



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CORAM:D.S MAJANJA J.**  
**CRIMINAL APPEAL NO. 80 OF 2018**

**BETWEEN**

**JMO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. J.K Mutai – RM dated 27<sup>th</sup> February 2017 at the Principal Magistrate’s Court at Ogembo in Sexual Offence Case No. 72 of 2017)*

**JUDGMENT**

1. The appellant, **JMO**, was charged and convicted of the offence of rape contrary to **section 3(1)(a)(b) and (3)** of the **Sexual Offences Act** (“the **Act**”). The charge against him was as follows:

*On the 13<sup>th</sup> day of November 2017 within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of INM without her consent.*

2. The appellant was sentenced to 15 years’ imprisonment and now appeals against conviction and sentence. The thrust of the appeal is that the prosecution did not prove its case and that the court relied on the evidence of a single witness without corroboration.

3. The evidence against the appellant was that the complainant (PW 1) was weeding in the shamba at about 6.30 am when the appellant, who was her nephew, came and raped her. She described what took place as follows:

*“I saw someone standing by the house. I went there to check. It was the accused person. I had covered myself with a scarf. He took the lessso from my head and he raped me. He covered my mouth with the lessso. He took off my pants and raped me. He inserted his penis in my vagina without my consent. He strangled me. He covered my mouth with a lessso.”*

4. The appellant was taken to Nyamache Sub-County Hospital on the same day, examined and treated. She also went to report the matter to the police station on the same day.

5. At about that time, PW 1’s brother in law (PW 3) heard PW 1 screaming at about 7.00 a.m. He found that she had fainted. A local farmer (PW 2) heard a woman crying and when he went to where they were, he was informed that PW 1 had been raped by the appellant. PW 3 assisted to take PW 1 to the Hospital. PW 2 also recalled that immediately, they went to arrest the appellant in his house.

6. The Clinical Officer (PW 5) produced the Post Rape Case Form and the P3 Form which confirmed that PW 1 was brought to Nyamache Sub County Hospital for examination and treatment on 13<sup>th</sup> November 2017. She had muddy clothes and her labia majora was swollen. The high vaginal swab revealed pus cells. PW 1 also had a painful neck, back and upper limbs. PW 5 concluded that there was penetration.

7. In his unsworn defence, the appellant denied the charges. He stated that had been informed on 9<sup>th</sup> November 2011 by a mob which included PW 2 that he was required to discuss a matte whereupon they took him to the Assistant Chief. He was arrested and taken to Nyamache Police Station. He was later taken for treatment and brought to the police station and informed of the charges against him. He alleged that he was being framed over a land dispute as his father had died and PW 2 was demanding that he sell the family land to him.

8. I have re-evaluated the evidence as required of the first appellate court and I am satisfied that PW 1 was raped. Her testimony was direct and straightforward and unshaken on cross examination. The appellant was not a stranger to her as he was her nephew and the incident took

place early in the morning in broad daylight. Although her testimony is not required to be corroborated, it was indeed corroborated by the testimony of PW 2 and PW 3 who found PW 1 in a state of distress. PW 3 arrested the appellant immediately as he was well known. Finally, the medical evidence by PW 5 confirmed penetration and physical assault by way of strangulation consistent with what PW 1 had described happened to her.

9. The appellant's defence was buried by the entirety of the prosecution evidence. When the issue of the grudge was put to PW 2, he denied it. It is also difficult to see how PW 1 and the other witnesses could have been ensnared in a criminal conspiracy to implicate the appellant.

10. I am satisfied the prosecution proved that PW 1 did not consent to penetration. I affirm the conviction.

11. That the investigating officer was not called to give evidence was not fatal to the prosecution case as there was sufficient and direct evidence to implicate the appellant. The investigating officer would only come and give a summary of the investigation and nothing emerged from the evidence that would require the investigating officer to answer or which would raise doubt in favour of the appellant.

12. The conviction is affirmed but the sentence is reduced to **ten (10) years imprisonment** which is the statutory minimum under **section 3(3)** of the **Act**.

13. Save for the sentence aforesaid, I dismiss the appeal.

**Dated and delivered at Kisii this 30<sup>th</sup> day of November 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.