



IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 86 OF 2017

BETWEEN

HARRISON MUIGAI MUTHONI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 18th August 2016 in Criminal Case No. 685 of 2015 at Limuru Senior Principal Magistrates Court before Hon. K.M. Njalale, SRM)

JUDGMENT

1. The appellant, **HARRISON MUIGAI MUTHONI**, was charged and convicted of the offence of rape contrary to **section 3(1) and (3)** of the ***Sexual Offences Act***. The particulars of the offence were that on 14th August 2015 at Bathi Sub-location within Kiambu County, he intentionally and unlawfully caused his penis to penetrate the vagina of E.W by use of force. He was sentenced to 10 years' imprisonment.
2. The appellant now appeals against conviction and sentence. In his oral submissions, the appellant contended that because the complainant was diagnosed as being HIV+ and he was neither tested nor infected, the charge against him was not proved.
3. The appeal is opposed by counsel for the respondent who submitted that the prosecution proved all the elements of the offence.
4. As this is the first appeal, I am enjoined to consider all the evidence before the trial court and reach an independent conclusion as to whether to uphold the conviction. I must bear in mind that I neither saw nor heard the witness testify.
5. The key witness was EW (PW 1) who told the court that she knew the appellant as he used to visit her neighbor John to watch movies from time to time. On the night of 14th August 2015 at about midnight, PW 1 was alone in the house when she heard someone who identified himself as John kept calling her to wake up her husband who had travelled.
6. Suddenly, a stone hit the door and it flung open. She screamed and the person strangled her but she was able to recognize him as the accused. He dragged her outside and proceeded to undress her and inserted his penis into her vagina. The appellant left her in distress until she was taken to the police station in the morning. She was also referred to the hospital where a P3 form was filled.
7. PW 1's evidence was clear and consistent on the fact that the appellant caused forceful penetration. She knew the appellant and this evidence, by itself, was sufficient to support a conviction under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides that in sexual

offences corroboration is not necessary if the trial magistrate, for reasons to be recorded, believed that the witness was telling the truth.

8. Further, the incident took place at night in circumstances which require careful consideration to avoid a case of mistaken identity. In this case though, the appellant was not a stranger to PW 1 and the time of interaction and the proximity of the parties leave no doubt that the recognition was positive and free from error.

9. There was also corroborating evidence from the doctor who examined PW 1 on the same morning. PW 3 examined her and confirmed that she had been strangled and had a knee injury. She had a discharge from the vagina although no spermatozoa were seen. The appellant contended that since he was not HIV+, the offence of rape was not proved. The essence of the offence of rape is penetration. Such penetration may or may not lead to infection and as the Court of Appeal held in ***Geoffrey Kioji v Republic***, NYR Crim. App. No. 270 of 2010 (UR), it was not necessary to examine the appellant in order to prove the offence of rape.

10. The appellant's defence that he was merely arrested on suspicion of rape was just a denial. The totality of the evidence is that the prosecution proved its case beyond reasonable doubt. The sentence imposed was the minimum statutory sentence and it is affirmed.

11. The conviction and sentence are affirmed.

12. The appeal is dismissed.

DATED and DELIVERED at KIAMBU this 20th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Maundu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.