**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT BUNGOMA Criminal Appeal 66 of 2008**

**PETER MUKABA ONDU.....APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant Peter Mukaba Ondu was convicted of the offence of rape contrary to section 3 of the Sexual Offences Act and sentenced to serve fifteen (15) years imprisonment. He appeals against conviction and sentence relying on three grounds of appeal:

1. The learned trial magistrate erred in law and or fact when he failed to resolve the conflicting testimonies of the prosecution witnesses in favour of the accused.

2. The learned trial magistrate erred in convicting the appellant contrary to the evidence that the complainant was a woman friend of the Appellant.

3. The conviction and sentence was harsh in the circumstances.

Mrs. Chunge for the Appellant argued that the evidence of the prosecution was contradictory. PW1 and the accused had an intimate relationship and had a child together. PW3 the mother of the complainant (PW1) admitted that her daughter had a child but she did not know who the father was. The evidence of PW1 that she was going to visit her friend when accused accosted her and pulled her into his house was not true. She did not even scream for help. The doctor said the complainant had no bruises. The defence contended that the court convicted the Appellant without any evidence of rape.

The Senior Principal State Counsel, Mr. Onderi, opposed the appeal. He submitted that it is not disputed that there was an intimate relationship between the Appellant and the complainant. But on that day the accused forced the complainant into having carnal knowledge with him without her consent. PW1's evidence that the Appellant confiscated her clothes forcing her to walk away naked was evidence of rape. PW5 a neighbour corroborated that evidence when she said that she saw the complainant naked and gave her clothes.

PW1 testified that she was on her way to a friend's house when the Appellant called her from the gate of his house. She went there and she was pulled by the appellant and dragged to his house. The door was shut. She was taken to the bedroom. The brother of the Appellant was sitting in the sitting room. She struggled to no avail. Her clothes were removed and the Appellant had sexual intercourse with her. Her clothes were locked by the appellant and she went away naked. A neighbour (PW5) helped her with clothes which she wore and went home.

PW2 the Clinical Officer examined the complainant two days after the incident. He found no physical injuries on her genitalia. Her hymen was broken and she had no discharge. She gave a history of rape. Treatment notes from N Health Centre dated 03/01/2008 showed PW1 had discharge consisting of pus cells, epithelial cells and a few sperm cells. She had been treated for the infection with

antibiotics. He produced the P.3 form.

PW3 the mother of PW1 said her daughter came home at 8.30 p.m on the material day escorted by one Roselyne. Roselyne explained that PW1 had gone to her place naked and she gave her clothes to wear. PW1 told her parents that the Appellant had raped her and refused with her clothes.

PW4 recorded the statement of the complainant and issued her with a P.3 form. She received PW1's clothes which were detained in the house of the Appellant namely a skirt, petticoat, underwear and a blouse which she produced in evidence. She re-arrested the accused from administration police officer and charged him with the offence.

PW5 testified that the complainant went to her house around 9.00 p.m naked. She told her that a neighbour called Peter undressed her and remained with her clothes. PW5 escorted PW1 to her parents' home.

PW6 is the administration police officer who recovered the clothes of the complainant from the house of the Appellant and handed it over to PW4.

Of great significance in this appeal is whether the appellant intentionally and unlawfully committed a sexual act on the complainant which caused penetration to her genitalia. PW1 said she was going to visit her friend called Kadogo. The Appellant was at the gate of his parent's home when she was passing. He called her as she passed on the road and pulled her to the house. The brother of Appellant one Protus was in the sitting room. She was pulled straight to the bedroom. The bedroom had no door and she was undressed and raped. PW1 did not say that she screamed for help at any one time from the gate to the bedroom. Lack of consent in an offence of this nature would be characterized by resistance and call for help. It is not disputed that PW1 did not call for help. If she did, she was at a public road where it is likely that there are homes in the neighbourhood. The Clinical Officer who examined her found no bruises or any physical injury which would be proof of resistance. It can therefore be concluded that PW1 went to the house of the Appellant voluntarily at the first instance on 2nd January 2008. It also sounds unbelievable that the Appellant could pull a girl by force and drag her through the sitting room where his brother was seated and further to the bedroom to commit rape. PW1 said that this was the house of the parents of the Appellant where he lived with his parents. It appears that the parents were not at home on the material day. But the choice of rape scene by Appellant also sounds out of character with the nature of the crime. Most of the sexual offences are committed in secret places as opposed to public places or in houses occupied by other people at the time of the crime.

PW1 went to that house at 4.00 p.m. She said she could not leave after the incident because the accused had hidden her clothes. She added that the Appellant took the clothes to his brother's bedroom. PW1 went on to say that she waited for darkness in order to walk out because she was naked. At that time the accused had left her in the house. I would pose a question here: Why did the complainant not pick a bed sheet or a blanket to cover her nakedness so that she could go to her home or to seek for help. The accused was not there to prevent her from doing so. She did not say that anyone was left guarding her.

Darkness normally sets in around 7.00 p.m in the evening. PW1 did not explain what she was doing in the house from 4.30 p.m up to 8.30 p.m. She said that she was waiting for darkness to set in.

On cross-examination, the complainant admitted that she was a woman friend to the Appellant and that she had sex with him before the incident. Her explanation was that, the relationship was no longer in existence at the time of the incident. If this was true, it would not make sense to be called by the Appellant from the road and agree to go to his house. PW1 denied she had a child fathered by the Appellant. Her mother PW3 admitted her daughter has a son but she does not know the father. From this evidence, it may be rightly concluded that PW1's evidence is wanting of truth. The evidence of her mother PW3 brings out hostility of the parents towards the whole saga. She said in her evidence: *"F father became very hostile."* This was before complainant explained her demise to her parents. It was still PW5 explaining to the parents how she had helped their daughter by giving her clothes. PW3 had already slapped her daughter before any explanation was given. She said: "*I gave F one slap"* If this was a genuine case of rape, one would have expected that PW1 would be comforted by her parents upon learning of her fate. As she explained, her mother would have listened to her. Instead, both parents reacted with hostility. This reveals a history of habitual unbecoming conduct of their daughter which they loathed. This kind of hostility which complainant may have predicted explains the possibility of PW1 making up a story including walking out of the accused's house naked in order to get sympathy from a neighbour with a view of neutralizing the wrath of her parents.

The medical evidence was not conclusive of the offence of rape. PW4 said the hymen was

broken. This girl already had a child and a broken hymen does not add value to this case. She had no discharge or any spermatozoa. The Clinical Officer who had examined her only a day before found a host of micro-organisms. There was pus cells which was evidence of an infection. There was spermatozoa and epithelial cells. She had taken medication for only one day and the infection could not have cleared. It is surprising that PW2 found no discharge the following day. The Appellant was not examined to find out whether he had any infection. In cross-examination, PW2 told the Appellant on cross-examination:

*"I made a conclusion that she was raped. I could not tell whether you raped her or she was your friend."*

The court proceeded to convict the Appellant with the contradictory and inadequate medical evidence. I agree with the contention of the defence that PW2 relied on the history given in order to conclude that PW1 was raped. The findings of the Clinical Officer from N Health Centre leaves a lot to be desired.

Apart from the complainant's evidence which is not credible, the trial court relied on the circumstantial evidence of PW3, PW5 and PW6. All this circumstantial evidence was based on the incredible story of the complainant. The court in its judgment stated:

*"I find the circumstantial evidence against the accused person overwhelming. I reject his defence to be a mere denial and an afterthought."*

It is my finding that the lower court which honestly believed the complainant did not analyze the issue of consent from the complainant's evidence. This is in regard of how she went to the house of the accused, the amount of time she spent there before *"escaping"* and the circumstances in which the offence was allegedly committed. Had the trial court done so, it would have arrived at a different finding. The medical evidence was neither consistent nor reliable.

I find that this appeal is merited and must succeed. I therefore quash the conviction and set aside the sentence of imprisonment. The Appellant is hereby set at liberty unless otherwise lawfully held.

**F. N. MUCHEMI**
**JUDGE**

*Dated, Delivered and Signed at Bungoma*
*This 25th day of November, 2009 in the presence of the appellant and Mr. Onderi State counsel.*