



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 79 OF 2016**

**DANIEL MASIKA NZIOKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 18<sup>th</sup> November, 2010 by Hon. B.A. Owino (Senior Resident Magistrate) Chief Magistrate's Courts at Thika in Criminal Case No. 2810 of 2008).**

**JUDGMENT**

1. The Appellant Daniel Masika Nzioki was charged as follows:

**Count I:**

**Robbery with violence contrary to Section 296 (2) of the Penal Code.**

**The particulars of the offence being that on the 11<sup>th</sup> day of July 2008 in Thika District within Central Province jointly with others not before court robbed A N K of Ksh.70/=, Five chicken valued Ksh.2000/= and at the time of such robbery used actual violence to the said A N K.**

2. **Count II:**

**Rape contrary to Section 3(1) (9) (iii) of the Sexual Offence Act No. 3 of 2006.**

**The particulars of the offence being that on the 11<sup>th</sup> day of July, 2008 in Thika District within Central Province, intentionally and unlawfully committed an act which caused penetration with A N K genital organs without her consent.**

3. **Alternative Count:**

**Indecent Act with a female contrary to Section 11(1) of Sexual Offences Act No. 3 of 2006.**

**The particulars of the offence being that on the 11<sup>th</sup> day of July 2008 in Thika District within the Central Province, committed indecent act with A N K by touching her private parts without her consent.**

4. The prosecution called four witnesses in support of their case. The prosecution case was that the complainant, 73 year old A N K was in her house sleeping. At about 3.00 a.m. the door of her house was pushed open and a man entered her room. She tried to scream but the man held her by the throat, punched her four times on the face and injured her on the eye, cheeks and mouth. The intruder then ordered her to light the lamp and to give him all her money. The complainant complied. She lit the lamp and gave out Ksh.70/= . The intruder then put off the lamp, grabbed the complainant, pushed her down the bed, lifted her skirt up and raped her telling her not to scream as he was with others who he could call.

5. The complainant identified the said intruder as the Appellant, stating that she knew him as a neighbour and she saw him well when she lit the lamp. In the morning the complainant discovered that her five chickens were missing. The complainant alerted neighbours on what had befallen her. The complainant's children were called and the matter reported to the area chief and a report made to the police. The complainant was escorted to hospital for examination and treatment. After investigations the Appellant was charged with the offences herein.

6. The Appellant gave sworn evidence in his defence. He stated that on 10<sup>th</sup> July, 2008 at about 10.30 a.m. the complainant requested him to go and repair her cowshed. While carrying out the repairs in the afternoon, a girl came to visit him and he gave her the keys to his house. At about 6.00 p.m. when the Appellant finished the work he returned the tools to the complainant's house. That the complainant then asked him to drive her cows into the cowshed which he did. That the complainant then sent him to buy some traditional brew. That thereafter the complainant gave him food and some of the brew and they ate and drank while chatting

7. That in the course of the conversation the complainant inquired about the girl who had come to see him. That the complainant who was his lover and was jealous of the girl's relationship with the Appellant grabbed him tightly. That he then sensed danger and slapped the complainant and left the house with the complainant hurling insults at him.

8. The Appellant further stated that he went home where he was served food by his girlfriend and they went to sleep. That the following day he went on with his daily routine but was disturbed that his relationship with the complainant had come to an end. That evening police officers went to his house with the complainant's son and arrested him and escorted him to the nearby police post. The Appellant was then charged. He denied the charges against him.

9. At the conclusion of the trial, the trial magistrate found the Appellant guilty in both counts I and II and convicted him accordingly. The Appellant was sentenced to death in Count I and to ten year imprisonment in Count II

10. The Appellant was dissatisfied with both the conviction and appealed to this court on grounds that can be summarized as follows:

- (a) That the Charge Sheet was defective
- (b) That the prosecution case was not proved to the required standard.
- (c) That his defence case was not considered.

11. During the hearing of the appeal, the Appellant relied on his written submissions as well as oral submissions. The submissions essentially expound on the grounds of appeal.

12. The learned counsel for the state opposed the conviction in Count 1 only. He submitted that there was no evidence of sexual assault but that there was credible evidence in support of count I.

13. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.

14. I have considered the Charge Sheet in Count I. It is stated that the Appellant was with others and that actual violence was used. A charge of robbery is proved if one of the following is proved:

- The offender is armed with a dangerous weapon.
- The offender is in the company of others.
- That immediately before or immediately after the robbery he used violence on any person

(see for example **Joseph Njuguna Mwaura & 2 others v republic [2013] eKLR**)

15. The complainant's evidence is that of recognition. Her evidence was that although it was at night she saw the face of the Appellant when she lit the lamp and recognized him as a neighbour's son who she knew by the name Daniel Masika son of Nzioki. The complainant during cross examination described the Appellant as somebody who is young enough to be her grandchild and who she had known since childhood and used to give him casual work. She stated that although she lived alone and had been widowed for 13 years she could not have an affair with the Appellant as suggested by the Appellant. She denied that they had drinks together and further denied having had an agreement with the Appellant or harbouring any bitterness against him.

16. DW2 Timothy Kanyeki Munyoki the then Acting Chief of Ngelelya Location gave evidence that corroborates the complainant's on the report made. The name of the Appellant was given to the Chief and the Appellant arrested. The chief's evidence further shows that the complainant physically identified the Appellant after the arrest. The evidence of PW4, PC John Njuki who received the complainant's report also confirms that he was given the name of the Appellant, as Daniel Masika and that the complainant physically also identified the Appellant.

17. Indeed the Appellant has not denied that he was known to the complainant. The evidence by the accused boils down to having been framed up by the complainant due to a love affair gone sour.

18. On the evidence of recognition, the court expressed itself as follows in the case of **Anjononi & ano v Republic 1980 KLR**:

**“A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”**

19. I have considered the defence case by the Appellant that there was an altercation with the complainant because of jealousy over his girlfriend. The complainant vehemently denied the said assertion by the Appellant and stated that she cannot sleep with the Appellant who is like her grandchild. Indeed the Appellant during cross examination stated that the complainant is over 70 years old and described his girlfriend as about 30 years old.

20. Although the Appellant stated that he only slapped the complainant during the altercation, the medical evidence adduced by PW3 Dr. Onyimbo Kirama was that the complainant had a swollen face. Although the doctor did not see any signs of rape, the complainant was categorical that she was raped. The complainant described her state of clothing as having worn a skirt without any underwear when she was raped.

21. The complainant reported the matter in the morning to her neighbours and the authorities and her children came and took her to hospital where the doctor examined her genitals. The trial magistrate who saw both the complainant and the accused testify and observed their demeanour believed the complainant. I do not find any reasons to differ with the findings of the trial magistrate. It is unlikely that the complainant would have stage managed all the aforesaid occurrences.

22. I am satisfied that the prosecution case was proved beyond any reasonable doubts in both counts. The main counts in count I & II. The Appeal has no merits and I dismiss the same. The sentence of rape shall be held in abeyance.

**Dated, signed and delivered at Kiambu this 22<sup>nd</sup> day of June, 2018**

**B. THURANIRA JADEN**

**JUDGE**