



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

***Criminal Appeal 37 of 2009***

***(From Original Conviction and Sentence in Criminal Case No.995 of 2008 of the Principal Magistrate's Court at Kwale:  
Ogembo – D.O. - S.R.M.)***

**HAMISI HEMEDI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein **HAMISI HEMEDI** has appealed against his conviction and sentence in the lower court on a charge of **RAPE CONTRARY TO SECTION 3(3) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that

***“On the 15<sup>th</sup> day of June 2008 at about 11.00 p.m. at M V, N location of Msambweni District within Coast Province, unlawfully and intentionally committed an act which caused his penis to penetrate into M H K vagina without her consent”***

The Appellant was arraigned before the lower court on 18<sup>th</sup> July 2008 and pleaded ‘**not guilty**’ to the charge. His trial commenced on 1<sup>st</sup> September 2008 and the prosecution led by **INSPECTOR GITONGA**, called a total of three (3) witnesses in support of their case. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 5<sup>th</sup> March 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the lesser offence of Attempted rape and sentenced him to serve ten (10) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

Being a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court and to draw my own conclusions on the same – **OKENO –VS- REPUBLIC 1972 EALR 32**.

The complainant **M H K**, told the court that on the night of 15<sup>th</sup> June 2008 she was asleep in her house when at 11.00 p.m. a man climbed over the wall and attacked her and raped her. **PW1** told the court that her attacker was a man she knew well and was able to recognize him by the light of the candle which was burning in her room. She also states that she was able to recognize his voice when he spoke saying that he intended to have sexual intercourse with her at any

cost. The witness identifies the Appellant as the man who raped her. At page 3 line 20 **PW1** states

***“The one who entered my house and raped is you. Even to the police station, I said it was you. I saw you well even as you dropped from the roof. .... I know you well and there is no way I can mistake you for another man. I even know you and your mother and grand-mother”.***

It is clear from this that the complainant was very sure of who raped her. She stated that the Appellant was well known to her including his mother and grandmother. Evidence of recognition has been held to be far more reliable than mere visual identification alone. In the case of **ANJONONI –VS- REPUBLIC [1980] KLR 59** the Court of Appeal held that

***“recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”***

Aside from that the complainant did tell police when she reported the incident that she knew the man who had raped her. Though it was dark 11.00 p.m. the complainant was able to see as she had a candle burning in her room. The complainant was fully awake and alert as shown by the fact that she had even picked up a panga to fight off her assailant, but the Appellant overpowered her.

The Appellant in cross-examination of **PW1** raised the issue of mistaken identity claiming that **PW1** had initially named one ‘**Saidi**’ as her attacker. **PW1** vehemently denies this and states at page 3 line 19

***“I did not mention the name of S M K - Sis a small boy”***

**PW3 PC ALEX MUTWIRI**, the arresting officer also denies that there was any mention of **PW1** of the name Saidi. This is clearly an attempt by the Appellant to shift blame to someone else. From the evidence on record I am satisfied that there has been a clear positive and reliable identification of the Appellant based on recognition.

The complainant claims that the Appellant threw her to the floor and proceeded to rape her for about one hour. **PW2 ESTHER PENDO KARISA**, a senior clinical officer at Msambweni District Hospital produces the complainant’s duly filled P3 form **Pexb1**. The injuries found confirm that there was use of force. The sex was not consensual. The complainant told court that when she heard a man climb over her roof she picked up panga to defend herself. Instead Appellant snatched the panga and cut her on the leg. The P3 form indicates that she had a cut wound on the left thigh. She had bruises on her private parts again emphasizing the use of force. However no evidence of penetration was noted. This is not surprising. Being an adult woman the complainant may have been sexually active thus no evidence of penetration could be noted. Be that as it may the learned trial magistrate did reduce the charge to that of Attempted Rape. This was in compliance with S. 184 of the second schedule Transitional Provisions of the Sexual Offences Act 2006 which provides

***“184 Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the Sexual Offences Act, he may be convicted of that offence although he was not charged with it”.***

There can be no other reason why the Appellant an adult man would climb into a woman's room, naked, strip her naked and throw her to the ground and inflict bruises on her private parts, other than that he did or at the very least attempted to rape her. I am satisfied that the charge of Attempted Rape is sufficiently proven. The learned trial magistrate did give due consideration to the Appellant's defence which he dismissed page J3 line 33. I find this conviction was sound based on the law and facts of the case and I do confirm the same. The ten (10) year sentence imposed is also lawful under S. 4 of the Sexual Offences Act and I do uphold it. This appeal fails in its entirety. The conviction and sentence of the lower court are confirmed.

**Dated and Delivered at Mombasa this 9<sup>th</sup> day of September 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

**M. ODERO**

**JUDGE**

**9.9.2010**