



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 56 OF 2017

(CORAM: R.E. ABURILI – J)

PETER OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against sentence and conviction 12.6.2017 in Criminal Case No. 15 of 2017 in Ukwala PM's Court before Hon. G. ADHIAMBO – SRM).

JUDGEMENT

1. The Appellant **PETER OMONDI** was charged with the offence of rape contrary to **section 3(1) (a) as read with section 3 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 26.3.2017 the Appellant, while in Ugenya Sub County within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of JJ (full name withheld),by use of force. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to **section 11(a) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 26.3.2017 the Appellant while in Ugenya Sub County within Siaya County intentionally touched the vagina of JJ against her will.

2. In count 3 the Appellant faced the charge of assault causing actual bodily harm contrary to **section 251 of the Penal Code**. The particulars of the offence are that on 26.3.2017 the Appellant while in Ugenya Sub County within Siaya County assaulted JJ (full name withheld) occasioning her actual bodily harm.

3. The Appellant denied all the charges and the prosecution called 6 witnesses to establish their case which led to the conviction of the appellant. The appellant was sentenced to serve 10 years imprisonment on the main charge and on count two he was sentenced to pay a fine of Kshs 20,000 in default to serve 4 months imprisonment. Sentences were to run consecutively. This was on 12/6/2017.

4. Dissatisfied with the conviction and sentence imposed on him the appellant filed this appeal on 22nd June 2017 contending in the grounds of appeal that:

1. The Learned trial Court Magistrate erroneously convicted the Appellant on the purported allegation without noticing that the adduced evidence was insufficient in law.

2. The Medical evidence adduced was insufficient to warrant a sound conviction.

3. I cannot recall all that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.

4. I pray for orders of Habeas Corpus.

5. This being a first appeal this court is obliged to re-consider and re-evaluate the evidence tendered before trial court afresh with a view to arriving at my own independent conclusion. **See Okeno vs Republic [1912] EA 32.**

6. Revisiting the evidence before the trial court, PW1 JJ (full name withheld)the complainant recalled that on 26.3.2017 at around 1:00 am she was at her house sleeping when she heard something entering the house and thought that a cat had entered the house.

7. That when she checked she realized that someone had entered the house without her knowledge. She saw a man in a white t-shirt and that when she tried to scream the person held her throat then ordered her to shut up. That the person threatened to kill her if she continued making noise. He was talking to her in Swahili. Her solar lamp was on and that the person tried to hit the solar lamp down so that it goes off and he

also tried to cover her eyes so that she could not see him. When the person could not switch off the solar lamp, he hid the solar lamp under the blanket which was on her mattress that was on the floor. He then held her throat and squeezed it while asking her whether he should strangle her. He ordered her to remove all clothes and by then the person was struggling with her on the mattress. He asked her if she was a Kikuyu and asked her if she knew what tribe he was. She told the person that she knew him well and that he was a Luo.

8. PW1 struggled with the person and told the person that she was not going to undress. She was wearing a blue skirt and a brownish blouse. The person forcefully removed her inner pant and told her that he wanted to f*** her six times until morning. The man had sex with her by force and that all through the ordeal she was struggling to free herself from the man. As the man lay on her he threatened her with a knife and he also held her breasts. He did not use any form of protection as he inserted his penis into her vagina without her consent and eventually the man fell asleep.

9. PW1 took advantage of the sleeping rapist and opened the door and escaped to the house of her mother in law SO which was close to her compound. She said that she told the people who were at her mother in law's home what had happened to her and that the slippers of Omondi that is the Appellant were found in her house but by then the said Omondi had already left. She said that at the time she was being raped her three year old child was inside the same house and that her brothers in law found that Omondi had moved the child out of the house and placed the child beside the house. She insisted that she was raped by Omondi whom she identified as the Appellant herein. She stated that she had known the Appellant for a period of 16 years and that she did not have any relationship with him. She denied that the Appellant had ever been her boyfriend. She even stated that the Appellant had not at any time seduced her. She further stated that when Omondi went to her house Omondi did not tell her what he had gone to do at her house. She stated that Omondi entered her house through the opening that was between the top of her door and the roof.

The incident was reported to the **Mlango Kumi** elder who in turn rung the chief and were referred to the Ukwala Sub county Hospital. She was issued with a P3 form at Ukwala Police Station. It was filled at Ukwala Sub county Hospital. She then recorded her statement at the police station. She identified her P3 Form dated 27.3.2017 and the slippers which she said belonged to Omondi being orange and black slippers. She said that she had never disagreed with Omondi and that neither had she framed up the appellant. She said that she viewed Omondi for around five minutes and saw him with the help of the solar lamp before Omondi decided to hide the solar lamp under the blanket. She said that she also recognized Omondi's voice. She said that she had known Omondi's voice for around ten years and that she cannot confuse Omondi's voice with any other voice. She said that Omondi is her neighbour and that Omondi's voice is familiar to her.

11. On cross examination she insisted that the slippers she identified before court belonged to Omondi. She said that the first day her house was being constructed, the Appellant went to her home while wearing the said slippers. She said that her brother in law even confirmed that the slippers belonged to the accused. She said that the footprints were in the ditch near her home and she insisted that she saw the Appellant at 1:00am because the solar lamp was on when the Appellant entered the house. She insisted that she saw the Appellant well and recognized him. She also identified his red innerwear. She stated that at first when the Appellant entered the house he did not talk. She confirmed that she had never in the past heard any complaints being raised against the Appellant that he had raped anyone. She insisted that she had not framed up the Appellant and said that she was saying the truth.

12. **PW2 SOO** a juakali artisan recalled that on 26.3.2017 at around 1:00am towards 2:00am, he was at his home when the complainant arrived at their home while screaming and bleeding above the eyebrow, and told him that she had been attacked by Omondi and raped at her home. In the company of FO, they went to the house of the complainant and found the slippers of the Appellant inside the complainant's house. The said Omondi had escaped leaving behind his pair of slippers at the house of the complainant.

13. **They** reported the matter to the **Mlango Kumi** elder and started searching for Omondi. They met Omondi and his brother who asked them where they got the slippers they were carrying and they told Omondi and his brother that there was a case involving the slippers and that they should accompany PW2 and his brother to the home of the parents of PW2. Together, they went with Omondi to their parents' home where they found many people and Omondi and his brother kept demanding for the slippers. The complainant had gone to Ukwala Sub county Hospital. They took the pair of slippers to Ukwala Police Station which slippers he identified in court. The witness identified Omondi as the Appellant herein and stated that he had known Omondi for a period of 20 years. He confirmed that he had never in the past quarreled or disagreed with Omondi. He also denied framing up Omondi.

14. On cross examination, PW2 reiterated his earlier testimony and stated that the Appellant was the one who claimed that the slippers belonged to him. He insisted that the slippers belonged to the Appellant and that they were found inside the complainant's house.

15. PW3 **Patrick Ouko Okere** a clinical officer working at Ukwala Sub county Hospital filled and produced the P3 Form for the complainant JJ aged 30 years, and the lab request form for Peter Omondi the appellant herein, the treatment notes for Peter Omondi and P3 Form for Peter Omondi. He testified that the complainant went to the facility dressed in blood stained clothes. He also said that the complainant's skirt was stained with mud and that the complainant had a history of having been attacked and raped by a person well known to her on 26.3.2017 at about 1:00 am inside her house.

16. The Clinical Officer stated that the patient was sober and was not under the influence of any alcohol or drugs (not intoxicated). On examining the complainant, he made the following findings- on the head there was a slight cut on the right forehead; On the thorax and abdomen there were bruises on both lungs that is on both sides of the abdomen; on the upper and lower limbs there was no significant finding. He stated that on genital examination there was a normal external genitalia and there was normal pubic hair distribution but there was foul smell evident from her genitalia. There was no discharge or bleeding noted. On lab tests being conducted on the aforesaid samples, the HIV test was non-reactive, the pregnancy test was negative, the hepatitis B test was negative and on urinalysis leucocytes were noted. He said that the presence of leucocytes was a sign of infection. He said that a high vaginal swab did not reveal any spermatozoa but it showed presence of pus and **epithelial cells**. He said that they did a syphilis test and it was found to be positive. The victim went to their facility 6 hours after the incident and she had not received any treatment prior to the examination. Additional remark was that the victim's husband stays away and that the victim currently lives with her 3 year old child. He indicated that he also recorded in the additional remarks that the victim reported that the perpetrator never used a condom and kept strangling her during the incident to prevent her from making noise. He said that from the lab results even though there was no spermatozoa, **they suspected that there was indeed sexual intercourse due to the presence of epithelial cells in the high vaginal swab**. He classified the injury as harm and filled and signed the P3 Form on 27.3.2017.

17. He also produced the P3 Form of the complainant dated 27.3.2017 as exhibit. The witness also examined the appellant Peter Omondi aged 39 years and filled his P3 Form with a history of having raped and assaulted a middle aged woman on the night of 26th and 27.3.2017 and on examining the genitals of the said Peter Omondi he found that he had no signs of ulcers or any discharge from the urethra. The HIV test, syphilis test, Hepatitis B test and urinalysis were all non-reactive. He produced the P3 Form of Peter Omondi dated 30.3.2017 as P.exhibit 3a and the lab results relating to Peter Omondi as P.exhibit 3b.

18. **PW4 No. 235350 Inspector Mike Opicho** of Ukwala Police Station recalled that on 26.3.2017 at about 1500 hours the complainant lodged a complaint of rape and assault causing actual bodily harm. He said that the complainant reported that on 26.3.2017 at around 01.00 hours while she was asleep in her house, she realized that somebody had unlocked her door and entered her house unnoticed. He held her by the neck, warned her not to raise an alarm, she recognized him as a neighbor. She struggled with him but he overpowered her and she sustained a cut above the right eye using a sharp object. He raped her then he fell asleep then she escaped and left him in bed, to inform her in laws. He threatened to kill her. When her brothers in law went to her house they found that the Appellant had already escaped.

19. Upon receiving the report of the complainant PW4 issued her with a P3 Form because at the time the complainant was lodging a complaint the complainant had already been treated. He also recorded her statement and that of the other witnesses and after compiling the evidence he charged the Appellant with the offences of rape and assault causing actual bodily harm. He also recorded the exhibits being black and orange slippers which he produced as P.exhibit 2 and a blood stained sleeveless blouse as P.exhibit 4. He identified the Appellant herein as the suspect he charged and stated that he never knew the Appellant prior to this incident. He said that from the evidence he gathered from the complainant and other witnesses he found that the Appellant is a person the complainant and the other witnesses knew, interacted with and they even used to see the Appellant wearing those slippers and further that they were able to identify the slippers as those of the appellant herein.

20. On cross examination he stated that it took about 3 days for the Appellant to be arrested. He said that after the incident, the Appellant escaped from the scene. He said that the complainant's door is made of papyrus reeds and so it was easy for someone to unlock the door without the knowledge of the complainant so that is how the Appellant gained entry into the said house. He stated that the complainant knew of the entry after the Appellant had already entered the house. He insisted that he completed his investigations and stated that the complainant even recognized the Appellant by his voice. He stated that if somebody else committed the offence then the complainant could have stated that somebody else and not the Appellant who raped and assaulted her.

21. **PW5 Stanslaus Oduor Ndiga** a resident of Karadolo West sub location and the Assistant Chief of Karadolo West sub location testified that he had worked as an Assistant Chief for a period of twenty years. He stated that on 26.3.2017 at around 7:00am he was heading to church when he received a telephone call from the village elder of Uduny Oboy Aduda informing him that the wife of O had been raped and that the slippers of the offender remained at her house after the incident. He told the village elder to tell O's wife to go to hospital before bathing and that he immediately proceeded to the Ukwala Police Station and reported the matter. He also went to Ukwala Sub county Hospital where he found the complainant and noted that the complainant had an injury on the forehead. He said that the complainant upon being asked as to how many people raped her, she said that she was raped by one person. He left the complainant being treated. He also said that the village elder told him that the person who raped the complainant was recognized. He did private investigations.

22. On cross examination, he reiterated his earlier testimony and said that he was told that the slippers found in the house belonged to him. (Here the court noted that **the appellant himself stated to court that...** *"(the sleepers belong to my younger brother)."*)

23. **PW6 FOO** a resident of Karadolo within Ukwala recalled that on 26.3.2017 at around 1.00 am, it was raining and he was asleep together with his brother SOO when they were awakened by the screams of the complainant who was living in a nearby home. He said that the complainant ran to their home and when he got out of the house, the complainant sought for help saying that she was dying. He said that they ran to the house of the complainant to find out what was happening at the home of the complainant and they found the door to her house open. Using the torch from their phones, they searched in the house of the complainant and found orangish slippers. He said that their purpose for running to the complainant's house was to see if they could find the person who was interfering with the complainant.

24. They proceeded to the clan elder Bob Aduda and told him that someone had attacked the complainant then the clan elder promised to deal with the matter. They went and found the complainant seated in her mother in law's house bleeding from the forehead and on inquiring what had happened the complainant told him that someone attacked her in the house, squeezed her neck, hit her head on the wall and raped her.

25. The following morning the complainant went to the hospital. He said that the slippers which were found in the house of the complainant belonged to the Appellant and that they found the Appellant and his brothers searching for the said slippers. He said that even as they went to the complainant's house together with the Appellant and his brother the Appellant insisted that the said slippers were his. The slippers were taken to the Ukwala Police Station where the matter was reported. He said that the Appellant lived in the same village as him and that he had known the appellant for about ten years as his neighbour.

26. On cross examination he reiterated his earlier testimony and stated that the complainant said that a person had hijacked her. He then stated that the complainant said that she locks the door with a small stick. PW6 stated that they even saw footprints heading to the home of the complainant because it had rained.

27. At the close of the prosecution case, the appellant was placed on his defence. He gave sworn defence denying the charge. He gave evidence as DW1 and stated that he had nothing to say but would call witnesses. On being cross examined, he confirmed that he is a resident of Karadolo and that even though he knows the complainant he is not related to the complainant. He said that on 26.3.2017 it was a Saturday and that he was at their home with her sister in law Everline Akinyi, Barrack Ochieng and Akinyi Odhiambo. He said that they were asleep at their home. He maintained that he was asleep at his house alone. He said that his wife lives in Mombasa. He denied being in the house of the complainant on 26.3.2017 at 1.00 am. He confirmed that he knew the complainant in the past and that he had never disagreed with the complainant. He said that the complainant, was misled by people to frame him up.

28. **DW2 Barrack Ochieng Odhiambo** a resident of Karadolo and brother of the Appellant confirmed that he understood the charges facing the appellant. He told the court that on 26.3.2017 at around 5:00pm he and the Appellant went to collect money from a teacher to whom they had sold charcoal and that on their way back home they passed through the home of their other father Ouma Ben. He said that the man who had inherited the wife of Ouma Ben (**deceased**) had some visitors and so they relaxed with the said visitors as they partook chang'aa until 8.00 pm. He said that the Appellant left going to the home of their other brother and he found 3 men who were Luhya at the fence.
29. He further stated that the three men frightened the Appellant and the Appellant escaped to the home of their sister in law where he borrowed a panga. He said that at that time the Appellant was wearing a pair of green slippers. He said that their brother escorted the appellant. He said that even though it was still raining, he (**DW2**) left for home but before then he left his sister in law in possession of his (DW2's) phone and then left his sandals at the home of OB because he (**DW2**) was very drunk. He said that he walked while falling until he reached home. He said that he knocked his gate and that his sister in law opened the gate for him. He said that when he arrived home the Appellant arrived home with their sister Jane Akinyi. He said that after that they all went to the main house where he said they found their mother relaxing with their sister in law who had opened the gate for them. He said that when they were served with food, his brother the Appellant said that he was very drunk and he requested that the food be kept for him and that he would eat his food the following day. He said that he took his (**DW2's**) food and headed to his house.
30. **DW2** stated that the following morning at 8:00am they milked the cows and then he asked the Appellant to escort him to the home where he had left his sandals. He said that while they were on their way to the aforesaid home, they met the brother in law of the complainant and two other men that is FO and Peter whom he said is a Luhya and another whose name he said he does not know but whom he said is a Luhya.
31. The appellant's witness further stated further that one of the three men was carrying his sandals (tuktuk) which he said he had left at B's home. He said that he asked Peter where he got his (DW2's) tuktuk and yet he had left them at another home together with his phone. He said that the said 3 men told him that they got the slippers at a corner within the complainant's house. He said that he asked how the slippers reached the complainant's house and the three men told him that the person who had the slippers was the one who raped the complainant.
32. Further, that he suggested to the men to accompany him to the house of the complainant so that investigations would be conducted to find out who went with his slippers to the complainant's house. He said that they found the complainant seated in the house of her mother in law and that when they asked the complainant if she knew the person who went to her house with the said sandals the complainant said that she had no idea.
33. He added that the complainant said that the person who went to her house was short, wearing a long-sleeved white shirt and that the person asked her if she was a kikuyu. He said that the complainant also said that the person at that time told her that she would know how well a Luhya can do it, and that he later went with the complainant's brother in law and other young men to the home where he had left his sandals.
34. DW2 then asked the man who inherited BO's wife to give him the things he left at his home. He said that the man gave him his phone and went to check for the slippers beneath the seat where he had kept them but he said that the sandals were missing. He said that he informed the man of where the slippers had been found. He said that they were advised to look for the young men who were with them in that compound. That they searched for the young men and found them taking Busaa at Luhano centre. They told the men to accompany them to the complainant's home and that while on the way the two Luhya men disappeared before they reached the complainant's home. Further, that after three days Peter the Luhya carried away all his property and swore that he will never set foot in court. He said that even on the day he attended court to testify Peter lied that he would attend court but he did not appear before court.
35. He stated that the Appellant had green slippers. He further stated that no proper investigations were conducted in this matter and that it is the **Mlango** elder who identified the Appellant to the police. He said that the two Luhyas currently bragging in their home area that the offenders are free and that the person who has been arrested is innocent. He said that the said two Luhyas have always dodged them since this case started. He went on to state that people defraud Peter for no reason and that even the villagers know that Peter is innocent. He insisted that the complainant framed up the accused.
36. On cross examination, DW2 responded that the Appellants his elder brother. He said that he left the home of B at around 9:00 pm after the Appellant left the said home at around 8:00 pm. He said that after DW2 he left BO home we went home and arrived home at around 10:00pm. He stated that he was not with Peter on the way and that at 10:00pm he was with Peter at his mother's house when they were eating. He said that the Appellant said that he could not eat. He said that around 10.30 pm the Appellant went to sleep alone at his house. He said that the Appellant had a habit of making noise while drunk and that the accused's house is adjacent to his house. He said that from 10.30 pm he saw the Appellant again at 6:00am as he went to the farm.
37. DW2 also answered that when the Appellant went to sleep, he heard the appellant talking till morning and that at around 5:00am the Appellant went to his mother's house and knocked then asked for a **jembe**. He stated that his one roomed house is 6 metres from the accused's one roomed house and that one can hear what is happening at the accused's house from his (DW2's) house. He said that the home of OB is not far from the complainant's home. He said that his testimony about what happened to the Appellant as he was going home is what the Appellant told him. He said that he did not see the other Person taking things away from his home. He further stated that he had no idea as to where the Appellant was from 10.30 pm till morning.
38. DW2 denied the suggestion that he was the person who raped the complainant and stated that the complainant is well known to him as his sister in law. He said that he had a good relationship with the complainant. He however stated that what the complainant alleged is untruthful and that the complainant was incited to say that the Appellant was the one who raped her. He confirmed that the slippers were found in the complainant's house not his house.
39. **DW3 Sharon Akinyi** a bartender testified and stated that the Appellant was her elder brother. She stated that on 26.3.2017 she left her workplace at around 9:30pm and headed home. On her way she met Peter Omondi the Appellant and Ochieng leaving a certain home. She said that she asked them where they were coming from at that particular time of the night and they told her that they were from the home of

Nyakondiek where they had been relaxing with visitors. She asked Ochieng where his phone was because she had rung him and he could not be reached and Ochieng told her that he had left his phone in possession of Nyakondiek together with his sandals. She said that at that time the Appellant was carrying his green slippers because it had rained and that he was drunk.

40. She walked with her aforesaid two brothers and left them at the gate as the gate was being opened as she had to rush back to the bar keys to the owner of the bar. She proceeded to her home and found Omondi and Ochieng eating at their mother's house at around 10.00 pm then the second rains started. She said that after that, Omondi and Ochieng went to sleep at their respective houses.

41. According to DW3, the following morning at around 6:00am, she woke up Omondi and Ochieng at their respective houses so that they could go to the farm but that Ochieng told her that he was escorting Omondi to N home so that he could pick his phone and slippers. She stated that when her brothers reached the gate of the Kikuyu lady as they were on their way to N's home, they were told that the Kikuyu lady that is the complainant herein had been raped and that a Luhya by the name of Peter had been found with the slippers of Ochieng.

42. She stated that Omondi and Ochieng proceeded to the home of Nyakondiek where he was given his phone but his slippers were missing. She said that the husband of N said that he was left with three young men in the said home namely Brian, Peter a Luhya and Otis and that N husband said that one of the three aforesaid men was the one who took the slippers of Ochieng and went with them to the house of the complainant.

43. She said that Peter the Luhya was again found with the said slippers of Ochieng and that she later heard allegations being made that the Appellant raped the complainant. She said that she went to the complainant to ask her about the allegations she had heard and the complainant said that she was raped by a Luhya man and that the man asked her if she is a Kikuyu then told her that that day she would know who a Luhya is. She said that the mother in law of the complainant told her mother (**DW3's mother**) that she would have the Appellant arrested and imprisoned because the mother of the Appellant took up her nephew (the complainant's mother in law's nephew) after the complainant's mother in law chased her own nephew away and that she had earlier asked the nephew to cut down trees for her but he refused, an act which the mother in law of the complainant said pained her and that she wanted the Appellant imprisoned.

44. On cross examination by the prosecutor, DW3 confirmed that DW1 and DW2 are her elder brothers and that the complainant is her sister in law. She said that they had been in good terms with the complainant. She said that she found Omondi and Ochieng at 9.30 pm as they were leaving the home where celebrations were being held. She said that Omondi started eating and then left with the food to his house and that Omondi did not give him the food to keep. She admitted that she had changed her statement. She said that she saw Omondi and Ochieng heading to their respective houses at 10:17 pm. She said that even though at that time she was seated in the house, the door of the house was open. She said that the house of Omondi and Ochieng are adjacent and that her mother's house where she slept was 20 metres from the accused's house. She said that one could hear what was happening at the accused's house from her mother's house and one can hear what is happening at the accused's house from Ochieng's house. She said that neither the Appellant nor Ochieng woke their mother and that from 10:17pm she saw the Appellant and Ochieng at 6:00 am. She said that she did not hear anyone knocking the door of her mother's house at 5:00am. She said that from 10:17 pm to 6:00 am the Appellant was at his house. She said that once the Appellant gets drunk he hurls insults if you talk to him but when the Appellant alone he does not talk. She said that on that night the Appellant slept alone and that she heard the Appellant saying "**ui ui**" then the Appellant eventually slept. She said that she did not hear the appellant talking. She said that when she talked to the complainant she was with her (**DW3's**) mother but her mother is not a witness. She confirmed that she cannot tell where Ochieng and Omondi were after they left the house to go to sleep. She said that she was not bribed to testify and further stated that she was not promised anything.

45. **DW4 Evaline Akinyi Oduor** the sister in law of the appellant recalled that on 26.3.2017 at around 10:00pm, she opened the gate for Peter Omondi, Barrack and Akinyi when they arrived home. She said that the Appellant refused to eat said that he was not going to eat and that he would eat his food the following day. He said that Barrack on the other hand told her to give him his food so that he could take to his house. It is her testimony that he served Akinyi with food and that she locked the gate with a padlock. It is further her testimony that Barrack and the Appellant went to sleep at 10:00pm and that they did not leave home again because she locked the gate. She stated further that the following morning he heard allegations being made by the complainant that Peter raped her and that the complainant later stated that she was raped by a Luhya. She said that the complainant said that the rapist asked her if she is a Kikuyu and that that day she would know that he is a Luhya.

46. On cross examination, she reiterated her earlier testimony and stated that while Barrack took food to his house she kept food for Peter because Peter said that he could not eat at that time. She stated that the three siblings passed by her house then they headed to the house of their mother. She said that no one left the compound because she was the one who had the keys to the gate. She said that the house of DW1 and DW2 are 20 metres opposite hers but no one can hear what happens at the houses of DW1 and DW2 while the person is at her house. She said that she had lived in that home for 12 years. She said that when the Appellant gets drunk she does not do anything. She said that the complainant said in her presence in the presence of Barrack and many other people that she was raped by a Luhya. She said that she knows Barrack and Peter were asleep in their house throughout that night. She confirmed that she could tell with certainty whether the Appellant and his brother were in their houses that entire night.

SUBMISSIONS

47. In support of his petition, the appellant filed written submissions which he adopted as canvassing his appeal and highlighted by stating that he wanted to go home because in Kodiaga prison where he was, was not good as it has many diseases. Further, that he has young children and that he knows the complainant, they are neighbours.

48. In his written submissions, the appellant contended that the prosecution never at all proved their case beyond all reasonable doubt. That he was at home when the complainant went while screaming and she was bleeding from above her eyebrow saying that someone had attacked her in the house. That this is a fabricated case which was framed up by the family members of the complainant and the Investigating Officers of the case.

49. Further, the appellant submitted that he did not deserve the sentence meted out on him. He also submitted that the evidence tendered by the prosecution failed far below the required standards for a safe conviction. Reliance was placed on **Okeno Vs. Republic [1972] E.A. 32** on the role of the first appellate court and a submission made that according to the evidence on the record, the complainant gave the clan elders of the area first report of this case but the said Clan Elders of the area did not testify as to what the complainant told them about how she was attacked.

50. The appellant further submitted that the evidence of PW3 Mr. Patrick Ooko Okere a Clinical Officer at Ukwala Sub-County Hospital did not link the appellant to the offence of rape because he never found any spermatozoa in the vagina of the complainant hence the case was fabricated against the appellant. He also accused the prosecution of failure to produce DNA results to connect him to the offence of rape.

51. The appellant further submitted that the Investigating Officer of this matter never visited the scene of crime to see if what the witnesses said was true or not true, and that the Investigating Officer never investigated the accused before taking him to court by the time he was arrested by Police Officers. He contended that there was no confidential statement recorded by Investigation Officer during the accused's arrest to support his allegation that he investigated the accused in this case.

52. The appellant further submitted that the complainant was a married lady, and that the time required by law for examination after raping is 72 hours, but that the complainant surprisingly went to hospital for examination after 6 hours yet still the sperms were not found in the vagina of the Complainant, which shows that the Complainant was not raped and if it is true the complainant was raped then the accused is not the one who raped the Complainant on 26.3.2017 at Karadolo village.

53. According to the appellant, there was a contradiction in the evidence of PW5 and that of the Complainant as to who made a report of this matter to Ukwala Police Station. He contended that witnesses in the matter were only family members of the complainants not neighbours. The appellant urged the court to allow his appeal and set him free.

54. In opposing the appeal, the Respondent represented by Mr. D. Okachi Senior Principal prosecution Counsel submitted that the conviction of the appellant was sound and that the sentence was lawful. He submitted that the victim knew the attacker and her evidence was corroborated by expert evidence. He submitted that there was no evidence to show that the appellant was framed by the complainant and that this was not raised in the lower court. He urged the court to uphold the conviction and sentence and dismiss the appeal.

DETERMINATION

55. I have considered the appeal herein alongside the evidence adduced for the prosecution and the defence in the lower court. I have given equal consideration to the submissions by the appellant and the Respondent's counsel.

56. In my humble view, the main issue for determination in this appeal is whether the prosecution adduced sufficient evidence to sustain the conviction of the appellant for the offences of rape and assault causing actual bodily harm.

57. The appellant in his appeal and submissions claimed that the prosecution did not adduce sufficient evidence to prove his guilt beyond reasonable doubt and that therefore his conviction was not sound. He also claimed that medical evidence was not sufficient as there was nothing connecting him to the offence as there were no sperms noted in the vagina of the complainant who was examined only 6 hours after the alleged rape. He also alleged that the Clan elders who received the report of rape did not come to court to testify hence evidence was not sufficient to nail him to the offence. In addition, he submitted that there was contradiction in the evidence of PW5 and the complainant as to who reported the matter to the police. The appellant finally claimed that he was framed and that only the family members of the complainant testified against him.

58. As correctly pointed out by the trial court, the onus is on the prosecution to prove beyond reasonable doubt that on 26.3.2017 the Appellant Peter Omondi while in Ugenya sub county within Siaya county intentionally and unlawfully caused his penis to penetrate the vagina of JJ (name withheld) by use of force and without her consent. Secondly, that the appellant herein assaulted the complainant causing her actual bodily harm.

59. To prove the offence of rape, the following elements must be present as stipulated in Section 3(1) of the Sexual Offences Act:

a. The offender intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

b. The other person does not consent to the penetration; or

c. The consent is obtained by force or by means or threats or intimidation of any kind.

60. Under section 3(3) of the Sexual Offences Act, a person who is guilty of an offence under the section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

61. "***Intentionally and unlawfully***" has the meaning assigned to it in section 43 of the Act if such act is committed:

a. in any coercive circumstance;

b. under false pretense or by fraudulent means or

c. In respect of a person who is incapable of appreciating the nature of an act which causes the offence.

62. Under section 43 (2) of the Act, the coercive circumstances referred to in subsection 1(a) include any circumstances where there is:

a. use of force against the complainant or another person or against the property of the complainant or that of any other person.

b. threat or harm against the complainant or another person or against the property of the complainant or that of any other person.....

63. The term penetration is defined in the section 2 of the Act to mean: ***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***

64. On assault causing actual bodily harm, **section 251 of the Penal Code Cap 63 Laws of Kenya** provides:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.”

65. Therefore, on whether the prosecution proved the guilt of the appellant for the offence of rape and assault causing actual bodily harm on the complainant beyond reasonable doubt, this court observes that only the complainant testified and stated that she was attacked in her house while she was sleeping at about 1.00 am and that she realized when the attacker was already in the house, asking her questions such as whether she knew who the attacker was and which tribe he was, while threatening to kill her, forcing her to remove her inner clothing and forcefully removing her underpants as she struggled to free herself from him. She also testified that her solar lamp was on and that despite him trying to put it off, he did not succeed. Further, that she knew the assailant as a neighbour and that she also recognized him not only facially but by his voice as a person she had known for a long time.

66. In addition, the complainant testified that after the attacker had raped her, he slept and that is when she found an opportunity to escape and on escaping she went and told her in laws of what the assailant whom she recognized as the appellant had done to her.

67. The complainant was in the house alone with her three year old child when she was attacked. No other adult was present as her husband worked and lived away. It therefore follows that apart from the complainant, no other person witnessed the offence being committed against the complainant, by the person she identified and recognized to be the appellant herein.

68. This court takes judicial notice of the fact that sexual offences are usually committed in concealment and it is therefore very unlikely for a victim of sexual offence to get an eye witness to corroborate his or her testimony.

69. Therefore, the question that this court must resolve is whether the visual identification and voice recognition evidence by the complainant of her assailant at night can be relied upon in the absence of any eye witness to corroborate her testimony.

70. **In R v Turnbull [1976] 3ALL ER 549** the Court held that some of the factors to be considered before determining whether or not to rely on the visual identification evidence of a single eye witness are as follows:

1. Whether the viewer viewed the suspect under sufficient lighting

2. Whether the viewer viewed the suspect from a close position and there was nothing which could have impeded proper identification.

3. Whether the viewer had ample time to view the suspect and it was not just a fleeting glance.

4. Whether there was any difference between how the viewer described the suspect and the actual appearance of the suspect.

5. Whether much time had lapsed between the time the viewer saw the suspect committing the offence and the time the viewer identified the suspect to the police.

71. The court in the **Turnbul** (supra) case further drew a distinction between recognition evidence and identification of a stranger and stated that recognition evidence is more reliable than identification of a stranger.

72. As stated above, PW1 testified that on that 26.3.2017 she was asleep in her house when at around 1:00 am she heard a commotion in the house. She said that the solar lamp was on and she realized that a man in a white t-shirt had entered her house. When she tried to scream, the man ordered her to shut up and by then the man was holding her throat. He told her that if she continued making noise he would kill her. She recognized the attacker to be the Appellant and that he tried to hit the solar lamp so that it could go off but was unable to switch it off so he hid it under the blanket that was on her mattress which was on the floor.

73. The attacker then held her throat and squeezed it while saying ***“should I strangle you? Should I strangle you? Today is today you will remove all the clothes.”*** She said that the Appellant struggled with her on the mattress where she was sleeping then he asked her ***“what tribe are you? Are you a Kikuyu? Do you know my tribe?”*** to which she answered him in the affirmative and told him that he was a Luo. The Appellant then forcefully removed her inner pant and told her ***“I want to f*** you six times until morning.”*** He remained on top of her while threatening her with a knife and held her breast and without any protection and further without her consent inserted his penis into her vagina. She said that throughout the ordeal, she struggled with the Appellant and that after the incident, the Appellant fell asleep then she got an opportunity to escape to her mother in law’s home while raising an alarm.

74. From the above description of the events as they unfolded on that material night, I am of the respectful view that the complainant had ample time to view the alleged offender before the said offender hid the lit solar lamp under the blanket. The events did not take place abruptly but there is a sequence of events that took place before the complainant was eventually raped.

75. In addition, her assailant was not masked. He spoke to her for some time asking her questions and threatening her. Even if she had not seen him, she testified that she recognized his voice which she knew very well as she had known him for over ten years. Further, when she ran to her in lows, she was bleeding from her forehead and mentioned the appellant as the person who had assaulted her and raped her.

76. The appellant with his witnesses who were his siblings and sister in law too confirmed that the complainant was a person well known to them and was even described as being their sister in law.

77. In my humble view, and from the evidence adduced on record, the complainant not only viewed the alleged offender under sufficient lighting that is under the solar light in her house, but that she also had ample time to view the offender who was incessantly talking to her as they struggled. He was a person she knew well and that she also knew and recognized his voice. It was therefore not just a fleeting glance.

78. The attacker was also close to the complainant, he was on top of her as he unleashed the terror, holding her neck and threatening to kill her if she screamed. The complainant was at a vantage point where she saw her attacker, as a person she knew very well, a neighbour at that. Although the appellant exercised his right not to testify after taking oath and left it to his witnesses to give very long stories of what had happened that day, the defence witnesses did not tell the trial court that they were with the appellant at or about 1.00am, the time when the complainant stated that she was attacked and raped. Further, the appellant and his witnesses conceded that they knew the complainant. It follows that when the complainant was saying that she knew the appellant very well and that she knew his voice and recognized it on that material night, it was not a figment of her own imagination.

79. The complainant also disclosed to her in law PW2 after the ordeal as she ran screaming for help, saying that Omondi had attacked and raped her. She also reported to the police her ordeal and gave the appellant's name as the attacker.

80. It is therefore my finding and holding that the complainant positively identified and recognized the attacker as the appellant herein and that the circumstances prevailing were favorable for such identification and recognition of the appellant as he was not a stranger to the complainant.

81. The trial magistrate who had the opportunity to see and hear the witnesses had this to say and I find no reason to differ with her findings of fact:

“PW1 stated that the accused is the person she recognized a fact which is not disputed by the accused even his siblings and sister in law who testified as DW2, DW3 and DW4. It therefore means that PW1 identified a person she recognizes and not a stranger. The visual identification evidence of PW1 is therefore reliable.”

82. The trial court further believed the evidence of PW1 on voice recognition and properly applied itself to the law as espoused in the **Mbella v Republic (1984) KLR626** case where the court stated:

“In dealing with evidence of identification by voice the court should ensure that:

a. The voice was that of the Appellant

b. The witness was familiar with the voice and recognized it.

c. The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.

83. PW1 having known the appellant for over ten years and as there was no contrary view, the trial court was right in finding that the circumstances were such that she could not mistake what the person she identified as the Appellant uttered because, other than the Appellant and herself, it is only her three year old child who was in the house.

84. PW2 did not witness the incident but in his testimony he narrated what PW1 stated immediately after the incident that is on 26.3.2017 at around 1:00 am when PW1 sought refuge at her mother in law's home. His evidence agrees with that of the complainant in all material particulars. He confirmed that the complainant raised an alarm on 26.3.2017 at around 1:00am heading to 2:00am. At no time did PW1 change her version on what transpired that night. PW2 also confirmed seeing PW1 bleed from her forehead above the eyebrow, evidence of a fresh injury. PW2 also testified that PW1 told him that it is Omondi, the appellant who had attacked her at her house.

85. Furthermore, the evidence by PW1 and PW2 that the slippers which the attacker was wearing were abandoned at the house of the complainant as the attacker whom PW1 said raped her disappeared was not displaced by the defence witnesses' testimonies. Neither did the appellant deny that the slippers belonged to him. Still on the issue of the slippers, PW6 confirmed in his testimony that PW1 sought refuge at the home of her mother in law where he was sleeping on 26.3.2017 at around 1:00am while raising an alarm and just like PW1 and PW2, PW6 stated that when he went to the house of PW1 in the company of PW2, they conducted a search at the house of PW1 and found a pair of slippers which were abandoned by the attacker. He, like PW2 confirmed that when PW1 sought refuge she was bleeding from the head.

86. PW1, PW2 and PW6 stated that the following day as he and PW2 embarked on searching for the owner of the slippers abandoned at the house of the complainant, they met the Appellant and his brother both of whom confirmed that the slippers aforesaid belonged to the

Appellant herein. The said PW1, PW2 and PW6 confirmed that the pair of slippers recovered from the house of the complainant shortly after the incident was taken to the Ukwala Police Station.

87. On whether the complainant's evidence that she was raped by the appellant was watertight or corroborated, PW3 a Clinical Officer who filled the P3 Form of the complainant at Ukwala Sub county Hospital confirmed that at the time of filling the P3 Form of the complainant JJ on 27.3.2017, she gave a history of having been attacked and raped by a person well known to her on 26.3.2017 at about 1:00 am while inside her house.

88. On examining the complainant, he found her with a slight cut on the right forehead, bruises on both lungs that is on the sides of the abdomen an indication of the complainant having had a struggle with her attacker. The Clinical Officer also examined the complainant's genitals and found that although spermatozoa was not found, and that she had a normal external genitalia, but that ***there was sexual intercourse owing to the presence of epithelial cells in the high vaginal swab.***

89. Whereas the complainant had syphilis unlike the appellant on examination, the Clinical officer noted that the complainant's husband lived away. Albeit the appellant claimed that there was no medical evidence to connect him to the offence and that no DNA test was carried out to confirm if he was the rapist, I find that the evidence of PW1 that she was raped was not displaced by any other evidence. The trial court had the opportunity to hear and see the complainant and her witnesses testify believed them and stated that the evidence was consistent. I have no reason to differ with that finding.

90. On the absence of spermatozoa, from the findings of the Clinical Officer, it is not always the case that sexual intercourse involves ejaculation and therefore it is not in every sexual activity that one will find spermatozoa in the genitals of the victim. In my view, penetration of the complainant's vagina was proved to the required standard, beyond reasonable doubt. In addition, there was more than sufficient evidence that the complainant never consented to have sexual intercourse with the appellant and that she was assaulted by the appellant in the course of subduing her to submit to forced sexual intercourse.

91. The evidence adduced by the investigating officer who recorded statements of prosecution witnesses PW1, PW2, PW3, PW5 and PW6 and collected exhibits such as the blouse that the complainant was wearing at the time of the incident which was produced as P.exhibit 4, and which blouse was blood stained confirmed that indeed force was used against the complainant at the time of the incident and further that the complainant was assaulted.

92. PW4 also produced in evidence as an exhibit the slippers which were identified by the complainant, PW2 and PW6 as the slippers the assailant and rapist left at the house of the complainant as P.exhibit 2 and stated that he believed PW1, PW2's and PW5's version that the slippers aforesaid belonged to the Appellant as he said that in the course of his investigations he found that the Appellant is a person that was well known to the witnesses as he used to interact with them and that they used to see the Appellant putting on the slippers.

93. The trial court observed some minor inconsistencies in the evidence of the complainant and the investigating officer in that while PW1 stated that her attacker entered her house through the opening above her house door, PW4 said that the said offender entered the house through the door. However, the trial court resolved the inconsistencies noted by believing the complainant who observed what happened on that material night. That minor inconsistency in my view was not material evidence that would go to the root of the case against the appellant. It is immaterial that the appellant gained entry into the complainant's house through the door or an opening above the door since he gained entry anyway and there was no contrary opinion that the complainant was sleeping in her house when the appellant entered and molested her.

94. Still on contradictions, the appellant claimed that it was not clear whether it was PW5 or the complainant who made a report to the police. In my view, there is no contradiction here because the complainant was escorted to the police by her in lows and the report was not only made to the police but to the Assistant Chief who also followed up the matter. I find the so called contradiction to be imaginary and unsustainable.

95. The appellant also claimed that all witnesses for the complainant were her relatives and that their evidence was fabricated against him. However, he never laid any basis for such alleged fabrication for this court to find that the prosecution witnesses had issues with the appellant and that therefore they must have fabricated the evidence to nail the appellant herein with such an offence. The fact of the witnesses being relatives or family members in itself is not evidence of fabrication unless it was shown that they were telling lies to achieve their own ulterior motive.

96. Furthermore the appellant himself called witnesses who were all his relatives. The appellant merely denied committing the offence and left his witnesses to explain what he had been doing on the material night of the offence. His witnesses testified that on 26.3.2017 the appellant arrived home at around 10:00pm and that he never left home. However, in cross examination, DW2, DW3 and DW4 confirmed that they were not with the Appellant on 26.3.2017 at 1:00am and therefore they could not account for his actions at that time.

97. An attempt by DW1 in cross examination to cover up his movements on the morning of the offence that at 5.00 am the appellant went to knock the door of his mother's house asking for a jembe was inconsistent with DW2's testimony, DW3 stated that she was asleep at their mother's house and she never heard anyone knocking the door at 5:00am. She also stated, contrary to DW2's testimony that she was the one who woke up DW2 and DW1 at 6:00 am so that they could go to the farm.

98. In my humble view, the trial court properly warned itself where a defence of alibi by the appellant was raised before dismissing it. Even then, I find that the evidence linking the appellant to the offences charged namely, rape and assault causing actual bodily harm was so overwhelming, consistent and believable that no amount of alibi raised at the trial could dislodge that evidence. In **Kossam Okiro v R (2014) eKLR** the Court of Appeal held:

“A defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when reigned against

all the other evidence it is established that the appellant's guilt has been established."

99. The trial court found that since the testimony of DW2, DW3 and DW4 was contradictory, they were not credible witnesses. DW3 stated that the mother in law of PW1 admitted framing up the Appellant because of the fact that she was living with the nephew of the mother in law of the complainant whom she (***the mother in law of the complainant***) had sent away. Those in my view were allegations which could not be proved and which were raised for the first time at the time the defence witnesses were testifying. There is no reason why the appellant himself could not say that there was a grudge with the complainant and instead left it to his witnesses to say so which I find not convincing.

100. DW2 alleged that the slippers found in the complainant's house were his but he confirmed that he did not rape the complainant. He alleged that he had left the slippers at the home of N (***BO's***) wife in the custody of the man that inherited Nyakondiek and that they were picked from the said home by the person who went to rape the complainant. The said man whom the slippers were left in his custody was not called as a witness by the Appellant to corroborate the testimony of DW2.

101. The testimonies of DW1, DW2, DW3 and DW4 were contradictory. DW3 stated that she found DW1 and DW2 walking home and walked with them up to the gate of their home where she left them waiting to enter as she went to submit the keys of the owner of the bar. DW2 on the other hand said that the Appellant left the home of N earlier than him and that he (DW2) later walked home. These contradiction raise doubt as to the credibility of the said DW2 and DW3.

102. In the end, I find and hold that the prosecution proved that none other than the Appellant caused his penis to penetrate the vagina of PW1 on the night of 26.3.2017 without the consent of the complainant by use of force which force included assaulting the complainant and threatening to kill her if she resisted. The said act on the part of the Appellant was not only intentional but also unlawful.

103. For all the above reasons, I find and hold that the conviction of the appellant for the offence of rape contrary to section 3 of the Sexual Offences Act and Assault causing actual bodily harm contrary to section 251 of the Penal Code was sound and safe. I uphold it and dismiss this appeal against conviction.

104. On sentence, the appellant in his submissions urged the court to help him to go home because his children were young and that prison was not a good place because it has many diseases.

105. I have considered the plea by the appellant who ought to have known the consequences of his actions, which include punishment for the offence. In his mitigation, the appellant said he had young children. The prosecution said that he was a first offender. However, as the sentence for a conviction of rape is mandatory minimum, the trial court sentenced him to serve ten years imprisonment. The section provides that the sentence may be enhanced to life imprisonment and this depends on the circumstances of each case.

106. I have looked at the circumstances under which the offences were committed. The complainant was alone in her house with her baby when the appellant struck with the intention and he executed his intention of forcefully having sexual intercourse with the complainant a married woman. From the evidence on record, it is clear that the appellant also abused alcohol most of the time.

107. As a married man, the appellant knows only too well that he would not make available his own wife for rape and neither would he let his daughters or sister and sister in law who testified in his favour in court to be raped by sex pests like him.

108. The appellant in my view deserved more severe sentence having regard to the violent manner in which he accosted the complainant sleeping in her house and even injured her with a knife as he threatened to kill her if she continued raising an alarm, as he subdued her into submission to forced sexual molestation.

109. Albeit minimum mandatory sentences have since been declared unconstitutional, this is a case where the appellant should have been handed a more severe sentence than the minimum but because the prosecution did not cross appeal, I say no more.

110. The trial court before sentencing the appellant considered his mitigation and the fact that he is a first offender. Rape is a traumatizing offence to the victim. The appellant did not even use any protection in penetrating the victim. The victim risked contracting a more serious disease and so did the appellant himself because of his insatiable thirst for illicit sex as the complainant had syphilis and she could as well have infected him then he would infect his spouse or his other sex partners.

111. The conviction for assault attracts a maximum of 5 years imprisonment but the appellant was handed a fine of Kshs 20,000 in default to serve 4 months imprisonment and sentences were to run consecutively. In my view the trial court was too lenient to the appellant. I would however find that as the offences were committed in the same transaction, the sentences to run concurrently.

The appellant has already served nearly three years of the ten years imprisonment. As the minimum mandatory sentences are no longer fashionable in law as espoused in **Jared Koita Injiri v Republic [2019] e KLR (CA-KISUMU)**. I exercise discretion and resentence him to serve 8 years in prison, to run concurrent with the four months imprisonment on the second count, taking into account the period already served.

Dated, signed and delivered at Siaya this 7th day of October, 2019.

R.E ABURILI

JUDGE

In the presence of:

Mr. Okachi SPPC for the Respondent

The appellant in person

CA: Brenda and Modestar