



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.174 OF 2009

BENARD OMONDI OCHIENGAPPELLANT

VERSUS

REPUBLICRESPONDENT

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM NYANDO SPMS
COURT: D. O CHEPKWONY – SRM**

IN CRIMINAL CASE NO.2175 OF 2006.]

J U D G M E N T

1. The appellant was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No.3/06. The particulars were that on the 16th day of February 2006 at **[particulars withheld]** sub-location in Nyando District within Nyanza Province, the accused were jointly with another not before court unlawfully had carnal knowledge of **R A O** without her consent.
2. The alternative charge was Indecent Act contrary to Section 11(6) of the Sexual Offences Act No.3/06. The facts were that on the 15th day of February 2006 at **[particulars withheld]** sub-location in Nyando District within Nyanza Province, the accuses were jointly with another not before court unlawfully committed an Indecent Act with **R A O** aged 25 years by touching her breast against her will.
3. The Prosecution called 3 witness in support of its case. PW1 the complainant told the court that on the fateful night at around 9 p.m., she had gone to the toilet which is about 200 meters from the house. Before she entered the latrine she was accosted by 2 people whom she managed to identify as the appellant herein and one Moi. She was able to identify them with the aid of moonlight.
4. They then forcefully dragged her to a dry river bed where they proceeded in turns to rape her. They thereafter took off and left her. She, then at around 5 p.m. reported to her father-in-law **J O** who was also a village elder.
5. Thereafter she went to Masongo hospital where she received treatment. She also went to Awasi police station where she was given a P3 form. She said that the appellant and his accomplice were people known to her and had infact threatened her before.
6. **PW2 APC FRANCIS MWITA** told the court how they arrested the appellant after receiving an order of arrest from OCS Awasi Police Station and together with the villagers they traced the appellant and arrested him at the centre and handed him over to the OCS Awasi.

7. **PW3 JACK OMONDI WERE** was the clinical officer who produced the P3 form. According to him there was tenderness over the cervical region, bruises on the upper limbs and over the right hip. There was an abrasion wound on right elbow. The lower limb had bruises on the left knee with lower limitation inflexion and extension. The genitalia revealed an inflamed labia minora and vaginal interiotus. There was whitish discharge noted on the labia majora region.

8. When put on his defence the appellant choose to give unsworn evidence. He denied the charge and basically narrated how he was arrested. He argued that there was no witness to the commission of the offence.

9. This court is enjoined to analyse the evidence afresh with a view of arriving at an independent conclusion. The respondent on its part opposed the appeal.

10. The petition of appeal dated 21.7.2009 is grounded on 5 grounds which can be summarised as:

- a. **Whether or not the evidence on record was so sufficient to have led to the conviction of the appellant.**
- b. **Whether holding the appellant for 4 days violated his constitutional rights.**
- c. **Whether the sentence was excessive.**

11. The written submissions by the appellant on the other hand are purely mitigation.

12. He deviated from the petition of appeal. According to him he has served 10 years jail term and that the court ought to take account of that and release him. That he has undergone various trades while in prison and this has totally reformed him and he should be allowed to go home albeit on probation.

13. Considering however the evidence on record I find that the actions by the appellant pre-meditated. The appellant was well identified and or recognised by the complainant. The moonlight was sufficient to have enabled her recognise her assailant. The act in short was barbaric and shameful. I do not find at all the right of the appellant having been violated and his 4 days stay in custody is an afterthought as the same was never raised during trial.

Neither do I find the 20 years imposed unlawful at all.

14. The upshot of this finding is that the appeal is not merited and the same is dismissed.

Dated, signed and delivered this 30th day of November, 2015

H. K. CHEMITEI

J U D G E