



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO.34 OF 2010**

**EDWARD OCHIENG OKUMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM NYANDO SPM'S**

**COURT: MBUGUA - SRM IN CRIMINAL CASE NO.1068 OF 2005.]**

**J U D G M E N T**

1. The appellant was charged with the offence of Rape contrary to Section 140 of the Penal Code. The particulars of the charge are that on the 27th day of July, 2005 at Andingo Panga Sub-Location in Nyando District within Nyanza Province had Carnal Knowledge of **P O M** without her consent.
2. The alternative charge was Indecent Assault on female contrary to Section 144(1) of the Penal Code.
3. The particulars were that on the 27th day of July 2005 at Andingo Panga Sub-Location in Nyando District within Nyanza Province unlawfully and indecently assaulted **P O M** by touching her private parts.
4. On his own plea of guilty the appellant was sentenced to 25 years imprisonment.

He has appealed against the same citing several grounds namely that:

- a. **The sentence was excessive;**
  - b. **He didn't understand the language;**
  - c. **He was convicted on a repealed law.**
  - d. **His rights under section 77(2) of the then constitution were violated,**
5. The state as expected opposed the appeal on the grounds that he pleaded to the charge and consequently he cannot appeal against it.
  6. On perusal of the proceedings its apparent that the plea was read and explained to the appellant in Dholuo language which he claimed to have understood. Later the facts were read to him and he changed

plea. A plea of not guilty was then entered against him.

7. However on 1/8/05 he changed his plea and the charges were read to him again in Dholuo and that's the moment he admitted the same. It is not therefore true that the appellant did not understand the language used by the court. At any rate having pleaded twice meant that he did understand the same.

8. It's true that Section 140 of the Penal Code was repealed by the Sexual Offences Act No.3/06. However the charge facing the appellant was before the advent of the new Sexual Offences Act. The court was therefore right in convicting him under the same Act,

9. The allegation that his constitutional rights under Section 77(2) of the old constitution were violated are spurious. There is no such evidence as the offence occurred on 27.7.05 and the appellant brought to court on 1.8.05. The 3 days or thereabouts period cannot be considered inordinate. In any case it appears that he was arrested on 30.7.05.

10. Finally Section 348 of the Criminal Procedure Code bars the appellant from appealing except on the question of sentence. The same was not illegal or manifestly excessive for this court to interfere with it. His action to say the least were inhumane and barbaric. As noted from the facts the victim was an 80 year old grandmother. The period of 25 years I find were commensurate to the offence.

The appeal is dismissed.

**Dated, signed delivered this 30th November, 2015**

**H. K. CHEMITEI**

**J U D G E**