



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 31 OF 2017

RAYMOND OTIENO OGALO.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Being an appeal arising from the judgment, conviction and sentence by Hon. Kamau, C.M., Resident Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 19 of 2017 delivered on 21/09/2017)

JUDGMENT

Background:

1. The Appellant herein, **Raymond Otieno Ogalo**, was arraigned before the trial court on 17/07/2017 and was charged with the offence of **Rape** contrary to **Section 3(1)(a)(c)** as read with **Section 3(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that *'on 12/07/2017 at [particulars withheld], Rongo Sub-County within Migori County, intentionally caused his penis to penetrate the vagina of M.A. by use of threats.'* The Appellant was charged in the alternative with committing an indecent act with an adult contrary to **Section 11(A)** of the Sexual Offences Act No. 3 of 2006. The Appellant denied both counts and a trial was ordered.
2. The prosecution called four witnesses in a bid to prove the charges. **PW1** was a Clinical Officer from Rongo Sub-County Hospital one **Lilian Nyaboke. M.A.**, the complainant testified as **PW2**. **PW3** was one V A, a sister-in-law to PW2 and a sister to the Appellant. **PW4** was the investigating officer one **No. 96522 PC(W) Joyce Tiriko Longore**. The Appellant was hence a brother-in-law to the complainant. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court except for PW2 whom I will refer to as **'the complainant'**.
3. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave unsworn defence without calling any witness. Thereafter the court rendered its judgment where the Appellant was found guilty of the offence of Rape and was convicted. He was sentenced to 10 years imprisonment.

The Appeal: -

4. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 03/10/2017 where he challenged the entire judgment on the following grounds: -

- (1) That this is the case which I pleaded not guilty from the beginning to the end.*
- (2) That the trial court failed in law and in fact by convicting me on case which had no exhibits either medical documents to prove the allegation.*
- (3) That the trial court erred in law and in fact when convicted on the evidence where the eye-witness testified that he saw nothing.*
- (4) That the trial court erred in law and fact when based on the evidence which the accused person was not medically examined.*
- (5) That the trial courts erred in law by convicting the appellant on the evidence which was full of contradiction and hear-says.*
- (6) That the court in law which failed to give the appellant room to hire the legal expert to defend him as provided by the constitution.*

5. Directions were taken and the appeal was disposed of by way of oral submissions. The Appellant contended that the charge was not proved as required in law as the evidence was so shaky and insufficient. That, the defence was not considered and that the evidence was riddled with inconsistencies and without any corroboration.

6. The appeal was opposed by the State through **Miss Atieno**, Learned Prosecution Counsel. Counsel submitted that the charge of rape was proved as required in law and that **Section 124 of the Evidence Act, Cap. 80** of the Laws of Kenya did not call for corroboration in sexual offences. The State prayed that the appeal be dismissed.

Analysis and Determinations:

7. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of rape were proved and as so required in law; beyond any reasonable doubt. The starting point is how the offence of rape is described in law. **Section 3 of the Sexual Offences Act No. 3 of 2006** (hereinafter referred to as '**the Act**') defines '**rape**' as follows:

(1) A person commits the offence termed rape if –

(a) he or she 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 of threats or intimidation of any kind.

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this 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.

9. It can therefore be safely said that the ingredients of the offence of rape include proof that the victim was not a minor, proof of penetration, proof of the perpetrator and proof that the consent was not freely given. On looking at those aspects in this judgment, this Court shall consider each of them singly. I must however confirm that the prosecution's evidence and the defence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

(a) On the age of the complainant:

10. The age of the complainant was not contested in this appeal. There is the evidence of PW1 as well as the complainant's P3 Form that the complainant was aged 23 years at the time of the alleged offence. The Appellant was hence an adult in law.

(b) On the issue of penetration:

11. **Section 2 of the Act** defines '*penetration*' and '*genital organs*' as follows: -

'penetration' the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

'genital organs' includes the whole or part of male or female genital organs and for purposes of the Act includes the anus'.

12. This position was fortified in the case of **Mark Oiruri Mose vs R (2013) eKLR** when the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....' (emphasis added).

13. Later the Court of Appeal, then differently constituted, in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

14. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

15. In demonstrating this ingredient, the complainant stated as follows: -

“... we got into the house he pushed me towards the bed which was in the sitting room. He threw me there..... He tore off the biker. He removed the panty. He undid his trousers and let them drop to the ground.... He parted my legs and inserted his penis into my vagina..... He then started to have intercourse with me. I cried out. He did not use protection.....”

16. PW3 who was initially with the complainant was sent by the Appellant to buy some items at the nearby shops leaving behind the Appellant and the complainant. On return this is what she stated: -

‘.....I then saw at the entrance to the house. He was putting on his trousers and adjusting it. Before I could talk to, M.A. dashed out of the house. She was wiping tears from her face.....I ran after M.A. I found her seated beside a path near our home. She was crying.....She told me thathad raped her.....I advised to tell her husband and the police...’

17. PW1 produced the P3 Form and the treatment notes as exhibits. PW1 confirmed that the complainant had been attended to at the Rongo Sub-County Hospital in the evening of 12/07/2017 and a physical examination as well as a laboratory high vaginal swab analysis was undertaken. The analysis revealed the presence of pus cells and epithelial cells which was evidence of friction or forced sex. That, the vagina was tender as a further evidence of penetrative sex. The P3 Form was filled in on 13/07/2017.

18. Going by the definitions of 'rape', 'penetration' and 'genital organs' in the Act coupled with the evidence of the complainant, PW1 and PW3 as well as the contents of the treatment notes and the P3 Form, this Court is satisfied that indeed penetration was proved in the circumstances of this case.

c) On whether the appellant was the perpetrator:

19. The Appellant vehemently denied any involvement in the alleged offences and he was sure that the charges were geared towards him losing the land which was part of his inheritance as the clan members had persistently ensured that he be a jailbird.

20. I have carefully gone through the evidence on record. The complainant narrated how she met PW3 on her way to the market to buy some vegetables where PW3 informed her that her brother, the Appellant herein, had the vegetables and they agreed that the complainant should instead buy from the Appellant. They both proceeded and met the Appellant working on his farm where the vegetables were and after agreeing on the type of the vegetables and paying the amount of money they both began picking the vegetables from the farm. The Appellant then called his sister, PW3, and sent her to the shops. Having been left with the complainant, the Appellant ambushed her and covered her head and eyes with a cloth and forced her into a house which was the Appellant grandmother's house before she died but which the Appellant then occupied as his own house. The Appellant was armed with a panga and threatened the complainant with death if she resisted as she pushed her to his house. Midway, the cloth slipped and the complainant saw the aggressor. The attacker then took his time and undressed the complainant and proceeded to engage in sex with her. The incident took place during day time and the complainant knew the Appellant so well as he was her brother-in-law.

21. It was the same Appellant whom PW3 left with the complainant at the farm as the Appellant sent her to the shops and whom on return saw at the entrance of his house dressing up his trousers shortly before the complainant dashed out crying. PW3 rushed after the complainant and on learning of what had happened she immediately advised the complainant to inform her husband and the police. The matter ended with the police that evening.

22. There is no evidence that the complainant had sex with any other person from the alleged incident. The impression that the complainant could have slept with her husband is hence unsupported, far-fetched and ill-intentioned and is hereby rejected.

23. On the defence raised, despite the same having been raised at the tail-end of the proceedings and without giving the prosecution an opportunity to cross-examine the Appellant, I find no iota of evidence that the clan members were out to frame the Appellant. Therefore, by placing the defence on one hand and the prosecution evidence on the other hand, I find that the defence put forth by the Appellant did not create any reasonable doubt on the prosecution's case. Infact it is the defence which remained very hollow, doubtful and an outright afterthought and fabrication. The same was rightly rejected by the trial court. I hence come to the finding that there was no error in the identification of the Appellant by the complainant as the aggressor.

d) The issue of the consent:

24. Sections 42, 43, 44 and 45 of the Act deals with the aspect of the consent of the victim at length. Section 42 states as follows:

‘For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice’

25. Sections 43, 44 and 45 of the Act goes into great detail in describing instances where one's consent cannot be said to have been obtained. I will reproduce Sections 43(1)(a) and (2)(a) and (b) of the Act as they are relevant in this matter.

43(1) An act is intentional and unlawful if it is committed -

(a) in any coercive circumstance;

(2) 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 person;

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

26. The complainant categorically denied consenting to the sexual intercourse with the Appellant, a brother to her husband. She narrated how the Appellant ambushed and threatened to harm her using a panga, dragged her into his house, tore her clothes and forcefully had sex with her. The complainant, while crying, readily disclosed what the Appellant had done to her to PW3 and even agreed to report the matter to the police. The complainant's conduct is hence not commensurate with some one who has voluntarily engaged into a sexual act. This Court now finds that the complainant did not consent to having sex with the Appellant.

(e) Other issues raised by the Appellant:

27. On corroboration, the Appellant contended that there was no corroboration of the complainant's evidence hence the same was not credible. **Section 124** of the **Evidence Act**, Chapter 80 of the Laws of Kenya which states that:

" 124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (emphasis added).

28. The law is very clear that the need for corroboration of evidence is exempted in sexual offences. In such cases a trial court is only called upon to believe that a victim is truthful and to record the reasons in the proceedings and can convict on such sole evidence. I have intently looked at the judgment by the trial court. The court observed the demeanors of all the witnesses as they testified. I did not find any adverse notes by the trial court on any of the witnesses in the proceedings as well as in the judgment. The court believed the witnesses and stated that their evidence was candid and truthful. The court recorded its reasons in the judgment for believing that the complainant was telling the truth. I have also carefully perused the proceedings and cannot fault the trial court on that finding. I therefore find that the trial court complied with the provisions of **Section 124** of the **Evidence Act** and as required in law.

29. As the appellant submitted that there were contradictions and inconsistencies on the record, I must state that I have carefully addressed my mind on the record. The alleged contradictions, if any, were adequately explained and reconciled by the court. Indeed, they were of a minor nature and cannot be said to have adversely affected the final finding of the court. In so finding, I echo the words of the Learned Judge in **R =vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** when he stated thus: -

"...It is trite law that minor discrepancies and contradictions should not affect a conviction."

In any event the provisions of **Section 382** of the **Criminal Procedure Code Cap. 75 of the Laws of Kenya** safely come into play.

30. Having found all ingredients of the offence of rape in favor of the prosecution, this Court finds that the Appellant was properly found guilty and convicted.

31. On sentence, the Appellant was sentenced to the minimum prescribed sentence under **Section 3(3)** of **the Act**. The sentence remains legal.

32. Consequently, no ground of appeal succeeds, and the appeal is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of October, 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Raymond Otieno Ogalo, the Appellant in person.

Joseph Kimanthi, Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

