



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMABAY

CRIMINAL APPEAL NO. 11 OF 2014

BETWEEN

EDWIN ONYANGO OGUTU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Rongo Criminal Case No.614 of 2012 by Hon. Z. J. Nyakundi, P.M. on 26th March 2014)

JUDGMENT

1. In the subordinate court, **EDWIN ONYANGO OTIENO** was charged with the offence of rape contrary to **section 3(1)(c)** of the *Sexual Offences Act, 2006*. According to the charge, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FAO without her consent on 15th December 2012 at Kogello Sub Location in Migori County.
2. After a trial, where the prosecution called five witnesses to prove its case, the appellant was convicted and sentenced to 10 years imprisonment. Mr Nyauke, counsel for the appellant, relied entirely on the following grounds of appeals set out in the amended petition of appeal to attack the conviction and sentence;
 - a. The learned magistrate erred in law when he found that the prosecution had proved its case beyond reasonable doubt.
 - b. That learned magistrate misapprehended the law under the *Sexual Offences Act*.
 - c. The evidence of the prosecution witnesses was full of contradictions and gaps.
 - d. There was insufficient evidence to convict the appellant.
 - e. That the identification of the appellant in the circumstances was wanting.
3. On the part of the State, Mr Oluoch, learned counsel, supported the conviction and sentence on the basis that the prosecution proved its case.
4. As this is a first appeal, the court is called upon to conduct an independent evaluation of the evidence and reach its own conclusions as to whether the conviction should be upheld. Allowance though must be made for fact that it neither saw nor heard the witnesses testify (see *Okeno v Republic [1973] EA 32*). The grounds set out in the amended petition of appeal call upon the court to review the facts of the case.
5. The prosecution case was that the appellant, a motorbike rider, was called by the complainant, PW

1 to take her sister's place which was at Waware. Instead of taking her to her sister's place, he took a different route whereupon he told her that the fuel had been exhausted. While they were waiting for another motorbike to come and pick PW 1, the appellant removed a knife and panga, threatened PW 1 and had sexual intercourse with her. When the other motorbike rider came, the appellant ran away. She went to the hospital and was treated and later reported the matter to the police station.

6. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the ***Sexual Offences Act, 2006***;

A person commits the offence termed rape if

- a. *He or she intentionally or unlawfully commits an act which causes penetration with his or 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*
7. The first issue for consideration is the identity of the appellant. According to PW 1, the incident occurred at about 8 pm. PW 1 stated that she picked the motorbike at the stage which was well lit. She rode with the appellant for some time before she was raped. PW 1 testified that when the motorbike ran out of fuel, she gave her phone to the appellant to call another motorbike on number 0711 ***566. When she went home after treatment, she sent the some money to the person the appellant had called and it one was one CJ (PW 2).
8. PW 2 testified and confirmed he had been sent credit from a number he did not know and that his number was 0711***566. When he was arrested, he confirmed that on 15th December 2012 at about 9 pm the appellant called him from a number that was not his asking for fuel. He identified that appellant as a boda boda rider he knew. The appellant did not contest the testimony of PW 2.
9. The testimony of PW 1 and PW 2 taken together confirms that the appellant was the motorbike rider who was with PW 1 at 9 pm on the material day. His testimony corroborates that of the PW 1 that she was with him and that the motorbike did not have fuel. Although the appellant denied the offence, he admitted in his unsworn statement that he knew the appellant. I therefore find that the prosecution proved that the appellant is the person who was with the appellant and who committed the felonious act.
10. The essential element of the offence of rape is that the act of sexual intercourse was without consent. The testimony of PW 1 was clear that the appellant threatened the appellant with a panga and a knife hence the act of intercourse was induced by fear. After the act, PW 1 immediately went to Awendo Sub-District Hospital where she was treated at about 1 pm on 16th December 2012. PW 5, a clinical officer at the hospital testified that the appellant's clothes were blood stained and that although her genitalia were normal there was blood stained discharge which was recorded in the medical report.
11. I therefore find that PW 1 was forced to have sexual intercourse out of fear. Consent given in fear is not consent. The testimony of PW 3, the complainant sister, adds to the consistency of PW 1's testimony that she was raped by the appellant. She testified that she had been called by PW 1 and when she went looking for her she found her along the road with muddy clothes. PW 1 informed her that she had been raped. Upon evaluation of evidence, I find that the appellant had sexual intercourse with PW 1 without her consent.
12. The prosecution witnesses were consistent and I do not find any gaps in the evidence. Having evaluated all the evidence, I have no doubt that the conviction was sound. Under **section 3(3)** of the ***Sexual Offences Act, 2006***, the minimum sentence for rape is 10 years imprisonment and a maximum sentence of life imprisonment. The appellant was sentenced to 10 years imprisonment. In light of the facts, I do not find the sentence harsh or excessive.

13.The conviction and sentence are affirmed and the appeal dismissed.

DATED and DELIVERED at HOMA BAY this 9th day of February 2015.

D.S. MAJANJA

JUDGE

Mr Nyauke instructed as by Nyauke and Company Advocates for the appellant.

Mr Oluoch, Assistant Director of Public Prosecutions, instructed by Office of the Director of Public Prosecutions for the respondent.