately before or immediately after the time of such robbery, maimed the said D O M.

Count II: Attempted Rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006.

Particulars: On the 24th day of April 2011 at [particulars withheld] Sub location in Ugunja District within Siaya County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of D O M without her consent.

Alt Charge: Committing an Indecent Act with an Adult contrary to section 11 (a) of the Sexual Offences Act No. 3 of 2006.

Particulars: On the 24th day of April 2011 at [particulars withheld] Sub location in Ugunja District within Siaya County, intentionally touched the vagina of D O M with his penis against her will.

To establish their case the prosecution called 4 witnesses. PW1 the complainant told the court that she was woken up at around 3 a.m by someone who had entered the house. When she attempted to raise alarm the intruder threatened her and infact went ahead to inflict injury on her eye and the head. The witness further told the court that she realised that the intruder was the appellant who was the son of her in-law. She recognised him through his voice. She however was unable to physically see him.

After he left with several assorted items as enumerated in the charge sheet. PW1 screamed and people came to her rescue. She also told the court that the appellant attempted to rape her but he was unsuccessful. The complainant was then taken to hospital for treatment where she was admitted for a while. Later she went to Sigomere police where she reported and P3 form was given to her.

PW2 Noel Sandwiri Murega, assisted in taking the complainant to hospital and taking her to the police station thereafter.

PW3 P.C. Ayub Manyasi, on the other hand received information from one Michael Otieno concerning the incident. Thereafter, when the complainant was discharged she went to the said PW3 who gave her the P3 form.

The P3 form was produced by **PW4 Howard Okeyo**, who confirmed the injuries suffered by the complainant. She had 3 facial cut wounds, on the forehead, between the eyelids and the right side of the face among other injuries. He classified the injuries as maim. He did not find any evidence of sexual assault.

When put on his defence the appellant gave unsworn evidence. He denied the charge and simply explained how he was arrested.

We have heard the submissions of both the appellant and the respondent. This being the first appeal this court is enjoined to reevaluate the evidence afresh with a view of arriving at a fresh independent finding as was enunciated in **Okeno -VS- Republic [1972] EA 32**. The question that we need to determine is whether the complainant's evidence that she recognised the assailant by his voice was sufficient enough to have persuaded the court to convict him.

We are not in doubt that the complainant is on record in saying that she did not see the assailant, although she saw a torch. The complainant told the court that:

“I was alone. He entered and came inside. I was shocked to see a torch. I woke up and remarked somebody wants to kill me. He told me to keep quiet. He then cut me on the face, the hand, and the finger (shows it to court). He then put me on the bed and he said that he wanted to rape me. I am 85 years. I heard his voice. He is Richard. He is my in-laws child and we live together as neighbours”.

She then went on to affirm that she was certain that it was the voice of Richard. Even on cross examination the complainant's evidence was unmistakable. On re re examination she said:

“He is the son of my in-law. He is very close to me. I knew him and his voice was familiar. He was alone”.

Despite all the above evidence by the complainant the appellant did not raise any defence to counteract the fact that they are related to the complainant or that they are neighbours. There is nothing to show that what the complainant said was false. If truly they are relatives and that close, we do not find any difficulty in concluding that it was not impossible for the complainant to have recognised the appellant's voice. Further we are equally cognisant of the fact that the whole incident although not indicated took sufficient time to warrant PW1 to have recognised the appellant's voice.

We have perused the appellant's petition of appeal as well as his written submission. We find that indeed the appellant was well recognised through his name by the complainant. We do not equally agree that the trial court failed to comply with section 324 and 329 of the Criminal Procedure Code. Regarding the sentence, having been found that the appellant violently robbed the complainant the only sentence was death and nothing else. This cannot be argued to be manifestly excessive as it is the only available punishment.

We are mindful of the authority of **Anjoni & Others -VS- Republic [1976 -80] 1 KLR**. This was a case

of recognition and not identification which the court has always found it to be more satisfactory. The appellant did not dispute the fact that the complainant was able to recognise him via his voice.

Equally, and as earlier observed the appellant did not dispute the alleged relationship between him and the complainant.

For the foregoing reasons we think that this appeal should fail. The same is therefore dismissed.

Dated, signed and delivered at Kisumu this 25th day of November, 2014.

H.K. CHEMITEI

E.N. MAINA

JUDGE

JUDGE