



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 33 OF 2016

BETWEEN

CHARLES OUMA NYAGILO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and Sentence of P. GICHOI (MRS), CM, in Homa Bay CM's Court Criminal Case No.1150 of 2014 dated 20/06/2016)

JUDGMENT

1. The appellant (**CHARLES OUMA NYAGILO**) was convicted on a charge of sexual assault contrary to **Section 5 (1) (a)** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve 10 years imprisonment.

The particulars of the charge were that on 22nd August 2014 at **[particulars withheld]** area in **HOMA BAY COUNTY**, he unlawfully used his hand and fingers to penetrate the vagina of **J A O**.

2. He was also convicted on a charge of assault causing actual bodily harm contrary to **Section 251 Penal Code** and sentenced to serve 2 years imprisonment.

The particulars being that on the same date and place, he unlawfully assaulted **J A O** thereby occasioning her actual bodily harm. The appellant denied both counts.

3. 27 year old **J A O** (PW1) was married to the appellant in 2006 and had three children aged 8, 6 and 4. They lived in their matrimonial home in **[particulars withheld]**, although the appellant was working in **MOMBASA** while **J** stayed in **[particulars withheld]**.

On 16/08/2014, **J** received a phone call from the appellant who claimed he had received information that she was moving around with another man. She denied but he told her he did not want her in that house again. The next day she tried to call him on phone but he declined to pick her calls.

4. On 18/08/2014, **J** moved back to her parents' home in **AWASI**, because her mother had received a message from the appellant, which prompted her to request PW1 to go home so that the appellant does not find her in the house.

5. On 20/08/2014, the appellant went to her parent's home and requested her to go back to their matrimonial home. She consented to the request. Once at their home, the appellant asked why she had gone back to him – she reminded him that he was the one who had asked for her return. She also prayed for his forgiveness. His response was that he'd gone to her home to settle matters with her parents not her. The appellant appeared hostile so PW1 decided to leave that evening around 6.00 p.m., and she went to the Bus stop at Olare. She also called her parents and told them what was happening. They advised her not to travel home that late as it was not safe. PW1 decided to go to **NYANGWESO** where there was a woman selling cooked food at a hotel. She explained her plight and was allowed to spend the night in the hotel.

6. The next day PW1 boarded a matatu from **NYANGWESO** and went to **[particulars withheld]**, and after making a call to her parents, she boarded a matatu heading to **AHERO** and sat next to the door. She did not look around to see who else was inside the vehicle. When they got to a school near **NYANGWESO**, someone requested to alight, so she shifted to let him pass. The person held her hand – that's when she realized it was her husband. He pulled her out of the vehicle and continued holding her hand.

7. They started walking along the road, then when they got near **[particulars withheld]** primary school, the appellant diverted to the path leading to his home. As they got near his home, the appellant begun beating PW1 and kicking her. He kept bending to retrieve a knife

which he had hidden in his socks, even as he kept slapping and kicking her.

PW1 was buying time, as they moved closer to where there were people – then she saw a homestead and decided she would not move any further. She sat down and refused to move, she screamed for help as he tried to drag her along. No one responded and the appellant managed to take her to their house. The door was locked with a pad lock – he kicked the wooden window open, lifted her, and throw her inside the house.

8. The children were nowhere to be seen and the appellant said he had hidden them somewhere. He then ordered her to undress, while holding a knife in one hand – she complied. The appellant then got hold of a rope which he used to tie her two hands and one leg to the roof, leaving her standing on one leg. He then got water in a jerrycan and also brought a jug. He then wore a nylon paper in his right hand like a glove. He told PW1 he would torture her until she gets tired, then he would kill her.

9. The appellant then inserted his hands into PW1's vagina, and using his fingers, he started pulling out something from inside her vagina. It was very painful, and the appellant told her he would keep her alive until 4.00 p.m. – the last Muslim time to be alive. He kept showing her the knife as he continued inserting his hand inside her vagina. She pleaded with him.

“Baba N (N is the name of their first born son) why are you torturing me.”

The appellant warned her not to refer to him by that title saying he was a killer. PW1 stated:-

“Due to pain, I soiled myself with urine and faeces. I had no further energy. I felt like fainting. He took the water in a jug and forced me to drink. I regained some energy. He continued with the same torture inserting his hand in my vagina.

A few minutes before 4.00 p.m., he cut the ropes and lay me on the ground and still continued. He then picked the faeces on the ground and forced me to eat it. He held the knife and forced me to swallow. He could then take the water and force me to swallow the faeces with it.”

10. The appellant continued threatening to kill her and showed her the phone which indicated it was 3.57 p.m. He threw her clothes onto her and she wore them, then took the ropes and tied her hands again to the roof, and left the house, saying he would not take her anywhere.

11. After he had left, PW1 realized the rope was not too tight, so she moved until her hands were loosened and she escaped through the window. She had no energy to walk, and had faeces all over her body and head, as the appellant had smeared her with the faeces. PW1 crawled to her neighbour's house, one **AYA**, and hid herself after warning the children not to tell anyone about her as she did not wish appellant to know where she was.

12. The neighbor and his wife arrived at night and found her inside their house. They allowed her to stay the night and since police had restricted night movement of motorcycles in the area, they had to wait until 5.00 p.m. when PW1 got a motor cycle which took her to Oyugis, and from there she boarded a matatu to her parents' home in **AWASI** arriving there at 10.00 a.m. Unfortunately her mother did not have money to take her to hospital, until the next day when she was taken to make a report at Awasi police station then to hospital for treatment.

Awasi police advised her to report the matter to the nearest police station to the scene of the incident – so on 26/03/2014 she reported the matter to **NGEGU** police post. Meanwhile the appellant had returned to Mombasa from where he was eventually traced and arrested.

13. On cross examination PW1 stated that as they walked home, with the appellant holding her hand and beating her, she would scream, but people feared to go to her rescue. She clarified that it was the wooden window which the appellant forced open and threw her through into the house and he used the same window to get into the house. She also explained that the knife which the appellant had hidden in his socks was in a sheath.

14. She also explained that upon escaping from the **“torture chamber”**, she could not walk properly and had a discharge from her vagina. As at the time of giving evidence, she had not fully recovered.

PW1 also stated that thereafter the appellant called her parents and said he had taken the children with him to Mombasa and they should look for PW1.

15. **M A O** (PW2) **J**'s mother confirmed that on 16/08/2014 at 8.00 p.m., she received a call from the appellant who was in Mombasa. He told her his brother (**E**) had informed him PW1 had become a prostitute and was always in Kochia. The appellant sent a text message to her the next day, declaring that **J**'s behavior had destroyed the respect he had for her family. PW2 showed that message to her husband and every member of her family.

16. On 18/08/2014 the appellant sent another message saying he wanted a clear response before he could take action. Appellant forwarded the same message to **J**'s father. The **O**'s became scared – that is how PW2 called PW1 and told her to come home immediately – she obliged.

17. Eventually the appellant went to PW1's home and pleaded that – she goes back as he had been left with young children – the **O**'s gave in to his request, and that is how PW1 went back to her matrimonial home the next morning. Later in the day PW1 called her mother to say the appellant was very cruel and was asking her why she had gone back to him.

18. The next morning at 10.00 a.m. PW1 called PW2 again to say she did not spend the night in her house but inside a kiosk at **NYANGWESO** because she was afraid of being harmed by the appellant who appeared very violent. PW2 advised her to go to an Mpesa shop so she could send her money for transport. She did not hear from PW1 until the next day at 5.00 a.m. when she later called to say she had boarded a motor cycle but had no money, and eventually PW1 got home.

19. It was PW2's evidence that she noticed PW1 was walking with her legs apart and appeared soiled with human waste on her head, legs and hands. PW2 narrated her ordeal to her mother.

She eventually took PW1 to report to police and also to hospital. She also sought help from the Human Rights Office at **AWASI**.

20. On cross examination PW2 stated that appellant eventually confessed his brother had not given him the alleged information about PW1's misconduct but he had dreamt about it.

She denied suggestions that she was the cause of the rift in the appellant's marriage or that she and PW1 had fabricated the whole incident upon learning that he had married another girl.

21. Upon request by the appellant during cross examination, she showed her the text messages he had sent to her on her phone. She confirmed that the appellant had married another girl, but she had no problem with that.

22. PW3 **M O's** (PW1's father) evidence corroborated that of PW1 and PW2.

23. **SGT JOSEPH KIRWA KORIR** (PW5) of **NGEGU** police station confirmed receiving a report from PW1 regarding the assault and that the appellant had fled to Mombasa. He visited the appellant's house and found no property therein.

24. PW5 learnt that the appellant had taken away all the property to Mombasa. He liaised with fellow officers at **NYALI** police station who eventually managed to trace the appellant in Mombasa who was collected by **CPL RAVAS C.O. KARENJE** and brought to Homa Bay.

25. **MICHEAL OCHOLA** (PW6) a clinical officer at Homa Bay County Referral Hospital confirmed that upon examination, PW1 had bruises on the right and left wrist joints, as well as the ankle joint.

26. On cross examination he confirmed that PW1 had also been sexually assaulted but he did not carry out a genital examination because by the time he saw her, the injuries had healed. There was another clinical officer (**KENNEDY OOLO ONYANGO**) who was then working at **AWASI** dispensary and who initially attended to PW1 and stated:-

“She complained of pain in her genital area, pain on both left and right wrist joints, pain on the left ankle joint.”

27. He described her appearance as emotionally disturbed with hyperemic lesion along both wrist joints and left ankle joint, consistent with rope marks. An internal genital examination revealed abrasions on the vaginal wall and non bleeding wounds on the area between the anus and vagina. There was a white something discharge and from the trauma in the genital area. PW7 concluded that there was something that injured her in the genital area.

28. On cross examination, PW7 explained that if any bleeding had occurred it probably resolved with time because he attended to PW1 two days after the incident.

29. On cross examination, PW7 ruled out the possibility of a male sexual organ causing the trauma.

30. The appellant in his sworn testimony confirmed that PW1 was his wife but that they differed because she was having love affairs. He reported her conduct to her parents but they took no action. She would leave their child unattended while going on her rendezvous and the appellant suffered embarrassment. So in 2012 told her to go back to her parent's home, hoping she would improve, and she left their Mombasa home.

31. He later regretted sending her away, so he got her back but sent her to live in his rural home in [particulars withheld]. Meanwhile the appellant confessed he was also having extra marital affairs even when PW1 lived with him in Mombasa.

32. However PW1's behavior got worse and his brother Gordon Omondi gave him updates about her; and Eric Odhiambo.

33. In August 2014 Eric told him a man had come to his home at 1.00 a.m. accompanying PW2 and they had sex; and Eric caught them naked. This is what led him to call PW1's mother and send the text messages.

34. He therefore came to the village, questioned PW1 and went to have audience with her parents. According to the appellant, PW1 admitted her mischief and asked for forgiveness – that's when he told her to go back to his home as he had forgiven her. According to the appellant PW1 never went back to his house and he later saw her in the company of another man heading towards Homa Bay on a motor cycle.

The appellant then left for Mombasa where he was working.

35. On cross examination he denied being with PW1 on 22/08/2014 or assaulting her at all but that he saw her on a motor cycle on the aforementioned date, although he never spoke to her.

36. The appellant's witness **ERIC ODHIAMBO** (DW2) said that PW1 was unfaithful, and he had even ambushed her and found her naked in the company of an equally naked man at night in his brother's house.

He then informed PW1 about the matter. He spoke to appellant on 22/08/14 and learnt that he had not seen PW1.

37. On cross examination he said he had been in the appellant's company on 22/08/2014 up to 9.30 a.m. when he went away for 30 minutes then came back and they remained together thereafter till nightfall when each went to sleep in their separate houses.

38. In her judgment the trial magistrate found there was no dispute that the appellant and PW1 did not get along well, and the appellant relied on what others told him about his wife – which he deemed to cause him embarrassment. Further that it was common ground he had ordered Pw1 to leave the matrimonial home and he did not deny sending text messages to PW1's mother on 18/08/2014 which read:-

“Give me the reply now. If not I will take my action from now. I am in bad condition because of your daughter.”

39. The trial magistrate found that the message showed the appellant had made upon his mind to take action against PW1. She further pointed out that the appellant did not deny seeking forgiveness and recanting the accusation he had made against PW1.

She was persuaded that what Pw1 described was too detailed, systematic and graphic that it could not have been an imagined tale.

40. She held that although there was no eye witness, PW1's evidence was materially corroborated, and the trial magistrate having observed the demeanour of PW1, was satisfied that she was truthful and consistent. The trial magistrate also invoked the provisions of **Section 124** of the **Evidence Act** in accepting PW1's evidence. Her evidence was found to be supported by the material evidence regarding the sexual assault.

41. The trial magistrate considered the appellant's defence and rejected it on grounds that mere suspicion that PW1 was having extra marital affairs did not warrant the kind of trauma the appellant exposed her to; and his actions could not be described as reaction in the heat of the moment.

The trial magistrate stated:-

“He worked himself up on all the results of his “investigations”, laid an action plan on how to punish PW1. He executed the same in a viscous and cruel manner which robbed Pw1 of all her dignity first as a human being and secondly as a woman There were other ways of resolving the conflict which the accused person chose not to pursue.”

42. The trial magistrate concluded that the appellant even in cross examination intended to embarrass, irritate and annoy the complainant's parent by suggesting that PW3 impregnated his own daughter, and this added no value to his defence.

43. The defence witness was dismissed as being inaccurate and did not in any way rebut the prosecution evidence; rather it went to prove the motive and the opportunity the appellant had for commuting the offence.

44. The trial magistrate held that the relationship between the appellant and PW1 was that of husband and wife – it was a case of domestic violence. She noted that there was nothing to suggest that the appellant had any interest in sex or had even made any sexual advances to PW1 for whatever reason. She stated:-

“This is purely sexual violence meted on the complainant by her husband ... I am satisfied that he sexually and physically assaulted the complainant herein ...”

45. These findings have been challenged by the appellant in a supplementary petition of appeal that the trial magistrate erred in the interpretation of criminal law and evidence in convicting the appellant under the Sexual Offences Act whereas the acts he committed were not at all motivated by a sexual urge.

46. It was appellant's contention that the evidence only proved that the appellant tortured and assaulted his wife.

47. Under the circumstances then, the sentence meted was excessive and **Section 5 (1) (a) (1) (2)** of the **Sexual Offences act** ought not to have applied.

48. The court was urged to be persuaded that the appellant was rendered temporarily insane by rage due to misinformation and had prayed leniency; as the issues were purely matrimonial in nature and both needed counseling.

49. At the hearing of the appeal, **MR. G.S. OKOTH** on behalf of the appellant reiterated the position that this was pure assault inflicted on the sexual organs under **Section 251 Penal Code** and not an offence under the **Sexual Offences Act**. Counsel argued that there was no evidence that appellant was seeking sexual satisfaction, and although his conduct was extreme, it must be borne in mind that this was a matrimonial problem where the issue of chastity is rather devious in the minds of some people to the extent that when death occurs it is reduced to manslaughter. He urged the court to reduce the sentence meted out.

50. In opposing the appeal the State served a notice of enhancement of sentence from the 10 year sentence to life imprisonment.

51. **MR. OLUOCH** on behalf of the State submitted that the offence for which the appellant was convicted exists under the Sexual Offences Act. Further the appellant did not deny his action but only tried to defend them as not having any sexual intention.

He referred to the graphic details including PW1 being forced to eat her own faeces and urged the court to find that the aggravated nature of his conduct warrants enhancement of the sentence to life imprisonment.

52. Mr. Okoth in response maintained that the graphic narrative merely showed there was an element of torture and the sexual assault referred to under the sexual Offences Act contemplates non consensual sex for purposes of sexual satisfaction.

53. It would seem the appellant does not deny that the incident occurred and he acted in the manner described by the trial magistrate. His only concern is that this was committed in the course of matrimonial set up and ought to be considered as pure assault with just some extreme and rather gross manner of executing it.

54. Indeed the trial magistrate thoroughly considered to the last detail the manner in which the offence was committed, and how PW1's evidence was corroborated by PW2 and PW3 and also PW6 and PW7. Should this have been pure assault?

Section 5 (1) of the Sexual Offences Act provides:-

“5(1) Any person who unlawfully –

a) Penetrates the genital organs of another person with –

1) Any part of the body of another or that person or Is guilty of an offence termed sexual assault

2) A person guilty of an offence under this action is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”

55. The provision does not suggest that the assault or act must be for the assailant's sexual satisfaction or that it excludes persons married to each other. It does not limit which part of the body is used to inflict the assault. It is also not to be ruled out that the appellant was using perverted sexual invasion of PW1 as a tool to torture and humiliate her.

There was no error in the finding by the trial magistrate and I find the conviction was safe and is upheld.

56. Should the sentence be enhanced, of course the acts of the appellant were so horrifying and distressing it sounds like a horror movie – not something that happened to a living person. The trauma, the humiliation, the indignity, was so intense that I am persuaded the ten year sentence was merited.

57. The DPP has not demonstrated why it is necessary to enhance the sentence and I confirm the sentence meted out by the trial magistrate.

58. The appeal has no merit and is dismissed.

Delivered and dated this 16th day of October, 2017 at Homa Bay

H.A. OMONDI

JUDGE