



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

Criminal Appeal 199 of 2007

ISAYA OMONDI NYAWALA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in the Senior Principal

Magistrate's Court at Rongo, Criminal Case No.368 of 2007 by

HON. D. KIMEI ESQ., SRM)

JUDGMENT.

The appellant was charged with assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. He also faced a second count of rape contrary to **section 144** of the **Penal Code**. In the first count it was alleged that on 14th April 2007 at Migori District the appellant assaulted **MAO** and occasioned her actual bodily harm. Regarding the second count, on the aforesaid date, the appellant had unlawful carnal knowledge of **H A A** without her consent.

After a full trial the appellant was convicted on both counts and sentenced to twelve months' imprisonment on the first one and seven years' imprisonment on the second one. Both sentences were ordered to run concurrently. The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court.

The brief facts of the case were that on 14th February 2007 at about 7.30 p.m., **M A O, PW1**, was in her house at **particulars withheld**. She heard someone knocking at her door. PW1 was with her sister, **H A, PW2**. When PW1 opened the door a person who was dressed like a police officer walked in. The person informed PW1 that her husband had been arrested by the police in connection with a theft that took place at his place of work. The person informed PW1 that her husband wanted to see her and so she agreed to accompany him. While they were walking, an on coming vehicle illuminated their faces by its powerful headlights. The person who was with PW1 told her to stoop down so that the vehicle's headlights would not shine on their faces. PW1 was surprised by that statement because she had thought the person was a police officer. As a result she looked at him properly and realized that he was a friend of her husband known as "**Omondi**", the appellant herein. PW1 called out his name and asked the appellant why he was masquerading as a police officer. At that juncture, the appellant knew that he had been recognized by PW1 and threatened to kill her. He started to strangle her but PW1 managed to slip away and started screaming. The appellant chased her up and started undressing her as he continued to

assault her. PW1 managed to run away and members of the public were attracted to the scene by her screams. As a result the appellant disappeared. PW1 feared to return to her house and spent the night in one of her neighbour's home.

When PW1 returned to her house the following day she found her sister, PW2, who told her that the appellant had returned to her house and pretended he had been sent by the PW1 to call her. When PW2 agreed to accompany the appellant on their way the appellant turned against her and proceeded to rape her.

PW2 corroborated the evidence of PW1. She added that shortly after the appellant left with PW1 he returned to the house and told her that PW1 was in his house and wished to talk to her. The appellant was dressed as a civilian and PW2 was able to recognize him as a friend to the husband of PW1. At that time PW2 was six months pregnant and did not have much energy. On the way the appellant pushed PW2 into a bush and raped her. He threatened to kill her if she raised any alarm. After the ordeal the appellant fell asleep and PW2 managed to escape. The incident was reported to police and both PW1 and PW2 were issued with P3 forms and proceeded to a hospital where they were treated.

In his defence the appellant denied having committed the offences as charged with. He alleged that PW2 had been his friend but they disagreed and he married another lady.

The learned trial magistrate considered the appellant's defence but rejected the same as untrue. He held that the appellant was properly identified by PW1 and PW2.

I have carefully considered the evidence that was tendered before the trial court. The appellant was well known to both PW1 and PW2. He was a friend of PW1's husband. At the material time the appellant was housing the husband of PW1. It appears that at the material time the husband of PW1 was on the run. PW1 used to go to the appellant's house to deliver food to her husband. I have no doubt in my mind that the appellant tried to disguise himself by wearing what appeared like police uniform so as to deceive PW1. The two complainants had no reason to frame up the appellant. PW1 was able to see the face of the appellant clearly because of the powerful headlights of the vehicle as aforesaid. When the appellant returned to the house of PW1 he was dressed normally and PW2 was able to recognize him. I am satisfied that there was no possibility of any mistaken identity. The appellant's conviction and sentence was proper and well founded in law. I dismiss this appeal in its entirety.

DATED, SIGNED and DELIVERED at KISII this 30th day of October, 2008.

D. MUSINGA.

JUDGE.

Delivered in open court in the presence of:

1. The Appellant
2. Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE