**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO.185 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KENNEDY OUMA OCHIENG.....ACCUSED**

**J U D G M E N T**

1. This is a judgment against conviction and sentence of the appellant by the lower Court at Maseno (J.M Nangea, Principal Magistrate) on 21/1/2011. The appeal was opposed by the prosecution when it came up for hearing before me on 15/10/2013. The appellant is **KENNEDY OUMA OCHIENG.**

2. In the lower court, the appellant had been charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act No.3 of 2006. The charge was to the effect that on 19/4/2010 at around 8p.m, at [particulars withheld], Kisumu West District, Nyanza Province, the appellant intentionally and unlawfully penetrated into the genital organ of M A O with his penis without her consent.

3. The trial court took evidence from 5 witnesses, who included the complainant (P.W.1), and thereafter took the appellant's defence. What followed was a judgment resulting in conviction and sentencing of the appellant to 10 years in prison.

4. It is against that conviction and sentence that this appeal has been brought. Various grounds of appeal have been advanced.

In sum, the appellant faulted the trial magistrate for not appreciating the intensity of moonlight used by PW4 to identify him, failing to find that the medical evidence availed was not conclusive of rape, failing to appreciate the necessity of identification parade, and failing to accept the appellant's defence.

5. Further supplementary grounds were filed later. The trial magistrate was further faulted for not finding the charge defective because of not naming the complainant's genital organ and for not stating the names of witnesses.

6. It was also wrong, according to appellant, for trial magistrate to rely on P.W.3's evidence (this is the medical evidence) bearing in mind that P.W3 didn't treat the complainant. The trial magistrate was also said to have relied on the evidence of a single witness without warning himself as required by law.

7. The appellant continued that the trial court was wrong in finding that P.W.3 saw him while that witness allegedly admitted in cross-examination that he didn't know the person he saw leaving the

compound.

8. Issue was taken also with the allegations by P.W.5 that the complainant's clothes were torn while such evidence was not forthcoming from other witnesses.

9. And it was alleged that the complainant could possibly have had sex with her husband and that the trial court took several items of uncorroborated utterances and proceeding to mistake their frequency for corroboration. In particular, it was stated that P.w.4's evidence should have been corroborated by the evidence of her grandchildren said to have been with her during the incident.

10. And the appellant said he made sworn evidence which the prosecution didn't challenge, meaning that it was accepted. According to the appellant, his defence of alibi was truthful and should have been accepted by the trial **COURT.**

11. When the matter came for hearing on 15/10/13, the prosecution averred that the appellant was properly identified, was not a stranger, and was arrested almost immediately and identified by the complainant.

12. The prosecution continued that the medical evidence availed was enough to show rape and there was also no need for identification parade as the appellant was known.

13. And contrary to assertions by the appellant that his defence was not considered, the prosecution said that the defence was considered and rejected and the record is clear on that.

14. The appellant filed submissions. In essence, the submissions are an attempted repudiation of evidence touching on medical proof and identification. The appellant stated that the medical proof availed was not conclusive of rape and there was possibility that the complainant could have had sexual contact with her husband.

15. On identification, the appellant pointed out that he was Ken to the complainant but he was Ouma to P.W.4. Also added is that the appellant was not the only **KEN** or **OUMA** around.

16. Other issues submitted on and also stated earlier in the grounds of appeal concerned the need for identification parade, the intensity of the moonlight used to identity the appellant, and the possibility that a person other than the appellant could have raped the complainant.

17. The court was urged to find that the appellant was beaten, arrested, and framed-up so as not to act or comment on P.W.2's acts of interference with a piece of land belonging to appellant's family.

18. I have considered the material laid before me for purposes of the appeal. This is a first appeal and it is necessary to look at the evidence a fresh. As I do so, I take into account that id didn't hear, see or observe the witnesses. It is the trial **COURT** that had the benefit of doing so.

19. A look at the evidence of PW1 complainant shows, inter alia, that somebody calling himself KEN came to her home asking for her husband – P.w.2 - on 19/4/2010 at 8p.m.

It was raining and P.w.1 was alone in the house. Shortly, P.W.1 went out of the house to fetch rain water and the person attacked her from behind. He attempted to strangle her while dragging her back to the house. A struggle ensued and at some point P.W.1 managed to get out of the house. The assailant was however undeterred and he followed. He got hold of her. He strangled her, removed her pant, and wrestled her to the ground. P.W.1 was overwhelmed and the assailant raped her thrice. Her attempts at screaming were suppressed by struggling.

20. Rape over, the attacker ran away and PW1 immediately rushed to her mother in law screaming. A short talk with her mother-in-law, which included a description of the attackers wear and appearance, led the mother-in-law to comment that the attacker was Ouma, who had been in her

house only a moment earlier.

21. The mother-in-law to P.W.1 is P.W.4 - **M A.** She said the appellant had been to her house at the time enquiring about the whereabouts of her son - O (PW2). It was raining. The appellant left. It stopped raining about 30 minutes later and on opening her house door, she saw the appellant in her compound running away. She saw all this about 23 or 25 metres away in a moon-lit night with clear sky. A while later P.W.1 came saying she had been raped. Her clothes, a skirt and a blouse, were wet and muddy.

22. While daughter (PW1) and mother-in-law (PW4) were talking, PW2, who is husband and son to both respectively, arrived home.

He enquired what was happening. Everything was explained and he, assisted by others, went looking for the appellant. They arrested the appellant that same night.

23. P.W.3, a clinical officer at Chulaimbo sub district hospital examined the complainant, who went to the hospital complaining of having been raped. He found that the complainant had scratch marks on the neck and had bruised left elbow joints. The injuries were about 3 days old. The patients labia majora and minora were intact but urinalysis revealed epithelial cells aligning the vaginal walls. The cells were not conclusive of rape perse but the fact that they were numerous suggested there might have been rape.

24. P.W.5, who is the investigating officer, came into the picture after the event. He received the appellant from those who had arrested him and also received various exhibits which included the complainants torn blouse, skirt, pant, biker and a pair of bras.

25. The appellant gave his defence on 1/10/2010. His defence is essentially an alibi. He talked of visiting his late mother's land where he found some youth – including P.W.2 cutting trees. He asked the youth why they were doing that and P.W.2 threatened to kill him.

The appellant was later attacked by some youth who included PW2 while going to report the matter to the area village elder. Darkness had by then set in and a vehicle came which took him to police station at Maseno. The appellant said he came to know of rape allegations while at Maseno Police Station.

26. The judgment of the lower Court found as a fact that the complainant was raped and that it is the appellant who raped her. The judgment does not fault identification or the medical evidence availed. It noted that the defence of the appellant failed to displace prosecution's evidence.
27. The appellant observed that the intensity of the moonlight was not stated. From evidence, it is necessary to observe that the appellant was not a stranger to P.W.4. He had been to her house only a short while earlier. Whatever the state of the moonlight, I think P.W.4 was not seeing him for the first time. She had seen the appellant only moments earlier and was seeing him again running away only shortly afterwards.

It seems to me therefore that there is no possibility of error here. The time between the seeing of the appellant by P.W.4 in her house and the time of seeing him running away was too short an interval and P.W.4's accuracy cannot be doubled. There had been an earlier interaction.

28. But that was not all there was about identification. P.W.1 described the appellant to P.W.4. P.W.4 realized the appellant was the same person who had been to her house only a short while earlier. She called him Ouma. P.W.1 had informed her that her attacker had called himself **KEN**. But when appellant was arrested, **KEN** and **OUMA** turned out to be one and the same person. P.W.1 identified him. P.W.4 identified him.
29. It is also necessary to consider other relevant evidence in order to rule out error in identification.

From P.w.1's evidence, it is clear that she struggled with her attacker before she was overpowered. It is plain therefore that she faced her enemy. She had also seen her attacker when he came asking for her

husband. She had talked with him. When she was overpowered she was laid on her back, face up. Her rapist then must have come on her facing down.

In short the two were also facing each other when rape was going on. And rape went on not once but thrice. When all this is considered, identification clearly comes not only from P.W.4 but also from PW1. And considering the circumstances including the distance of P.W.1 and P.W.4 from the appellant during the incident, I am unable to believe that there was an error.

30. The medical evidence was faulted on the ground that the epithelial cells seen on the vaginal lining of the complainant were not conclusive proof of rape. It should be clear that nobody alleged they were. The appellant created this himself. In law, the conclusive proof of rape lies in successful penetration of the victims genital organ and lack of consent from such victim. When these two are proved, it would still be rape notwithstanding the absence of epithelial cells.

31. The appellant thought the identification parade was necessary. The Court agrees with the prosecution that it was not necessary. The appellant was seen by P.w.1 and P.W.4 immediately after arrest.

Identification is necessary where the witnesses have not seen the suspect after arrest and where such suspect is a complete stranger to the witnesses. What need therefore was there to identify the appellant at an identification parade while he was not a stranger to P.w.4 and had been seen by both P.W.4 and P.W.1 after arrest?

32. The appellant said the charge was defective for not naming the complainants genital organ. This is not a serious point. How many genital organs does a human being have? More specifically, how many genital organs does the complainant have? Every human being, unless in abnormal situations, has only one genital organ. It is therefore readily understood when one talks of a female genital organ or a male genital organ. In any event, it is very clear in the evidence given as to what genital organ the appellant penetrated.
33. The trial court was said to have relied on the evidence of P.W.3 – the clinical officer to convict the appellant. This is a lie. The court relied on the evidence availed as a whole and evaluated it against the defence of the appellant. The evidence of P.W.3 was not the sole reason why the appellant was convicted. And the defence of the appellant was considered and found wanting. The judgment is clear that the defence could not displace the prosecution evidence. I have myself considered the evidence of the prosecution and the defence that was given by the appellant. I have no reason to fault the trial court for its finding.

34. It is also clear that the appellant thinks that the trial court relied on evidence of single witness to convict; that P.W.5 is the only one who described the complainant's clothes as torn; that P.W.1 could have had sex with her husband; that his sworn defence was not questioned by the prosecution; and that P.W.1 needed to be examined within 6 hours to show sexual contact but was examined outside this period, meaning that the appellant could not have been possibly the one who did it.
35. It is clear however that the trial court didn't rely on evidence of single witness. There were 5 witness who testified and their evidence was considered. And torn clothes are not evidence of rape. There would still be rape even if there were no torn clothes. What is required is evidence showing penetration of the victim and lack of consent. The fact that torn clothes are not mentioned by anybody else at all does not vitiate other credible evidence pointing to rape.

36. And the complainant could have had sex with her husband, the appellant alleged. This is a far-fetched allegation. Could the husband also have scratched the complainant's neck and bruised her elbow joint? Not at all. Indeed, there is other evidence that the appellant raped the complainant. That evidence was availed, evaluated and given its place in the trial court's judgment.

The court is also not persuaded that the complainant needed to be examined medically within 6 hours. If that were to be the case, rapist would have a field day. Very few cases would be proved. Luckily for rape

victims cases abound where examination has taken place much later. The law does not insist on such period. It insists on credible evidence to prove the offence beyond reasonable doubt. Such evidence was found by the trial court to have been availed in this case, and was used.

37. Which way then after all this analysis? I have evaluated the evidence availed to the trial court including the defence. I have looked at the appellants grounds of appeal and endeavoured to address the concerns raised. I have keenly also looked at the appellant's submissions. The judgment of the lower court is also considered.

38. In my view, there is no merit at all in any of the grounds of appeal raised. The judgment of the lower court is sound. Nothing displaces the fact that the appellant raped the complainant at or around 8.00pm on 19/4/2010 at [particulars withheld], Kisumu West District, Nyanza Province.
39. Such rape was well demonstrated beyond reasonable doubt before the trial court. The appellant's appeal both on conviction and sentence is found to have no merit and is hereby dismissed.

**A.K. KANIARU – JUDGE**

**28/10/2013**

**28/10/2013**

A.K. Kaniaru – Judge

Diang'a George – C/C

Appellant – Present

Interpretation: English/Kiswahili

Sang for Kiprop for Prosecution

**COURT**: Judgment read and delivered in open COURT. Right of Appeal – 14 days.

**A.K. KANIARU – JUDGE**

**28/10/2013**

**SANG**: I apply for certified copy of judgment.

**COURT:** Certified copy to be availed as requested.

**A.K. KANIARU – JUDGE**

**28/10/2013**