



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 9 OF 2012

GEORGE OWINO OPIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Senior Resident Magistrate's Court at Ukwala Criminal Case No. 91 of 2011 Before Hon. E.K. Mwaita]

JUDGMENT

Introduction

1). The appellant was charged with the offence of Sexual assault contrary to section 5 (1) (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 25th February, 2011 at [particulars withheld] in Ugenya district within Nyanza province unlawfully used his fingers to penetrate the vagina of

M A O

2). The appellant was equally charged with Stealing contrary to section 275 of the Penal Code. The particulars are that on the 25th day of February 2011 at [particulars withheld] in Ugenya district within Nyanza province stole cash Kshs. 750/=, the property of M A O.

3). The appellant was convicted and sentenced to 10 years imprisonment in respect to the first count and discharged under the provisions of section 35 (1) of the Penal Code in respect to the second count.

Facts

4). The complainant PW1 told the court that she was asleep in her house on the material night. At around 8 p.m the appellant and his accomplice forcefully entered her house and got hold of her. They proceeded to strangle and raped her. She became unconscious in the process and when she regained her consciousness she went and reported to the assistant chief and thereafter went to the hospital for treatment. The appellant was arrested the following day.

5). PW2, M A is a neighbour who on the material day had gone to the complainant's house to give her some money. On reaching her house she found the appellant putting her fingers on PW1's private part and his co-accomplice was pouring water on her. He knew both the appellant and his accomplice. She went to

call other people but when she came back the appellant had taken off together with his friend.

6). **PW3, PC Norbert Mugwi** was on 7-3-2011 instructed by Sgt. Bashir to proceed to the assistant chief's place who was to assist him apprehend the suspect. The said assistant chief as well as PW1 assisted him in arresting the appellant.

7). The appellant gave an alibi defence. He said in his unsworn evidence that on the material day he had left for Kericho where he works as a turn boy in a bus called Emirates. He denied the charge but he agreed that they are related with the complainant.

Analysis and Determination

8). The appellant has mounted five grounds of appeal. He has contended that the prosecution did not establish who raped the complainant and that they relied majorly on circumstantial evidence.

This court's primary duty at this juncture is to re-evaluate the evidence on record and come to a fresh and independent finding.

9). The charge against the appellant was that of sexual assault. Sexual assault has been defined by Black's law Dictionary 8th Edition as **“sexual intercourse with another person who does not consent”**. It is also defined as **“offensive sexual contact with another person exclusive of rape”**.

10). The circumstances obtaining in this case are unclear. Was the complainant raped or sexually assaulted? Section 5 of the Sexual Offences Act in which the charges were brought is broad in nature and it appears that sexual assault in that case applies to the second limb definition as envisaged by Black's Law Dictionary above.

11). According to PW1 the assailants strangled and raped her till she lost consciousness. On cross examination she said that she did insert her two fingers

in her vagina. This insertion of the fingers was corroborated by PW2. However on cross examination PW2 said that the appellant was sleeping on her and putting his fingers on her vagina.

12). The two, namely raping and insertion of her finger in the complainant's vagina are separate and distinct.

13). The complainant did not apparently produce any medical report. She said that she went to the hospital but there was no treatment notes produced neither was any P3 form produced. Whether the complainant was raped or assaulted in the manner said, the same ought to have been corroborated by a medical report.

In the absence therefore of such crucial piece of evidence I do not find the basis for the court to have convicted the appellant.

14). Equally, there was the question of identification which was not very clear. PW1 did not clearly tell the court how she managed to recognise or identify Okoth and Ochieng. It was 8 p.m in the night and she ought to have explained to the court how she recognised the assailants.

The assistant chief perhaps would also have been of assistance if he had testified.

15). This court finds that the case was poorly investigated. The investigating officer ought to have ascertained the injuries if any by ensuring that medical evidence are produced to back up the case if indeed he did any investigation.

For the above reasons I do find this appeal meritorious and do allow the same and order the appellant to be released unless lawfully held.

Dated, signed and delivered at Kisumu this 20th day of January, 2014.

**H.K.
JUDGE**

CHEMITEI

HKC/va