REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.25 OF 2016

BETWEEN

DAVID OCHIENG ADOYO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No.139 of 2015 of the SRM's court at Ndhiwa)

JUDGMENT

[1] The appellant, **DAVID OCHIENG ADOYO**, was charged with rape, contrary to **Section 3 (1) (a) (b) (3)** of the **Sexual Offences Act** in **Criminal case No.139 of 2015** at the Principal Magistrate's Court in Ndhiwa. In the alternative he faced a count of indecent act with an adult contrary to **Section 11 (A)** of the **Sexual Offences Act**.

[2] It was alleged that on the 7th May 2015 within Homa Bay County, the appellant, had carnal knowledge with **M M O**, without her consent or intentionally and indecently touched her private parts (vagina). He appeared and was tried before the Senior Resident Magistrate at Ndhiwa and was eventually convicted on the main count and sentenced to twenty (20) years imprisonment.

[3] Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds in his written submissions filed herein.

A formal petition of appeal is herein lacking. The petition filed herein dated 26th March 2016, relates to a previous case No.518 of 2014.

[4] In the interest of justice and without giving due regard to procedural technicalities, this court has treated the grounds in the appellant's written submissions as his formal grounds of appeal.

Be that as it may, the appellant appeared in person at the hearing of the appeal and relied on his written submissions in support of his case. The respondent/State was represented by the learned prosecution counsel, **MR. OLUOCH**, who opposed the appeal.

[5] In his submissions, learned counsel stated that the complainant (PW1) had known the appellant from 1996 as a village mate and that on the material date the two met but after the complainant declined to show him the way using a torch, he walked ahead of her only to later emerge from some shrubs, hold her neck and put her down. She soiled herself in the process but the appellant went ahead to rape her.

[6] After the incident, the complainant proceeded to the home of PW2 for assistance. He (PW2) noted that she was bleeding from the vagina and smelling of faeces. She was also frail and with a swollen body. After being arrested, the appellant admitted the offence and blamed it on Satan.

Learned prosecution counsel, contended that the appellant was properly convicted and that the sentence imposed on him was merited as he had a previous conviction of defilement.

[7] In response to the foregoing, the appellant submitted that he was charged, convicted and sentenced because of a land dispute between him and the family of the complainant and that the previous case of defilement was also due to the same land dispute.

[8] This court has given due consideration to the rival submissions and being a first appellate court was required to re-visit the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **OKENO –VS- REPUBLIC [1972] EA 32)**.

[9] In summary, the prosecution case was that the complainant was on the material date at 7.00 p.m. heading to home from the market. She reached a sugarcane plantation and met the appellant. He appeared from the rear and asked her to show him the way using her mobile torch light. She declined and he walked ahead of her. He waited for her and when she reached him, he held her clothes and manhandled her. In the process, he pulled her into a bush and raped her. She also soiled herself. Thereafter, he kicked her and left.

[10] The complainant, proceeded to the home of **N O M (PW2)** and told him that she had been raped by the appellant who was also known by the name **"Ounde"**. He noted that she was smelling of faeces and blood was trickling down her legs. He called a neighbour and reported the matter to the chief, **JOSEPH OTIENO MOBAI OTENG (PW3)**, who proceeded to the scene and found the complainant, looking sick and tired with an upper swollen lip. She explained to him what had happened and implicated the appellant in the process.

[11] The chief (PW3) proceeded to the appellant's home and informed him of the allegation against him by the complainant. He denied the allegation but was later arrested by the police. **PC BERNARD KIOKO (PW4)**, based at Ndhiwa police station received the necessary report and investigated the case. Thereafter, he preferred the present charge against the appellant.

[12] The complainant was medically examined on 8th May 2015, by a Clinical Officer, **JOSEPH ONYANGO OMBEWA (PW5)**, who completed and signed the necessary P3 form (**P. Exhibit 2**) showing that the complainant was assaulted. He was uncertain with regard to the alleged rape of the complainant.

[13] The defence case was that the appellant did not commit the offence. He was at the material time a motor cycle taxi operator (boda boda) cum farmer and was at his home on the material date of the incident. He went to his farm on the following day and also grazed his livestock.

On the 25th May 2015, he proceeded to Ndhiwa court for his judgment in another case. He was then arrested while seated outside the court awaiting delivery of the judgment. It was at that juncture that he learnt of the present case which he did not understand.

[14] From all the foregoing evidence, it is apparent to this court that the main issue arising for determination was whether the complainant (PW1) was raped and if so, whether the culprit was the appellant.

The defence raised by the appellant was a denial. It was therefore incumbent upon the prosecution to prove the charge against him beyond reasonable doubt and not for him to prove his innocence.

[15] As to whether the complainant was raped, the trial court believed the complainant and found that she was raped as she had contracted a sexually transmitted disease (std).

The trial court disregarded the fact that the medical report (**P. Exhibit 2**) indicated that there was uncertainty as to whether an act of rape hand been committed. The Clinical officer (PW5) clearly indicated that penetration could not be determined.

[16] The trial court was however, of the view that there was penetration because the complainant contracted a sexually transmitted disease. That, may have been so, but there was no evidence to show a linkage between the contracting of the disease by the complainant and the appellant. There was no evidence that the appellant infected the complainant with the disease and at what period in time.

[17] It would follow that the prosecution failed to adduce sufficient evidence, more so medical evidence, to prove that the complainant was raped, on the material date and time.

Similarly, there was insufficient evidence to prove the identity of the rapist even if it was accepted that the complainant was indeed raped.

The incident occurred in the night but the complainant did not say how and by what means she was able to identify the offender. She talked of mobile phone torch light but did not indicate the intensity of the light it emitted and from which position she was able to flash it on the offender for a positive identification.

[18] The complainant mentioned the appellant as the offender and when he was interrogated in the presence of **NICHOLAS** (PW2) he allegedly said that it was Satan who tempted him to rape the complainant. The interrogation was allegedly by the chief (PW3) who did not say anything about the appellant admitting the offence.

On the contrary, the chief said that the appellant denied that he raped the complainant. This was a vital contradiction and it goes a long way to discredit the alleged identification of the appellant as the culprit.

[19] It is possible that the complainant was on the material date offended by being assaulted rather than being raped. However, her evidence with regard to the identification of the appellant was neither cogent nor credible.

Consequently, this court must now find and hereby finds that the appellant's conviction by the trial court was neither safe nor proper.

[20] In sum, this appeal is allowed to the extent that the appellant's conviction is hereby quashed and the sentence of twenty (20) years imprisonment set aside.

The appellant be forthwith set at liberty unless otherwise lawfully held.

[21] Ordered accordingly.

J.R. KARANJAH

JUDGE

05.07.2018

[Delivered and signed this **5th** day of **July, 2018**]