



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 39 OF 2017

PETER ODONGO NAMULOBA....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.99 of 2016 of the Chief Magistrate's Court at Busia by Hon. M.A. Nanzushi– Senior Resident Magistrate)

JUDGMENT

1. **Peter Odongo Namuloba**, the appellant herein, was convicted for the offence of rape contrary to section 3(1) (a) (c) (sic) as read with section 3(3) of Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on the 12th June 2015 in Bunyala East Location of **Busia** County, intentionally and unlawfully caused his penis to penetrate the anus of **COA** by use of threats.
3. The appellant was sentenced to serve ten years imprisonment. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised the following grounds of appeal:
 - a) That the trial magistrate erred in law and in fact by relying on the evidence of the complainant who was mentally unstable.
 - b) That the trial magistrate erred in law and in fact by basing the conviction on conflicting evidence.
 - c) That the trial magistrate erred in law and in fact by relying on insufficient identification evidence.
 - d) That the trial magistrate erred in law and in fact by relying on inconclusive medical evidence that was produced by unqualified person.
 - e) That the trial magistrate erred in law and in fact by relying on circumstantial evidence.
5. The state opposed the appeal through Ms. Ngari, learned counsel.
6. The facts of the prosecution case were briefly as follows:

When the complainant was going to fetch water, the appellant called him into an incomplete building. He threatened him with a knife and buggered him.
7. In his defence, the appellant denied the offence and pleaded an alibi.
8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
9. The first issue in a case like this where the complainant has been declared to be mentally challenged is to ascertain to what extent his evidence can be relied upon. In other words, the trial court must satisfy itself how far in the past can such a witness be able to remember the facts and give an accurate account of the same. When we talk of accuracy, we are not looking for the mathematical precision but a degree of acceptability and more so when taken together with other evidence on record. In the instant case, the learned trial magistrate called for a

medical report which was availed and according to the report, he was found to have a mild mental retardation. I would have to assume that the report was prepared by a registered nurse. This is because he signed his name as Isaac B. Khaunya (RN/M/PSY).

10. The report is short and I wish to reproduce it hereinbelow:

MENTAL STATUS ASSESMENT

Appearance: Fairly well kempt.

Behaviour: Calm

Rapport: Established

Speech: Coherent

Mood: appropriate

Orientation: Unable to tell day, date, month or year.

Able to approximate time.

Thought process: No flight of ideas.

Thought content: No delusions elicited

Abstract reasoning: Fairly good- will spend Shs.1000/ = wisely

Memory: Poor

Insight: Present

Impression: Mild mental

retardation.

Isaac B. Khaunya

(RN/M/PSY)

This report raises two issues; the capacity of the complainant to recollect and the qualifications of the maker.

11. Psychiatry is a specialized field where medical doctors undertake a post graduate training to be qualified as Psychiatrists. It would have been imperative for Isaac B. Khaunya to be called to testify so as the court could appreciate his qualifications before acting on his report. Unfortunately, he was not called.

12. Tied with the issue of qualifications, is the finding of memory being poor. How did the court assess how far this witness could be able to remember? The alleged offence was committed on 12th June 2015 but he did not testify until 21st June 2016. This was after one year and one month of the alleged offence. When analysing the evidence on record, I will have these two issues in mind.

13. A person with mental challenges has rights just like any other person before the court. The basis of this right is provided for at Article 50 (1) in the following terms:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The Convention on the Rights of Persons with Disabilities which was ratified by Kenya in 2008 and by dint of Article 2(6) of the Constitution, making it part of the law of Kenya, provides at Article 12:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

14. In his testimony, the complainant testified that he lived with his father, mother and sister called R. It however transpired in evidence that R A was a house help employed in the home of the complainant's parents. The first question one has to ask oneself is why the complainant would describe her as his sister.

15. When R A (PW2) testified, this is what she said:

He came and told me he had been molested. He explained what had happened. First trip he went fast and the second trip he delayed. That on his way back he found a man who called him and was taken to a house. The house was unfinished, then he told the complainant to remove the trouser or he would kill him. He then had sex in the anus, he then was ordered to go home. He came back. We were speaking in Kiswahili. He came back at 1130 a.m. We waited for his mother to come and I reported. The father came and took him to hospital. He went and sat under a tree. He said he knew the person well Peter Odongo Namuloba (sic). I know him he lives in Budalangi(sic)

This evidence ought to have raised a red flag on the issue of the identification of the perpetrator. If he was well known to the complainant and to R (PW2), why would the complainant refer to him as a man instead of referring to him with his name? Why would R (PW2) refer to him in the same manner while testifying in court? In her evidence she gave the name of the accused as an afterthought. This gives an impression that she may have been prompted to do so. My finding is buttressed by her own admission during cross examination that she had not known the accused before. Her contention that she used to see him does not mend her dented credibility. We are left wondering when she was able to place the name on the face. The Court of appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283** held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

16. Though the complainant testified that he used to see the accused, it is not clear when he mentioned his name. The evidence of KO (PW3) his father, raises this doubt. He testified that his wife reported to him that the complainant had been raped by someone. In the evidence of R (PW2), the mother of the complainant was first to arrive home before KO (PW3). Ordinarily, she ought to have been told who the perpetrator was. While reporting to her husband she would not have referred to him as someone but by name. In his entire evidence KO (PW3) did not mention the name of the accused.

17. There is no doubt that the complainant was sodomised. However, the identity of the perpetrator was not proved to the required standards. It was unsafe to convict on the evidence on record. I therefore set aside the sentence and quash the conviction. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 4th Day of March, 2019

KIARIE WAWERU KIARIE

JUDGE