



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA T KISUMU

CRIMINAL APPEAL NO. 11 OF 2013

ALFRED OGENDI OTIENOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 650 of 2010 of the Principal Magistrate's Court at Winam – PW MUTUA PM)

J U D G M E N T

Introduction

- 1). The appellant and his co-accused were charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006 as well as indecent Act contrary to Section 11 (a) of the same Act and assault causing actually bodily harm contrary to Section 251 of the Penal Code.
- 2). The particulars are as hereunder:-

CHARGE SHEET

1. ALFRED OGENDI OTIENO
2. JOSEPH ODHIAMBO OCHIENG

CHARGE

GANG RAPE CONTRARY TO SECTION 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

COUNT 1. ALFRED OGENDI OTIENO. On the night of 15/16/12/09 at [particulars withheld] sub location in Kisumu East District within Nyanza province in association with **Joseph Odhiambo Ochieng** intentionally and unlawfully caused his penis to penetrate the vagina of **E A A** a female aged 60 years without her consent.

ALTERNATIVE CHARGE Indecent act with an adult contrary to Section 11 (a) of the sexual offences Act No. 3 of 2006.

ALFRED OGENDI OTIENO. ON THE NIGHT of 15/16/12/09 at [particulars withheld] Sub location in Kisumu East district within Nyanza province, did commit an indecent act with **E A O** an adult aged 60 years by touching her breasts.

GANG RAPE C/SEC 10 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

COUNT 11: JOSEPH ODHIAMBO OCHIENG. On the night of 15/16/12/09 at [particulars withheld] sub location in Kisumu East district within Nyanza Province in association with Alfred Ogendi Otieno intentionally and unlawfully caused his penis to penetrate the vagina of **E A A** a female aged 60 years without her consent.

ALTERNATIVE CHARGE INDECENT ACT WITH AN ADULT CONTRARY TO SECTION 11 (a) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

PARTICULARS: JOSEPH ODHIAMBO OCHIENG. On the night of 15/16/12/09 at [particulars withheld] sub location in Kisumu East District Nyanza province did commit an indecent act with **E A A** an adult aged 60 years by touching her breasts.

CHARGE

COUNT III: ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE.

PARTICULARS: 1 ALFRED OGENDI OTIENO 2. JOSEPH ODHIAMBO OCHIENG

On the night of 15/16/12/09 at [particulars withheld] sub location in Kisumu east district nyanza province, jointly with others not before court unlawfully assaulted **EUNICE A A A** thereby occasioning her actual bodily harm

- 3). The appellant was convicted on the main charge of gang rape and sentence to serve ten (10) years imprisonment.
- 4). On the material night PW1 was asleep in her house together with other people who had attended a funeral ceremony. At around midnight his son PW2 who was sleeping in the sitting room woke her up as there were people who were knocking the door and they were alleging that they were police officer.
- 5). The complainant went to the sitting room and lit a tin lamp. The intruders broke the door and entered the house. They proceeded to assault the complainant using some sharp and blunt objects. The intruders were five (5) in number. The appellant according to PW1, proceeded to rape her while his co-accused and others assaulted her. She lost consciousness in the process.
- 6). PW3 B O the complainant's child saw all these as he hid in the cupboard. He thereafter escaped and managed to notify his brother who came only to find the assailants having left and PW1 was outside bleeding and dirty.
- 7). The said **PW2, J O A** then helped her mother to the house and cleaned her.
- 8). The complainant was taken to the hospital three days later. A report was made at Mamboleo Police Post as well as Riat Police Post.
- 9). **PW7, George Mwita** produced the P3 Form which he filled at Kisumu District hospital and which according to him showed that the complainant had been raped.
- 10). When put on his defence the appellant denied the charge. He gave an account of where he was that particular night upto 11p.m. The whole defence as well as those of his witness centered around one **F A**, PW3 whose husband John Milo had died and was to be inherited.
- 11). From the line of the defence it appears that the said Florence resisted attempts to be inherited which

it appears was being propagated by PW1 her mother in law.

Analysis And Determination

12). Mr. Ouma for the appellant has submitted on the long issue of whether the complainant was actually raped by the appellant or was simply assaulted. The issue of identification seemed to have been well settled by the evidence of the complainant and PW3. On this Mr. Kiprop counsel for the State argues that this was the crux of the matter and if this was the case what better defence did the appellant had.

13). I have perused the entire proceedings including the appellants defence and the testimony of his witness. What is clear is that the complainant sustained serious bodily injuries during the attack. The light from the lamp helped her and PW3 to identify the attackers who apparently were relatives and people known to her.

14). The explanation by the appellants witness only ends at 11p.m and not thereafter. None of them explained where the appellant and his co-accused were at around midnight when the attack took place.

15). I do not find therefore any single piece of evidence to suggest that the appellant was not at the scene. Both PW1 and PW2 clearly identify them.

16). But what was the nature of the attack? From the defence evidence it appear that they did not want F A to be inherited after the death of her husband. This inheritance story and the performance of the ritual by one Lazarus was apparently advised by the complainant.

In light of this finding was the complainant raped or simply assaulted by the assailants? Evidence was led by the prosecution to show that the complainant lost consciousness in the process of the attack. The complainant herein told the court that:-

“Accused 1 pushed me down. I got defensive for was heading towards my prosecute parts..... watery substances were oozing from my private parts. I had not had sexual intercourse for long”.

On cross examination she said:-

“ I asked accused 1 why was touching my private parts..... I saw accused 1 having sex with me by force. I went unconscious thereafter”.

She further said on cross examination:-

“The rest of the groups continued boxing me as accused 1 raped me”.

17). Finally on re-examination she maintained that she saw the appellant having intercourse with her before she became unconscious.

18). PW7 corroborated PW1 by his findings as per the P3 Form produced. Although sperms were not seen because of the duration the privates parts were swollen and there was fungal infection. He said that he had relied on the other treatment notes in filling the P3 Form.

19). Mr. Ouma however attacked this evidence arguing that the same was not conclusive as the clinical officer found that fungal infection is not sexually related and neither swelling of the genital area.

20). Reading however the evidence of PW7 I find that the appellants counsels reading is not conclusive. What the witness said was that “not all” fungal injection or swellings in genital area are as a result of sexual infection. My understanding simply is that it can still be an indication of sexual assault.

In fact the said P3 Form concludes that there was sexual penetration hence the prognosis that the

complainant was raped.

21). Despite going for treatment three (3) days later as well as reporting to the police late I do find that indeed the complainant was raped and assaulted. The attackers were clearly identified through the light from the tin lamp before it was put off by the attackers. PW3 clearly knew the appellant and his co-accused. I do not find any difficulty in concluding therefore that the appellant was among the persons who attacked and raped PW1 on the fateful night.

22). Despite the circumstances surrounding DW3's whereabouts I do not find any malice for the complainant to have targeted the appellant as one of her attackers.

I find no merit in this appeal and therefore I shall proceed to dismiss the same.

Dated, signed and delivered at Kisumu this 27th day of January 2014.

H.K. CHEMITEI

JUDGE

In the presence of:

.....for state

.....for the appellant

HKC/va