



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 106 OF 2018**

**BETWEEN**

**SHADRACK OTIENO alias OKOTH.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against judgment, conviction and sentence in***

***Tamu S.O No. 14 of 2017 by Hon. P.K. Rugut (SRM) on 04<sup>th</sup> October, 2017)***

**JUDGMENT**

**Background**

1. The Appellant herein **SHADRACK OTIENO alias OKOTH** has filed this appeal against his conviction and sentence on a charge of attempted rape contrary to section 4 of the Sexual Offences Act. (*the Act*). The offence was allegedly committed against MA on 03.06.17.

**The prosecution's case**

2. The prosecution called 3 witnesses in support of the charge. PW1 the complainant stated that 03.06.17 at about 11.00 pm, the Appellant found her outside her house, strangled and felled her and threatened to have sex with her forcibly. She stated that she screamed and was rescued by one Nancy. She said she suffered a swollen neck and leg and was issued with a P3 form by the police but did not go to hospital because she did not have fare.

3. **PW2 Nancy Achieng** stated that that 03.06.17 at about 11.00 pm, she heard the complainant screaming and when she peeped through the window saw the Appellant lying on her. She said she saw complaining pulling down her dress and the Appellant pulling up his trousers as he escaped from the scene on his motor cycle.

4. **PW3 SGT Dan Omachode**, investigated the complainant's complaint, arrested the Appellant on 03.08.17 and caused him to be charged.

**The Defence Case**

5. In his sworn defence, Appellant denied the offence and stated that he was in Nairobi on 03.06.17 when the offence was allegedly committed. He stated that he returned home on 25.07.17 and was arrested on 03.08.17 and charged with an offence that he did not commit.

6. *In a judgment dated 04<sup>th</sup> October, 2017, the Appellant was convicted and sentenced to 7 years' imprisonment.*

**The Appeal**

7. The conviction and sentence provoked *this appeal. From the 6 grounds of appeal, amended grounds of appeal and written submissions filed on filed on 03.10.19* the main ground of appeal is that

8. *When the appeal came up for hearing on 24.07.19, Appellant stated that he was wholly relying on the grounds of appeal and written submissions filed on 03.10.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submission filed on 03.10.19.*

## Analysis and Determination

9. This being a court of first appeal, I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 OF 2005** which held as follows: -

**“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.**

10. Section 4 of *the Act* under which the Appellant was charged states as follows:

**Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life**

11. Penetration on the other hand is defined in section 2 of *the Act* as follows-

**“‘Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.**

12. I have considered the evidence by the complainant and contrary to PW2's evidence that she saw the Appellant lying on complainant and thereafter saw complaining pulling down her dress and the Appellant pulling up his trousers as he escaped from the scene on his motor cycle, the complainant in her testimony stated that the Appellant strangled her and felled her but escaped when she screamed.

13. Attempted rape is a failed rape. That is why the intention to penetrate is a key ingredient. The evidence of the complainant did not disclose any element of the offence of attempted rape. Even if indeed the Appellant strangled the complainant and felled her, in complainant's own words, the Appellant did not attempt to penetrate her.

14. From the foregoing, I find that the trial magistrate misdirected herself when she stated that the felling and strangling of the complainant by the Appellant proved an attempt to rape her.

## Disposition

15. In view of the foregoing analysis, it is clear to this court that the prosecution did not discharge its burden to prove the case against Appellant beyond any reasonable doubt. I thus find and hold that the conviction and sentence were unsafe. Accordingly, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, I order that appellant shall be set at liberty forthwith.

**DATED AND SIGNED THIS 21st DAY OF November 2019**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistants - Amondi/Okodoi**

**Appellant - Present in person**

**For the State - Ms. Gathu**