REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 35 OF 2017

DAVID OURU OCHIENG.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTION

Appeal from the conviction and sentence passed on 7th November, 2016

by Hon Obiero, PM at BONDO in Bondo PM Cr Case No 157 of 2015)

JUDGMENT

1. The Appellant **DAVID OCHIENG OURU was** charged with two counts in Bondo PM Criminal Case No 157 of 2015. In Count 1, he is charged with the offence of **Rape contrary to Section 3(1)(a)(b) read with Section 3(3) of the Sexual Offences Act No. 3 of 2006**.The particulars are that on the 24th day of February, 2015 at around 2200 hours at [particulars withheld] Village, Abom Sub-Location in Bondo District within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of **DA (name withheld for privacy protection)** without her consent.

2. The Appellant was further charged with the alternative charge of **Committing an Indecent Act with an Adult contrary to Section 11(A) of the Sexual Offence Act No. 3 of 2006.** The particulars are that on the 24th day of February 2015 at around 2200 hours at [particulars withheld] village, Abom Sub-Location in Bondo District within Siaya County, intentionally touched the vagina of **DAA** with his penis without her consent.

3. In Count II the Appellant was charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code.** The particulars are that on the 24th day of February, 2015 at around 2200 hours at [particulars withheld] Village Abom, Sub-Location in Bondo District within Siaya County, being armed with a dangerous weapon namely a panga robbed DAA of her KShs.5000 and at or immediately after threatened her with actual Violence.

4. The Appellant denied the charge and the Prosecution called four (4) witnesses who testified in support of their case.

5. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of ***Okeno vs. Republic (1972) EA 32*** where the Court of Appeal for Eastern Africa stated that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

EVIDENCE

6. PW1 DAA a female adult of sound mind testified that on the material day at about 10.00 pm, she was preparing to go to bed. She went out to relieve herself and while out there, she found somebody standing near the door. She asked the person who he was and what he wanted. The person told her that he was Ouma the son of Cosmas and that he had gone for her. She stated that the person was armed with a panga and she screamed and called one Erick and in the process the person caught her neck and pushed her into the house. While inside the house in the sitting room, the person struggled with her. They struggled and went to the bedroom where there was a lamp. She managed to see the

face of the person and she identified him as Jaramula and that she knew him by that name.

7. PW1 further testified that the appellant who did not want her to see his face pushed her on the bed and had sexual intercourse with her. After that, he St down holding her and demanded for money and threatened to cut her with the panga and she gave him KShs.5,000 which she had and which was mean for purchasing material to repair the floor. She stated that after that, he went away.

8. It was her further testimony that on the following day at 6.30 am, she went and informed one **L**O her in-law who escorted her to the home of the village elder Aloyce Nyamulo. She later went to the Police Station where she made a report and she subsequently went to the hospital for treatment.

9. In cross examination by Mr Dola advocate for the appellant, the witness stated that he knew the appellant as Ochieng, and that he was a herdsman. She used to see him in the village. That she was a widow inherited by another man after the demise of her husband. She reiterated her testimony on how the appellant encountered her that night and added that she used to see him herding cattle but that that was the first day she spoke to him. That he wanted to rape her in the sitting room but she resisted and pulled him into the bedroom because she wanted to see him as there was a lamp in the bedroom. That she was able to see him in his face as he attempted to put off the lamp but he only put it off after he had pulled her on the bed and that she was able to see him well before he put it off. That he took a long period having sex with her and even rested while holding her and raped her again. That after he gave her the money as demanded he went away.

10. PW2 LOO testified that on the 25th day of February 2015 at about 6.30 am he was at home. The Complainant went and informed him that she had been attacked by one Jaramula who raped her. PW2 escorted PW1 to the home of the village elder and later to Mawere Police Post where they made a report.

11. In cross examination he reiterated his testimony.

12. PW3 Dr. Chebon testified that he examined the Complained aged 50 years and filled a P3 form on the 25th day of February 2015. He stated that the victim stated that she was raped by a person known to her. She had a bruise on the neck. That laboratory examination revealed that there were pus cells and spermatozoa which was an indication that the Complainant had been sexually assaulted. He produced the P3 form, the treatment notes and the Laboratory examination results as exhibits.in cross examination he reiterated that there were spermatozoa but denied carrying pout a DNA test on the appellant.

13. PW4 CPL. Joseph Kiboi testified that he investigated the case. He stated that on the 25th day of February, 2015 at about 10.00 a.m. the Complainant went and reported that she went to relieve herself outside at about 10.00 pm on the 24th day of February 2015 and somebody attacked her and pulled her into the house and that she was able to identify the person as one Ochieng Ouru.

14. That the police escorted PW1 to Bondo District Hospital where she was treated and examined. On the 26th day of February 2015, the Appellant was arrested and later charged with the relevant offences.

15. In cross examination he reiterated his testimony and added that he did not recover the clothing or beddings for the complainant and that the appellant used to work for the village elder so he was unwilling to record his statement in the matter. That the complainant showed him the appellant and that he was arrested after two days after the complainant pointed him out to him at Okala area.

16. The appellant's counsel submitted that there was no corroboration of PW1's evidence that it was unbelievable that she struggled with a man and took him to her bedroom to identify him and that the clothes shew wore were never recovered or examined for evidence. That the P3 exonerated the appellant as the doctor stated that the lady had her normal periods. That PW3 was not at the scene. That there was no evidence of whose sperms were found in the vagina of PW1.

17. The prosecution maintained that there was sufficient evidence to prove that the appellant who was known to the complainant raped her.

18. At the close of the Prosecution's case, the Appellant who was placed on his defence testified on oath and called three witnesses who testified on his behalf.

19. The Appellant **DAVID OCHIENG OURU** testified as DW1 that he knew the complainant as they lived together in the same village. That on the said date he returned at 5.pm and went to Odero's house to fetch water for him and returned to his house at 9pm where he watched TV until 11pm. That he was with John and Lenox and that he went to sleep with Lenox till morning. He denied the allegations that he went to the Complainant's house at the time of the alleged incident. In cross examination he stated that he did not have any grudge with the complainant and that the complainant knew him before the incident as he had lived in the village since 2005. He denied raping the complainant or demanding money from her. That at 10pm he was watching TV with John and Lenox Otieno.

20. DW2 **JOHN OMULO OKUMU** testified that the appellant was his herds' boy and that on the material day at about 10.00 p.m. the Appellant was in DW2's house where they were watching television and the Appellant went to sleep together with DW3 about 11.00 p.m. in cross examination he denied that the complainant went to his home the flowing day. He denied making up the story.

21. DW3 **VINCENT OMONDI ODERO** testified that the Appellant was at his home and went back to the home of DW3 at about 9.00 pm and went to Omulo's home. In cross examination he stated the appellant told him that he was going to watch news at Omulo's home and that he could not tell, what happened after 9pm.

22. DW4 **LENOX OTIENO** testified that on the material day at about 9.00 p.m. they were watching television together with DW2 and the Appellant and that they went to sleep in the same home with the Appellant at about 11.00 pm.in cross examination he stated that the appellant worked for the grandfather of DW4 and that when it reached 11pm their grandfather Omulo told them to go and sleep as he was

tired. He denied making up the story.

23. After considering the prosecution and defence case, the trial court framed the following issues for determination:

i. Whether the Complainant was raped. Whether the Complainant was robbed off her money.

24. The trial court found and held that the prosecution had established beyond reasonable doubt that the complainant was raped and that this evidence of PW1 had been corroborated by the evidence of PW3 who examined her on 25th a day after the rape ordeal and found that she had spermatozoa in her vagina and he produced a P3Form. However, the trial court was unable to find evidence to support the offence of robbery and therefore acquitted the appellant on this second count.

ii. Whether the Complainant knew the Accused person prior to the incident.

25. The trial court found that the complaint knew the appellant very well as he worked for a neighbor and that the appellant too conceded that he worked for the complainant's neighbour.

iii. Whether the Accused person was identified by the Complainant at the scene.

26. The trial court found that the complainant positively identified the appellant who wanted to rape her in her sitting room but she struggled with him to the bedroom where there was a lamp and that she was able to see him properly using that lamp. That after he had raped her, he switched off the lamp. In addition, that when the appellant told the complainant that he was Ouma, she doubted him because he was shorter than Ouma. That she also reported to PW2 the following morning that she had been raped by Jaramula the appellant as she did not know his full names but knew him as her neighbor's workman.

27. The trial court found the appellant guilty of the charge of rape and after considering his mitigation and calling for an age assessment report which showed that the appellant was about 20 years as at the time of judgment, he sentenced the appellant to serve 15 years imprisonment.

The Appeal

28. Being dissatisfied with the judgment, conviction and sentence meted by the trial court, the appellant filed a petition of appeal setting out the following grounds of appeal:

> ***a. That the appellant was not supplied with all the documents the prosecution relied upon during the trial;***
>
> ***b. That I cannot recall all that transverse during the trial hence pray for trial proceedings to adduce sufficient grounds.***

29. The appellant also filed submissions which were not signed and the court declined them. The appellant was allowed to submit orally in support of his grounds of appeal.

30. He submitted that the Lower Court never considered his witness in the defence which he offered when he was arrested, that he was never taken for medical examination to prove that he committed the offence, that in the village they have 3 levels of administration but hey never knew about this case against him, that his 1st Defence Witness never heard or know what happened yet he is the Village elder. He prayed that he be assisted because he was an orphan. That he was jailed for 15 years and that he did not know where he would after jail. He begged the court to acquit him because he never committed the offence. He submitted that he did not know why he was framed for the offence.

31. Mr. Okachi for the state opposed the appeal and submitted that the conviction and sentence ware sound and lawful. That the Appellant was not credible. That he alleged that he was aged 17 years yet medical evidence showed he was aged 20 years. He marinated that the Prosecution proved its case beyond any reasonable doubt. That the appellant's mitigations were considered by the trial court and that the victim and her witnesses were truthful and credible. On sentence, counsel submitted that the same was lenient. He urged the court to dismiss the appeal. In a rejoinder, the appellant maintained his innocence.

Determination

32. I have carefully considered the appellant's appeal, his submissions in support of the grounds of appeal and the opposition by the prosecution counsel. I have also considered the trial court record and the evidence adduced therein to support the charges and the defence tendered by the appellant supported by his three witnesses. In my view, the issues that flow for determination are:

> ***a. Whether the trial court failed to ensure that the appellant was supplied with all the documents relied on by the prosecution;***
>
> ***b. Whether the failure to subject the appellant for medical examination to determine whether he committed the offence charged was fatal to the prosecution's case***
>
> ***c. Whether the trial court considered the defence evidence***
>
> ***d. Whether the prosecution proffered evidence beyond reasonable doubt to prove the offence of rape against the appellant and to warrant a conviction***

e. Whether the sentence meted out was manifestly excessive and whether this court can interfere with the same

f. What orders should this court make?

33. On the alleged failure to supply the appellant with documents relied on by the prosecution, this court finds no merit in the allegation as the record clearly shows that the appellant was ably represented by Mr. Dola Advocate and if he did not have documents, this court does not understand why he never asked for them. Nonetheless, the trial record shows that on 27/2/2015 after the plea of not guilty was entered, the trial magistrate ordered that the appellant be supplied with all statements. If at the time of hearing such statements were not supplied, Mr Dola Advocate should have raised it which he did not, when the matter commenced for hearing on 1.7.2015 and he stated that he was ready to proceed. The ground of appeal fails.

34. On whether failure to subject the appellant to medical examination was fatal to the prosecution's case, Section 36 (1) of the Sexual Offences Act Stipulates:-

> ***"36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."***

35. On whether failure to take a DNA test on the complainant and appellant to determine whether the appellant was the person who defiled the complainant was fatal to the prosecution case and contrary to Section 36 (1) of the Sexual Offences Act No. 3 of 2006, first and foremost is that the complainant testified that she positively identified the appellant who struggled with her trying to rape her in the sitting room but she manage to pull him in the bedroom where there was light and she saw him before he put it off. Further, that he raped her, rested holding her and against continued raping her after which he asked her for money threatening to kill her and after she gave him, he left.

36. The trial court which had the opportunity to see and hear the complainant testify believed that she was raped and not that she had consensual sex. The complainant stated that she reported the incident to PW2 who went with her to the Village elder DW2 who, according to PW4, refused to record his statement because the appellant worked for him hence the appellant cannot claim that the village elder or administration were not aware of the incident. This is so because DW2 the village elder who received the report from the victim and PW2 testified for the appellant.

37. I agree that a DNA test should have been carried out on the appellant to establish whether he was the person that defiled the complainant, since her vaginal swab revealed presence of spermatozoa. Nonetheless, DNA testing in sexual offences is not mandatory. Section 36 (1) of the Sexual Offences Act was considered by the Court of Appeal in the cases, among them- ***Robert Mutungi Mumbi V. R Cr. App. No. 52/2014 (Malindi) and Williamson Sowa Mwanga V. R Cr. App. No. 109/2014 (Malindi)***. In the former case, the Court of Appeal stated:

> ***"Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."***

38. And in the latter case the Court of Appeal stated as follows on the issue of paternity and defilement:

> ***" …. It is patently clear to us that whilst paternity of PM's child may prove that the father of the father of the child had defiled PM. that is not the only evidence by which defilement of PM. can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at mot determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be raptured. (See Twehangare Alfred V. Uganda CR. APP No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."***

39. With the above decisions from the Court of Appeal and by which this court is bound and having regard to the circumstances of this case, the question is whether the trial Court should have ordered for a DNA test on the appellant to determine whether he committed the offence in question.

40. It is worth noting that PW1 the complainant testified on oath that she knew the appellant very well and the appellant and his witnesses all conceded that the complainant was known to them and they lived in the same village. The appellant even stated that he did not know why he was framed. In other words, there is absolutely no reason why the complainant a 50 year old widow would frame the appellant who was a 20 year old, equivalent of her son. The victim must have been telling the truth as it is clear that DW2 who was the appellant's employer only testified in favour of the appellant to assist the appellant escape justice. This is so because he, as a village elder to whom the crime was reported by the victim and PW2 refused to record a statement for the prosecution and instead chose to testify for his herd's boy. I have no doubt in mind, having reviewed the evidence adduced by the prosecution witnesses and the defence that the complainant and PW2 were telling the truth and that the defence was couched to assist the appellant escape punishment for his crime. This is further evidenced in his last minute address to the court that he was 17 years old leading to the trial magistrate ordering for his age assessment which revealed that he was not underage when he committed the offence. Such ploys were meant to assist the appellant escape justice.

41. The evidence is clear that the appellant had not one but two sessions of sexual intercourse with the complainant and therefore, in my humble view, the complainant had more than sufficient time to recognize his assailant who even demanded that he be given money before he could leave. Albeit the trial court did not find that there was sufficient evidence to prove robbery, neither is there evidence that the complainant was in any way lying about the money.in criminal cases, proof is beyond reasonable doubt. The appellant seemed not to be in a hurry to leave the complainant as he held her during the time he rested after raping her before the repeat ordeal. This gave the complainant sufficient time to know exactly who the rapist was. I find no mistaken identity of the rapist and therefore the claim by the appellant that only DNA evidence would have connected him to the offence of rape is uncalled for.

42. On the alleged defence of alibi, iam in agreement with the trial court that the legal position is that it is the duty of the Prosecution to prove the case against the Accused person beyond reasonable doubts and this burden can never shift upon the Accused person irrespective of the defence which he raises. As such, when an Accused person raises the defence of alibi it is the duty of the Prosecution to avail evidence to counter the Accused person's defence In the ***KARANJA & ANOTHER VS. REPUBLIC (2004) 2KLR 140*** *(CA*) the Court observed that as a general rule, the burden of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence raised is alibi or something else. The Court further stated that the burden of proving alibi does not lie on the Prisoner.

43. In the instant case, the Prosecution's evidence against the Appellant was that evidence of PW1 only. This raises the issues as to whether it would be safe to rely on the evidence of a single witness in the circumstances of this case. In ***OGETO VS. REPUBLIC (2004) KLR, it*** was held ***inter alia*** that it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially where it is shown that where it is shown that conditions favouring for identification were difficult. Further, that the Court has to bear in mind that it is possible for a witness to be honest but mistaken.

44. The complainant in this case the Complainant met with the Appellant outside her house and at that time she could not see him well as it was dark. However, when the person told her that he was Ouma the son of Cosmas, she realized that the person was actually shorter than Ouma. The person pushed her into the house. The person wanted to rape her in the sitting room but she struggled with him and they entered into the bedroom where there was a lamp. In the process, she saw the face of the person and recognized him as Jaramula, the appellant. She explained that after that, the person put off the lamp. According to PW2, when the Complainant went to his home on the following day, the Complainant told him that it was Jaramula who went to her house and raped her.

45. In my humble view, the complainant positively recognized the person who went to her house and raped her and the person was the Appellant whose full names were not known to the complainant but she knew him as a herd's boy of the neighbour and lived in the same village with her. He even used to pass by her house.

46. Whether the trial court considered the defence evidence, I find that the trial court elaborately dealt with the defence by the appellant as an alibi and considered the relevant applicable principles in defenses of alibi and concluded that the appellant was not telling the truth. I have also considered the said defence of alibi and find no merit in the allegation. I therefore dismiss the allegation that his defence was not considered and find that his defence was considered in full.

47. On whether the prosecution proffered evidence beyond reasonable doubt to prove the offence of rape against the appellant and to warrant a conviction, I find that on the basis of the above analysis, the prosecution case was proved beyond reasonable doubt and therefore I do not fault the conviction of the appellant for the offence of rape as charged.

48. On Whether the sentence meted out was manifestly excessive and whether this court can interfere with the same, the appellant was charged with the offence of rape contrary to section 3(1)(a) (b) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. Section 3(1) (a) and (b) creates the offence of rape whereas section 3(3) provides for punishment for rape upon conviction. It provides that 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. What the section creates is a minimum **AND NOT** a mandatory maximum sentence. That being the case, this court and the trial court has no power to reduce minimum sentence. And as the appellant was given 15 years imprisonment after considering the mitigation, which sentence is lawful, I find no persuasive reason to interfere with the same. I uphold it.

49. On what orders should this court make, I find and hold that the prosecution case against the appellant was proved beyond reasonable doubt. I find and hold that the conviction of the appellant was sound and sentence lawful. I uphold the conviction and sentence imposed on the appellant. I find this appeal lacking in merit and proceed to dismiss it.

Dated, signed and Delivered in open Court at Siaya this 3rd Day of December, 2018.

R.E.ABURILI

JUDGE

In the presence of:

The appellant **DAVID OURU OCHIENG** in person

Mr Okachi Senior principal Prosecution Counsel

CA: Brenda and Modestar