



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 113 of 2011

M.O.O alias M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence from the Principal Magistrate's court at Siaya Court Criminal no. 1404 of 2009)

J U D G M E N T

The appellant herein **MOO alias M** was charged with the following offences:-

Count I: Rape contrary to section 3 (1) (a) (c) (3) of the Sexual Offences Act No. 3 of 2006.

Particulars: **M.O.O** on the night of 30th – 1st day of December, 2009 in Siaya district of the Nyanza province, intentionally and unlawfully caused his penis to penetrate the vagina of **RAO** by use of force without her consent.

Count II: Committing and Indecent Act with an adult contrary to section 11 (A) of the Sexual Offences Act No. 3 of 2007 (2006).

Particulars: **MOO alias M** on the night of 30th -1st December, 2009 in Siaya district of Nyanza province intentionally touched the vagina of **RAO** with his penis against her will.

Count III: Burglary contrary to section 304 (2) and Stealing contrary to section 279 of the Penal Code.

Particulars: **MOO alias M** on the night of 30th – 1st December, 2009 in Siaya district within Nyanza province, broke and entered the dwelling house of **RAO** with intent to steal therein and did steal 14 Kgs of Maize, two hens and cash Kshs. 400/= all valued at Kshs. 1,420/= the property of the said **RAO**.

Count IV: Being in possession of Narcotic drugs contrary to section 3 (2)(A) of the Narcotic Drugs and Psychotropic substances control Act No. 4/94.

Particulars: MOO alias M on the 4th day of December, 2009 in Siaya district within Nyanza province was found being in possession of Narcotic drug (Bhang) to wit 20gms, which was not in its medicinal preparation.

After a full trial he was convicted and sentenced to serve 10 years imprisonment in count I, 3 years in count III and 2 years in count IV. The appellant being dissatisfied has filed this appeal citing 8 grounds namely:-

- 1. The trial magistrate erred in law by convicting me on a charge sheet that was defective because it does not accord with the evidence on record.**
- 2. The learned trial magistrate erred in law of facts by convicting me on the evidence of single witness without corroboration evidence from an independent witness.**
- 3. The trial magistrate erred in law and in facts by convicting me on the evidence of identification of a hurricane lamp which was allegedly used for some minutes by the complainant at the time of incident.**
- 4. The trial magistrate convicted me on the evidence of alleged voice resembling mine which is unsafe to convict me.**
- 5. The trial magistrate erred in law and facts by convicting me on the evidence narcotics which has no corroborated evidence to convict me.**
- 6. The trial magistrate erred in law and in facts by convicting me on corroborative evidence of an independent witness and failed to warn himself on the dangers of convicting me on such evidence.**
- 7. That the trial magistrate gravely failed to consider my defence and failed to comply with section C.P.C.**
- 8. That since I cannot recall all that was adduced to me in court I pray to be served with the certified copy of the proceedings to enable me erect further grounds of my appeal.**

The brief facts are that on the night of 1st December, 2009 **PW 1 RAO** an old lady aged about 80 years was asleep in her

house. She heard someone breaking the door. This was about 11.30 p.m. She woke up and lit a lamp (koroboi) which enabled her to see the appellant whom she called “**M**”. The appellant proceed to remove her dress and sexually

assaulted her. The appellant then left with some of her items which included chicken and some cash amounting to Kshs. 400/=.

The complainant later went to her in law where she was taken to hospital. Upon reporting to the police she was issued with a P3 form which was equally filled.

PW3 R. an in law to the appellant. On 1-12-2009 she gave her bicycle to assist in taking the complainant to hospital. The complainant told her of her ordeal in the hands of the appellant.

PW2 Sadiki Mwita is the clinical officer who filled the P3 form. His opinion was that PW1 had been sexually assaulted. The complainant had sustained injuries on the neck, head, lower lips or mouth and had a whitish discharge.

PW4 Corp. Joel Bitoto was the investigating officer. He said that they received a report of crime through the complainant’s daughter. He went to her home and found her. He did carry out the investigation and in the process of arresting the appellant he found him in him in possession of 20

grammes of bhang.

When he was put on his defence the appellant denied the charge. He however conceded that the complainant was his mother.

Having gone through the entire proceedings and the judgment, the points to be determined include whether indeed the appellant had committed the offences. Was there sufficient lighting for the complainant to clearly see and recognize the complainant? Did he steal the items on the charge sheet? Was he found with bhang?

From the facts on record it is evidently clear that the appellant as well as the complainant are related and whether or not the complainant is the mother to the appellant did not come out clearly from the evidence. Nonetheless, I am satisfied that the degree of consanguinity is very close. In effect these are people well acquainted to each other.

The next issue to determine is whether the complainant managed to fully recognize the appellant on the fateful night. From her evidence it is clear that she heard the door being broken. She was therefore able to prepare herself by lighting the lamp using a match box. She said:-

“I heard somebody breaking the door. I lit the match box and saw accused M. He held my neck and beat me on the head. I had lit the koroboi (lamp)”.

She went further and said: - **“He removed my nightdress, held my neck took his penis and entered my vagina”.**

This was a process that took sometime. I am therefore satisfied that the light from the lamp was sufficient to enable the complainant witness all that the appellant did. Moreover the complainant on the following day was able to tell PW2 who had committed the assault.

The P3 for as well as the evidence from PW3 shows the injuries sustained by the complainant being consistent with what was observed. On this count therefore the prosecution was able to establish that it was the appellant who sexually assaulted the complainant. I further agree with the court on the findings regarding the offence of burglary and stealing. The complainant said that her door was broken into by force.

Having found that the complainant was able to recognize the assailant, it is therefore also true that after finishing the sexual act the appellant went away with the complainant's valuables.

The items listed as stolen could easily be carried as they were not bulky or heavy at all. It matters not that the same were never recovered. The appellant has mentioned of a grudge between him and the complainant as well as the police. This did not come out during trial. There was no evidence showing that the police officer had married from that family, whoever the police officer may have been.

In respect to the count relating to bhang, the state conceded to the same on the ground that although he pleaded guilty facts were not tendered. Whereas that was the position, the prosecution during the hearing raised the same by tendering evidence, that evidence was never rebutted by the appellant. As a matter of fact he did not cross examine on the same. I do not therefore see any prejudice suffered by the appellant. Although initially he pleaded and the court did not produce the facts, they nevertheless during trial brought out the facts and evidence of actual bhang.

For the above reasons I shall disallow this appeal. There was no reason for the appellant to rape the complainant who apart from her age was clearly related. I do not buy the idea of a hidden agenda by the complainant to take away the appellant's land as being the reason for them to have brought these charges against him.

In the premise this appeal is dismissed. Let the appellant serve the period given by the trial court.

Dated, signed and delivered at Kisumu this 9th day of July, 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for the state

.....for the appellant

HKC/va