



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. 33 OF 2017**

**FREDRICK IRERI KIURA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the judgment of Senior Resident Magistrate Hon. V.O. NYAKUNDI, delivered on 3/8/2017 in Embu Court Sexual Offence Case No. 4 of 2016)*

**JUDGMENT**

The appellant was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act no 3 of 2006. The particulars of the offence are that the appellant on the 20<sup>th</sup> day of January 2016 in Kibuyu location within Embu County in association with another not before the court intentionally and unlawfully caused his penis to penetrate the vagina of MN without her consent.

The trial court convicted the appellant and sentenced him to serve 15 years in prison. The grounds of appeal are:-

- 1) That, the pundit trial magistrate erred in both points of law and facts when he failed to consider that the appellant was just a passenger in the vehicle which the complainant claimed that had been used to abduct her.**
- 2) That, the pundit trial magistrate erred in both points of law and facts when he failed to consider that PW1 was not around when PW2 and PW3 who were community policing officers who arrested the appellant and only came up with this charges for fear that the appellant had been assaulted by them and would place charges against them.**
- 3) That, the pundit trial magistrate erred in both points of law and facts when he failed to consider that no identification parade was conducted so as to confirm whether it is the appellant who committed the crime.**
- 4) That, the pundit trial magistrate erred in both points of law and facts when he failed to note that vital witnesses did not testify e.g. police officers.**
- 5) That, the pundit trial magistrate erred in both points of law and facts when he failed to consider the appellant's defense on weak reasons.**
- 6) That, the pundit trial magistrate erred in both points of law and facts when he failed to consider that the P3 form never supported the alleged offence.**
- 7) That, the case wasn't at all proved beyond any reasonable doubt as required by law as no supporting evidence was brought in court in support of the allegations.**

It is the appellant's submissions that the prosecution did not prove its case beyond reasonable doubt. The evidence of PW1 proves that no such incident occurred. PW1 alleged that she took a taxi from her place of work and she was taken to a house where she was raped until 6am in the morning. If PW1 was really abducted as alleged then she would not have allowed leaving the house in the morning and going for a call of nature without an escort. PW1 alleged that she took a bodaboda and went to a police station to report yet she did not seek the bodaboda's assistance. The appellant further submits that he did not know that pw1 was going to hire the said taxi. The same applies to the taxi driver. There was therefore no evidence that the appellant colluded with the taxi driver so that she could be raped. PW1's allegations that she went to KIBUGU police post and informed the police about what had happened but the police did not believe her leaves a lot of doubt on the complainant's evidence. There was nothing to prevent the police from believing the complainant. The appellant also submit that PW1's contention that she left her earrings and scarf in the appellant's house was also not proved. The two items were not brought to court as

exhibits. According to PW1 the two items were left at KIBUGU Police post. None of the officers from that police post were summoned to testify yet they were crucial witnesses who were alleged to have received the first report. No one testified that he or she saw the complainant in the appellant's house. The evidence of pw3 shows that she was not at the scene of the arrest but she only found that the appellant had been arrested. The same applies to PW2.

The appellant submit that PW2 did not testify that she called the area chief and they both went to arrest the appellant. However, the trial court in its judgment made such a conclusion. PW2 could not recall where she had recorded her statement. PW2 and PW3 could not recall the number plate of the taxi. Therefore PW2 and PW3 were not at the scene. The medical report does not support PW1's allegations. No examination was done to PW1 to find out if there were sperms in her so as to support the alleged charge of gang rape. The post rape care form indicates that the perpetrators did not use condom. The P3 form shows that no injuries were noted on the body on PW1. The doctor alleged that there was a reddish discharge but he did not indicate what the cause of the discharge was. It could be possible that the discharge was due to monthly periods. What was to be found as a result of lab test was the presence of multiplication of spermatozoa. The complainant was taken to hospital on the same date of the incident. The appellant also contends that **PW6 MOSES NJERU NJAGI** and **PW7**, the area chief testified in court when the appellant was absent. That was a breach of Article 50 of constitution and makes the trial not to be fair. PW5, the Investigating Officer testified that she went to the appellant's house together with PW1 and conducted a search yet at that time the appellant was locked up at Manyatta Police post. PW5 alleged that she recovered a hat and a panga that was used to scare PW1 but the same was not produced as an exhibit. Most of the allegations were not proved. PW1 did not allege that she was threatened with any weapon. It is also submitted that the appellant's defence was erroneously rejected on weak reasons.

Miss Nandwa, prosecution counsel opposed the appeal. Counsel submit that the incident occurred on 20<sup>th</sup> January 2016. PW1 was abducted by the appellant and another person. She was taken to the appellant's house where she was raped in turns. She was able to identify the appellant as one of the rapist. She managed to escape at 6.00am and informed PW2 who is a community policing officer. PW1 led PW2 and other members of the public to the appellant's house and the appellant was arrested and taken to the Police station. There was no need for an identification parade. PW1 showed other witnesses the appellant's house. The appellant was still in the house. Crucial witnesses testified and their evidence was sufficient. The appellant's defence was considered. The reddish discharge from the complainant's vagina confirmed that there was penetration. A post rape care form was also produced. The case was proved beyond reasonable doubt.

This is a first appeal and the evidence adduced before the trial court has to be evaluated to enable the court arrive at its own decision. PW1 was the complainant. She testified that she was a waiter at a hotel. On 20<sup>th</sup> January 2016 she left her place of work at midnight and took a probox taxi. There were two persons including the driver. The driver told her that the other person was also going towards the same direction. The driver told her that he would drop the other passenger and then drop her. The vehicle went to a rough road and she enquired from the driver why he had taken a different route but she was told to stop otherwise they were to kill her. She was taken to a two bed roomed timber house that was inside ashamba. There was no one in the house. The appellant took her to the house and told her to undress. The driver remained in the car. She was then raped in turn as the other person also went in. At 6.00am the driver left and she was told to continue sleeping. She woke up at 7.00am and requested to go and attend to a call of nature. She walked to the road and saw a bodaboda whom she asked where the police station was. She met two ladies and narrated to them what had happened. The ladies called the area chief who contacted the village elder. She took them to the house and the two rapists were inside the house. They were taken to the police station but the other person was released. She was taken to KIBUGU hospital and a P3 form was filled.

It is her evidence that she was raped by two people. The appellant was seated at the back of the car while she sat in front with the driver. She did not scream because the appellant had warned her. The house was not locked when the community people went to arrest the appellant. She was raped without any protective gear.

**PW2 DAMARIS NGITHI NJIRU** is a community policing officer. On 20<sup>th</sup> January 2016 at about 7.00am she was woken up by a person who was selling milk who was with PW1. PW1 was crying and she narrated to her what had happened. She contacted the area chief who told her to contact the area community policing. They went to the house and found the appellant sleeping. He was arrested. The owner of the motor vehicle was also there. PW1 identified the driver. The two were taken to KIBUGU police post. PW1 was referred to EMBU hospital. PW1's trouser was wet. When they went to arrest the appellant she was with community policing officers namely, **NELSON NJIRU**, **KINYUA NJIRU** and **KINYUA MUERA**. It is the complainant who led them to the house where the incident occurred.

**PW3 MARGARET WANJIRU KIRANGO** testified that on 20<sup>th</sup> January 2016 at about 8.00am she was called by the sub area by the name **CAROLINE NJERU** who asked her to go to the road. She went out and saw a big crowd. She saw PW1 in a motor vehicle. PW1 narrated to her that she had taken a taxi and was taken to a house where she was raped. She took PW1 to Embu level five hospital where she was treated.

**PW4 DR. PHYLIS MUHONJA** was based at Embu level five hospital. She testified that a post rape care form was filled by **STEPHEN JUMA** who was a clinical officer. PW1's genitalia were examined. Lacerations were noted inside and she had reddish discharge. There was an old rupture. There was penetration. She filled P3 form on 20<sup>th</sup> January 2016.

**PW5 INSPECTOR NICHODEMUS MUTHUNGU** was stationed at Manyatta police station. On 21<sup>st</sup> January 2016 he was summoned by the OCPD and informed of the incident which had occurred on 20<sup>th</sup> January 2016. He investigated the matter and visited the scene. He recovered a panga inside the appellant's house. The appellant had been arrested by members of the public. He charged the appellant with the offence of gang rape. They did not trace the other person.

**MOSES NJIRU NJAGI** is the area chief of KIBUGU location. He was summoned by the Court. He told the court that the appellant had not turned up, and they were looking for him.

In his sworn defence the appellant testified that he is a farmer. On 19<sup>th</sup> January 2016 he had planned with one **LAWRENECE MUTURI** to go to Embu town. He had sold coffee to him for Ksh 1,500. He waited for Lawrence up to 8.00pm. He hired a taxi which had six people including PW1. Two passengers alighted at CHUNGIRI show ground. Another person alighted at scheme and he alighted at MUTEGENE and went home. In the morning at around 6.00am people knocked at his door. He heard the voice of the village elder who asked him to open

the door. They told him that he was hiding a woman in the house. His Ksh 12,600 was taken. He was then taken to KIBUGU Police post. At the police post he met a taxi driver and the complainant. It is his evidence that the complainant denied that she had been raped by the appellant.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. It is the evidence of PW1 that she hired a probotaxi but on the way the vehicle took a different route. There was only the driver and the appellant in the vehicle. It is her evidence that she was gang raped the whole night and the rapist did not use any protection. In the morning she went out and was able to take members of the public to the same house where she was raped. This included PW2 and PW3. The evidence shows that PW1 led members of the public to the appellant's house. The appellant was found asleep inside the house and he was arrested. According to the evidence of PW2 and PW3 even the taxi vehicle was there and the taxi driver was taken to the police station. It is not clear how that person was released because the evidence of PW1 is that the vehicle stayed at the appellant's house that night and left in the morning. The appellant denied committing the offence.

From the evidence on record it is established that PW1 was raped. It is not mandatory that sperms must be noted in the victims private parts for a sexual offence to be proved. Even if no spermatozoa was observed and the rapist did not use condoms, the medical evidence proves that PW1 was raped. The evidence of PW1 also confirms that the incident took place. PW2 and PW3 found PW1 in their area early that morning. It is clear that the complainant was not living in that area and was taken to a different place where she was raped. It is also clear that the appellant acted in collusion with the driver of the vehicle who was not charged. The complainant was able to know the premises where she was raped and it was not by coincidence that the appellant was found in that house. The appellant contends that if PW1 was abducted then there was no way she could be released without an escort. It is the evidence of PW1 that she managed to leave the house and sought assistance. The appellant was not framed. He was properly convicted of the offence. The appellant also contends that he was not in court when the Investigating Officer and the chief testified. The Investigating Officer testified on the 4th of August 2016 and the record shows that the appellant was present. The area chief was technically not a witness. He was summoned as the appellant had failed to attend Court.

On 28<sup>th</sup> August 2016 it was noted that the appellant was absent. A warrant of arrest was issued. The chief was summoned and he appeared in court on the 6th day of February, 2017. The chief told the court that he knew the appellant. The matter was fixed for mention on 20<sup>th</sup> February 2017. The chief was sworn in mainly to explain why the appellant had not been arrested. The matter was mentioned on the 2<sup>nd</sup> day of March 2017, 14<sup>th</sup> day of March 2017, 20<sup>th</sup> March 2017 and in all those occasions the appellant was absent. On 20<sup>th</sup> day of March 2017 the court was told that the appellant had been arrested and was in police custody. The case was mentioned on 21<sup>st</sup> March 2017 and the appellant was present. The court remanded the appellant in custody. It is therefore established that the appellant was present all along when the case proceeded for hearing.

The appellant in his evidence confirms that he was in the taxi which the complainant was using. According to PW1 there were no other passengers in the vehicle and that evidence is believable. Why would the complainant taken members of the public to the appellant's house instead of to any other person. PW1 left the house at about 7.00am and could easily identify the house where she was raped.

I am satisfied that it is the appellant and the taxi driver who raped the appellant. Even if the panga that had been recovered from the appellant's house and the scarf belonging to the complainant were not produced in court, that does not disprove the complainant's position that she was raped.

In the end I do find that the appellant was properly convicted. He was one of the rapist who gang raped PW1. Under section 10 of the Sexual Offences Act, the sentence of 15 years imprisonment is the minimum sentence. It can be enhanced to life imprisonment. The trial court imposed the minimum sentence.

I do find that the appeal lacks merit and it is hereby disallowed.

**Dated and signed at Marsabit this .....Day of July 2018.**

**S. J. CHITEMBWE**

**JUDGE**

**Dated, Signed and delivered at Embu this 24<sup>th</sup> Day of July, 2018**

**F. MUCHEMI**

**JUDGE**