



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.122 OF 2014**

**JOSEPH OKUMU OMONDI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Appeal from original conviction and sentence from Bondo PM's Court: N. M. NAFULA – SRM  
in Criminal Case No.360 of 2014.]**

\*\*\*\*\*

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

**1.** The appellant was charged with the offence of Rape Contrary to Section 3(1)(a)(c) 13 of the Sexual Offences Act No.3/06.

The particulars of the offence were that on the 14th day of April 2014 at [particulars withheld] Village in Rarieda District within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of **E A** by use of force. The appellant was convicted and sentenced to 10 years imprisonment hence this appeal.

**2.** The prosecution called 4 witnesses to support their case. PW1 the complainant told the court that she did not see the person that forcefully had sexual intercourse with her.

**3. PW2 G O** however told the court that on the material day at 4 a.m. he heard PW1 screaming and calling him for help. He rushed to her house where he noticed that she was bleeding from her private parts. He then shone his torch on the appellant who started running away and hiding inside a bush. He proceeded to inform the village elder as well as the chief. The appellant was then arrested and taken to Manywanda AP Post. PW2 said that the appellant had a habit of raping old women.

**4. PW3 NICHOLAS MISANDO** the clinical officer did examine the complainant on 16.4.14 and concluded that she had been raped based on his findings that there were bruises on the vaginal opening. On cross-examination he confirmed that the complainant's clothes had blood.

**5. PW4 P.C. HENRY MUNENE** was the investigating officer. He re-arrested the appellant who had been brought by AP's from Manywada and preferred the charges.

**6.** When put on his defence the appellant gave unsworn evidence denying the charge. He said that he was arrested and put in the cells on 10.4.14 for an offence of stealing. He mentioned that on the material day that's on 14.4.14 he was in the police cells at Aram Police station.

7. Having summarised the facts, the Petition of Appeal generally challenges the evidence brought before court by the prosecution. The appellant in a nutshell argues that what the prosecution witnesses stated was at variance with the complainant.

8. The court is enjoined to re-evaluate the evidence afresh with a view of arriving at a fresh and an independent finding knowing very well that it did not have the benefit of conducting the trial. See **OKENO VRS REPUBLIC (1973) 32 E.A.** Both the learned state counsel as well as the appellant submitted strongly in favour and against the appeal. The appellant did further file some home made written submissions.

9. The issue of whether the complainant was sexually assaulted was proved beyond any shadow of doubt by the medical documents produced by PW3. The questions herein is who did the said criminal act.

10. PW1 the complainant only told the court that the person came and held her throat and had sex with her and that she did not know him. She did not state the place, the time and how she managed to extricate herself from this. The onerous task of proving her case was left to PW2.

11. The question therefore is whether the prevailing circumstances enabled PW2 to identify or recognise the appellant. The time was around 4 a.m. The only available source of light was PW2's torch. The said witness stated as follows:-

**“.....when I switched my torch I saw the accused person who started running away. The accused person went and hid himself in a bush. The accused person has a habit of raping old women. I reported the matter to the village elder and the chief.”**

The big question; is was the light from his torch sufficient enough to recognise the appellant? By the time he arrived at the scene, where was the appellant? How was the house designed? Where was the complainant's bedroom? Where was she lying by the time he found her? More importantly how did he realise that the appellant had gone hiding inside the bush?

12. I find the above questions not answered satisfactorily by the prosecution witnesses. PW1 though old and not able to recognise the appellant ought to have shed light on the actual circumstances that took place in the dark and to verify that it was PW2 who actually came to her rescue. In the absence of any corroboration from her it is difficult to sustain the line of argument taken by PW2. In any case PW2 seemed to suggest that the appellant had the habit of raping old women. This was never substantiated at all.

13. More importantly, there was need to have the evidence of the village elder and by extension the area chief. The area chief would have sufficiently explained where and how the appellant was arrested. This argument in my view would go along way to answer the argument by the appellant in form of an alibi that on 14.4.14 he was already at Aram Police Station having been arrested for an offence of stealing which he has kept on mentioning even when prosecuting this appeal.

14. In light of the above observation I do not find that there was sufficient evidence to sustain a conviction. The fact that the appellant had a criminal record does not necessarily make him culpable in the rape case. I find that the benefit of doubt should go in favour of the appellant. I Shall consequently set him free unless lawfully held.

**Dated. signed and delivered this 2nd November, 2015.**

**H. K. CHEMITEI**

**J U D G E**