



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 156 of 2007

JOHANES ODHIAMBO OWUOR1ST APPELLANT

RAPHAEL BWEYA ROMI.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

**(From original conviction and sentence in Criminal Case number 967 of 2010 of the
Principal Magistrate's Court at Nyando – Mrs. L. N. Mbugua.)**

JUDGMENT

The Appellants were charged with the following offences:-

RAPE CONTRARY TO SECTION 140 OF THE PENAL CODE

On the 1st day of September 2005 at God Abuor Sub location in Nyando District within Nyanza province jointly unlawfully had carnal knowledge of SAO without her consent.

ALTERNATIVE CHARGE

INDECENT ASSAULT ON FEMALE CONTRARY TO SECTION 144 (1) OF THE PENAL CODE

On the 1st day of September 2005 at God Abuor Sub Location in Nyando District within Nyanza Province unlawfully and indecently assaulted SAO by touching her private parts.

COUNT II

GREVIOUS HARM CONTRARY TO SECTION 234 OF TEH PENAL CODE

On the 1st day of September 2005 at God Abuor Sub Location in Nyando District within Nyanza Province jointly unlawfully did grievous harm to SAO.

They were found guilty and sentenced to serve twenty (20) years custodial sentence respectively. They then filed this appeal vide their petition of appeal dated 11th October 2007. The substance of their appeal is that the circumstances obtaining at the time of the commission of the offence were not conducive at all to warrant positive identification of the appellants, that the trial court erred in

convicting the appellants based on the evidence of a single witness and that the court failed to consider the appellants defence.

The brief facts of this case are that on 1st September 2005 at around 7:15 p.m., the complainant SAO closed her business. She then hiked a lift a board a tractor.

On the way some two people attempted to stop the tractor but the driver by passed them. After travelling for about 100 meters she alighted to go to her home. Soon somebody caught up with her. She realized that he was one of the boys she had seen stopping the tractor.

Immediately thereafter he was joined by a second man. The two persons proceeded to viciously attacked her. She sustained several injuries on her body. One of them raped her (the 1st appellant) as the 2nd person, (2nd appellant) held her.

Thereafter they walked with her towards the road and by chance a motor vehicle came and she managed to escape into the forest. She then went home and her brother took her to the hospital beside reporting the matter to the police.

She was taken to Russia hospital and later P3 form was filled. The following day a man hunt was conducted and with the assistance of PW5 and others he appellant were arrested. She further told the court that there was moonlight and that the whole ordeal went on for about one hour.

PW2 Samuel Otieno Onyango the villager elder told the court that he was told by the brother to the complainant that some people had raped her sister. He told him of the names of the culprits and he assisted in their arrest with the support of some youths.

PW3 JOO is the brother to the complainant. He left his work at around 6:00 p.m. He met the 1st appellant that evening who asked him about the whereabouts of her sister.

Later at about 8:00 p.m. the complainant came home bleeding from the injuries she had sustained after being attacked by the appellant. He called the police and took her to the hospital. He also participated in arresting the appellants.

PW4 Inspector Jerald Barasa was the investigating officer. After receiving the call from the complainant's brother he went to the scene using a taxi. He found the appellant bleeding. He took her to Chemelil dispensary where she was treated and later referred to New Nyanza Provincial hospital.

Later some people brought a suspect and after one hour the second suspect was equally brought.

PW5 Bonface Juma Okoth travelled with the complainant a board the tractor that night. He was a passenger. He said that he saw two men who appeared drunk and that he knew them. He told the tractor's driver not to stop. After passing them the complainant stopped to alight and he saw the two men running towards the complainant.

The following day he was surprised to learn that the two men he had seen raped and assaulted the complainant.

PW3 Dr. Macyoto Linda Awuor produced the P3 form on behalf of Dr. Kowiti who had filled the same. She did confirm based on the findings on the said P3 form that the complainant had indeed been assaulted and raped.

When put on their defence each of the appellant argued that they were not at the scene and that on the material night each was in his own house.

Mr. Kowino counsel for the appellant argued strongly that the complainant based on her evidence

and the prevailing circumstances was not in a good position to positively identify the appellants.

The Learned State Counsel on the other hand thought otherwise. I have perused the evidence on record and indeed the main issue to determine is whether in the prevailing circumstances the complainant was in a good position to identify the appellants.

From the testimony of the complainant as well as the witness this seemed to be so.

PW1 said that she managed to identify the Appellant as there was moonlight as well as the light from the tractor. She went on to say **“There was moonlight and I was walking slowly. I realized that one of the two boys who had stopped tractor was coming from behind me. I heard footstep and looked behind and I saw the boy. I had not known him before. He wore a round necked T shirt even at time he had been asking for a lift”**.

She went on to say **“ I could see the man clearly walking side by side with me. I could see his appearance because of the moonlight”**.

The complainant further told the court that event after the ordeal the appellant or the assailants continued to walk with her.

PW5 equally managed to recognize the two boys and in fact told the tractor driver not to carry them. He further told the court that he saw the two person running towards where Sarah was.

I do find that the said witness PW5 evidence was credible for he knew the appellants having stayed with them for a long time.

He further told the court” **I had been able to see both accused because of the assistance of the lights from the tractor. Accused had also stood in-front of the tractor trying to stop it but driver had swerved to avoid them”**.

Further PW5 told the court that when he was arrested the following day, the 1st appellant had a **“heavy nail scratch on the face”** I find this to be consistent with what the complainant told the court. She inflicted the injury as she was trying to defend herself.

I do not find therefore the appellant argument that this was a case of a single witnesses identification to be true. PW5 indeed corroborated what the complainant said. The evidence of PW6 the doctor is worth considering at this juncture. The P3 form produced clearly shows that the complainant was injured. Those injuries are consistent with what she told the court.

The injury on her private parts shows that there was forcefully attack therein.

The defence by the appellant does not hold. Apart from denying knowledge of the incident their explanation concerning their movements on the material evening is not convincing. Nothing would have been better if they had called witnesses to buttress these explanations.

Although the business of proving a case is left to the prosecution the appellant under the provisions of Section 111 of the Evidence Act Chapter 80 Laws of Kenya ought to offer such reasonable explanation to buttress their claim. In the absence of such an explanation I do disagree with their defence.

An argument was raised by Mr. Kowino learned Counsel for the appellant that the trial magistrate misdirected herself when he sentence the appellant on a repealed law I do not think this was so.

Although Section 140 and 144 of the Penal Code was repealed Section 49 of the Sexual Offences Act Number 3 of 2010 clearly spelt out the procedure to be followed. The first schedule thereof states:-

“1. Notwithstanding the provisions of any other Act, the provisions of this Act shall apply with

necessary modification upon the commencement of this Act to all Sexual Offences”.

2. For greater certainty the provisions of this Act shall supercede any existing provisions of any other law with respect to Sexual Offences”.

I do find that the trial court applied this law correctly.

For the foregoing reason I do hold that the appellants assaulted the complainants on the material night. They were visibly identified by the complainant and her witness. I shall dismiss this appeal. Let the appellant serve the full jail term ordered by the court so as to pay for their barbaric act against the complainant.

Dated, signed and delivered at Kisumu this 16th day of October 2012

**H. K. CHEMITEI
JUDGE**

In the presence of:

Miss Oundo for State Counsel

Onsongo for Kowinoh for Appellant

HKC/aao