



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO.3 OF 2018

SIMON OTIENO OBUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal from the judgment, conviction and sentence of Hon. J.S. Wesonga, SRM,
made on 15.02.2018, in Kendu Bay (Oyugis) Court Sexual Offences Act No.7 of 2017)**

JUDGMENT

[1] This appeal arises from the decision and judgment of the Senior Resident Magistrate at Oyugis in CMCC No.7 of 2017 in which the appellant, **SIMON OTIENO**, was convicted and sentenced to fifteen (15) years imprisonment for the offence of rape, contrary to **Section 3 (1)** read with **Section 3 (3)** of the **Sexual Offences Act No.3 of 2006**.

[2] It was alleged that on the 22nd June 2017, within the County of Homa Bay, the appellant intentionally and unlawfully caused the penetration of his penis

into the vagina of **LA** without her consent.

[3] There was an alternative count of indecent act with an adult, contrary to **Section 11 (A)** of the **Sexual Offences Act**, in that on the same day and place the appellant intentionally and unlawfully rubbed his penis onto the vagina of **LA**.

However, the conviction and sentence of the appellant was on the main count of rape.

[4] Being dissatisfied with the conviction and sentence, the appellant preferred five grounds of appeal contained in his petition of appeal filed herein on 1st March 2018.

Apart from grounds one and two which are irrelevant for the purposes of the appeal, the remaining three grounds are essentially a complaint that the appellant was convicted on evidence which was insufficient and unreliable in establishing the ingredients of the charge.

[5] At the hearing of the appeal, the appellant appeared in person and elected to fully rely on his written submissions in urging this court to **allow the appeal**.

The state/respondent opposed the appeal through the Learned Prosecution Counsel, **MR. OLUOCH (S/ADPP)**, who orally substituted that the appellant's written submission are incompatible with his grounds of appeal, in that issues which are not included as grounds of appeal are raised in the written submissions.

[6] The Learned Prosecution Counsel, contended that the appellant's written submission are of no consequences and submitted further that there was sufficient evidence from the complainant showing that she was threatened and raped by the appellant and that the incident was reported on the same day.

That, the appellant was properly identified and that the medical report showed that the offence of rape was complete.

Learned Prosecution Counsel, submitted that the sentence imposed on the appellant was lawful and urged this court to dismiss the appeal.

[7] This is a first appeal. Therefore, the duty of this court was to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In that regard, the evidence by the complainant **LA (PW2)** was considered along that of the clinical officer, **Dieno Haran Ajwang (PW1)**, a university student, **Robert Otieno Micogo (PW3)**, a Chief's elder, **Joel Ouma (PW4)** and the investigations officer, **P.C. Kambuni Karee (PW5)**.

[8] Also considered was the appellant's evidence in defence. He denied the offence and indicated that he was arrested and implicated after a disagreement with the chairman of his beach area over his registration as a member. He was at the time a Fisherman by occupation and said that he was arrested, tied with ropes and escorted to Kendu Bay police station after the said chairman made a call to the principle of [Particulars Withheld] Primary School.

[9] At the conclusion of the trial, the learned trial magistrate, considered the evidence in its totality and arrived at the conclusion that the offence of rape was indeed committed against the complainant and that the appellant was positively identified as the person responsible for it.

[10] The grounds of appeal are a challenge to the conclusion reached by the trial court. The appellant contends that there was insufficient evidence to reach that conclusion as the evidence by the clinical officer did not establish the offence of rape and that of the complainant's brother (PW3) was merely what he was told by the complainant on arrival at the scene after the fact.

These grounds were somehow captured in the appellant's written submissions which also contained irrelevant issue not forming part of the grounds in the petition of appeal.

[11] Basically, this court is of the view that the fact of rape was adequately and credibly established by the complainant's evidence as corroborated by that of the clinical officer.

Indeed, this was not a disputed fact as may be deciphered from the appellant's defence.

The complainant indicated that she was actually forcefully penetrated by the offender and that this happened on two occasions within the same period of time.

She also indicated that just before the act, she was threatened with harm and did offer resistance by struggling with the offender before she was overcome and sexually assaulted.

[12] Apart from her young children who may not have witnessed the incident as they were sleeping, the complainant indicated that she was alone in the house when the ordeal started. She was first attracted by some noises which awakened her.

She then switched on her solar lamp which emitted bright light as it was fully charged. It was then that she spotted the intruder who ended up molesting her sexually.

[13] The clinical officer (PW1) produced clinical notes (**P. Exhibit 2**) which showed that the complainant was medically examined and attended to a few minutes or hours after the incident. She indicated that she was taken to hospital after reporting to the police immediately after the offence. The chief's elder (PW4) indicated that he was called by the complainant to her house at about 6.00 a.m. on the material date. He took her to the chief who gave her a letter to take to the police and report.

The findings of the material examination carried out on the complainant were recorded in the prescribed P3 form which was produced by the clinical officer as **P. Exhibit 1**.

[14] The medical form confirmed that the complainant was not only assaulted but also raped by the person who intruded her home.

In the premises, the contention by the appellant that the fact of rape was not established by the availed medical evidence was thus unsustainable.

The necessary ingredients of the charge having been established, the identification of the offender became the only pertinent issue for determination. Indeed, the bone of contention in the whole case was not whether the complainant was raped but whether the appellant was the person responsible for the offence.

[15] The evidence showed that the incident occurred in the hours of darkness but the complainant switched on a solar lamp which was bright enough for purposes of identification of a person.

The light from the lamp therefore provided favourable conditions for identification of the offender. In that regard, the complainant testified that she saw and identified the appellant as the culprit. She said that he was not a stranger to her. She had known him for a period of eight (8) years prior to the offence and knew that he was called **Simon Otieno** but was also known as **Ajika**.

[16] The appellant's defence that he did not know the complainant was disproved by her contrary evidence to that effect.

Based on the complainant's evidence, the trial court found that the appellant was positively identified as the offender. This finding must be upheld by this court on the basis that conditions favourable for positive identification existed at the time and the fact that the unlawful act occurred on two occasion, one after another, showed that there was adequate opportunity for identification.

[17] Besides, the appellant was a person very well known by the complainant. He was actually seen and recognized by the complainant

rather than being seen and identified as a stranger. His was identification by recognition which is more satisfactory, more assuring and more reliable than identification of a stranger (see, **Anjononi –vs- Republic [1980] KLR 59**).

It would therefore follow that the appellant's conviction by the trial court was proper and sound and is hereby upheld.

[18] As to the sentence of fifteen (15) years imprisonment, it was lawful in terms of **Section 3 (3)** of the **Sexual Offences Act**. However, given that the appellant was a first offender, the sentence was rather on a higher side and must now be set aside and be reduced to the minimum ten (10) years imprisonment.

Other than that alteration in the sentence, this appeal is dismissed for want of merit.

J.R. KARANJAH

JUDGE

15.05.2019

[Delivered and signed this 15th day of May, 2019].