



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 38 OF 2016**

**JOHN MUCHEMI MATEMO.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Appeal from original conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 48 of 2011 (Hon. W. Juma, CM) delivered on 18<sup>th</sup> May, 2016)*

**JUDGMENT**

The appellant was charged with the offence of rape contrary to **section 3(1) (a) (c)** as read with **section 3 (3)** of the **Sexual Offences Act, No. 3 of 2006** in that on the 13<sup>th</sup> day of August, 2010 at *[particulars withheld]* village within Nyeri County, he intentionally and unlawfully caused his penis to penetrate the vagina of A W by use of threats.

In the alternative, the appellant was charged with the offence of indecent act contrary to **section 11 (A)** of the **Sexual Offences Act** the particulars being that on the 13<sup>th</sup> day of August, 2010 at *[particulars withheld]* village within Nyeri County, he intentionally and unlawfully touched the vagina of A W with his penis against her will.

The appellant pleaded not guilty and so the case against him proceeded to full trial at the end of which he was convicted of the primary count; he was sentenced to ten years imprisonment. I understand his amended grounds of appeal which he filed alongside his written submissions to be as follows: -

1. The learned magistrate erred in law and in fact in basing the appellant's conviction on the identification evidence of PW1 and PW2 although the conditions for positive identification were not favourable;
2. The learned magistrate erred in law and in fact in relying on the prosecution evidence that was contradictory and inconsistent;
3. The learned magistrate misdirected herself on the medical evidence; and,
4. The learned magistrate erred in law in rejecting the appellant's evidence yet it was not controverted by the prosecution.

It was the prosecution evidence that the complainant and her brother, **J M R (PW2)** were asleep in their house on 13<sup>th</sup> August, 2010 when at about 1.30 AM they were awoken by an intruder who gained entry into their bedroom through the bedroom window. They shared a bedroom but slept on separate beds.

When the complainant screamed, the intruder ordered her to keep quiet; she screamed and asked her brother to switch on the lights but the intruder warned him against it. This intruder demanded for money and the complainant told him that the money was in the sitting room; she suggested that she could go with her brother to get it for him. He said that he would rather go with her instead. He threatened to stab her. He asked **J M R (PW2)** to tell her to keep quiet. He in fact moved to his bed, uncovered his face and flashed it with his torch. He warned him not to say anything.

The complainant recognised the intruder's voice as that of the appellant; she had known him before as a person who had previously been employed in their home and was also a family friend. He moved back to the complainant's bed and ordered her to do as he directed. He forcefully removed the complainant's pants and raped her. Once he was through he jumped out of the window and ran away. The complainant then asked her brother to join her in her bed. They slept together till dawn.

The complainant reported the incident to her grandmother the following morning; she asked her to go and tell her aunt, **A W**, who in turn informed the complainant's father; the latter who was said to be in Nyeri town at the material time took up the matter with Othaya police station. The police referred the complainant to hospital for examination and treatment.

The complainant's brother, **J M R (PW2)** testified that he woke from sleep at about 2 AM on 13<sup>th</sup> August, 2010 because of his sister's screams. He corroborated the complainant's testimony that the intruder ordered her to keep quiet and threatened to kill her. He also told him not switch on the lights when his sister asked him to switch them on. He testified that the intruder raped his sister and then escaped through the bedroom window.

Just like his sister, he recognised the intruder's voice to be that of the appellant; it was his evidence that he had worked for their grandmother for seven years and it is apparently during this time that they knew the appellant. Again, his home was not far from the complainant's home.

According to **Ndirangu Chege (PW3)** (he's erroneously indicated in the proceedings as PW4) who filled the complainant's P3 form, the complainant had a history of having been sexually assaulted by somebody she knew; upon her examination, the genital organs were found to be intact with no visible injuries though a whitish discharge was detected in her vagina. A high vaginal swab also revealed traces of spermatozoa.

The complainant's father **I R (PW4)** though indicated in the record as **PW5)** testified that his sister S W called to inform him that his daughter, the complainant, had been raped by the appellant. He reported the case to the police who arrested the appellant.

Police constable **Alice Wanami (PW5)** confirmed that a report of rape was made at the Othaya police station on 13<sup>th</sup> August, 2010 at about 10 AM by the complainant. The officer who also investigated the case visited the scene and indeed established that the complainant and her brother shared a bedroom; the two were alone in their house as their mother had passed on while their father with whom they lived was away on the material day. The complainant pointed out the appellant to the police who arrested him.

The appellant denied having committed the offence; in his sworn evidence, he dwelt more on how he was arrested. He stated that the complainant's mother hired his motor cycle posing as a passenger and only led him to the police. He denied that he even knew the complainant. He also claimed that the complainant's father wanted to extort money from him. However, upon cross-examination, he not only admitted that the complainant's father was his cousin but that he also knew the complainant.

The foregoing evidence has to be analysed in the context of section **3(1) (a) (c) of the Act** which is the provision under which the appellant was charged. **Section 3(3)** of the Act which was also cited in the charge only prescribes the sentence for the offender. **Section 3(1)** of the Act reads as follows:

***3.(1) A person commits the offence termed rape if –***

***(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;***

***(b) the other person does not consent to the penetration; or***

***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***

Although subsection (b) was not cited in the charge against the appellant, it informs subsection (c) as they both deal with the element of consent.

On the whole **section 3(1)** largely defines the offence of rape and outlines the elements that constitute it. In order to establish this offence, the prosecution must prove first, that there was an act of ‘penetration’ caused by the genital organs of another person. The act of penetration is itself defined in **section 2** of the Act as follows:

***“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;***

Proof of insertion of the assailant’s genital organs into the complainant’s genital organs was corroborated by the uncontroverted clinical officer’s evidence of traces of a whitish discharge and spermatozoa in the complainant’s vagina. The act of penetration was thus proved beyond all reasonable doubt.

Further, in order to constitute this crime, the penetration must also be proved to have been intentional and unlawful. Again, the terms ‘intentional’ and ‘unlawful’ are technical terms which are defined in **section 43** of the Act as follows:

***43.(1) An act is intentional and unlawful if it is committed –***

***(a) in any coercive circumstance;***

***(b) under false pretences or by fraudulent means; or***

***(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.***

***(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is –***

***(a) use of force against the complainant or another person or against the property of the complainant or that of any other person;***

***(b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or***

***(c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.***

It was the complainant’s evidence that she was forced into submission to sexual intercourse by her assailant who forcefully removed her pants and inserted his genital organs into hers. Apart from subduing her, the assailant also threatened her with bodily harm if she resisted his illicit advances. It is apparent that the act of penetration was obtained in coercive circumstances in the sense that there was not only use of force against the complainant but there was also a threat of bodily injury against her. With these facts, it is safe to conclude that it was established beyond reasonable doubt that the penetration was not only intentional but it was unlawful as well.

The final question for determination was whether the appellant was the assailant who perpetrated this crime. The identification of the appellant revolved very much around the evidence of the complainant herself (**PW1**) and her brother (**PW2**). Their evidence appears to suggest that they positively recognised the appellant through his voice as he spent some reasonable time with them after he gained entry into their bedroom. It was their evidence that the appellant was not a stranger to them as he had been their grandmother's employee for seven years and in any event his home was not far from their home. In short, the appellant was a person they were familiar with and they would recognise his voice if they heard it.

As cogent as it appears, this evidence of identification was vitiated by the complainant's own statement later in her evidence in chief which appeared to cast doubt on whether she had indeed positively identified the appellant. This is what she said:

***During the last days I was undergoing treatment the accused was at large. Later he was arrested after I finished my drugs. My father is the one who pointed the accused to me.***

The question that one would reasonably ask is why the complainant's father would point the appellant out to the complainant when she had presented him in her evidence as a person she was always familiar with. There is no doubt that the trial court saw and heard the witnesses and was therefore in a better position to appreciate their evidence; however, despite the disadvantage I suffer, the complainant's statement should have created some reasonable doubt in the mind of the trial court whether the appellant was positively identified. As always, the appellant ought to have been given the benefit of this doubt and acquitted of the charge, in the absence of any other evidence linking him to the crime.

Apart from the deficiencies in the identification evidence, there are other aspects of the prosecution evidence that in my humble view vitiate the prosecution case such that it would be unsafe to conclude that it was proved beyond all reasonable doubt.

The complainant's evidence was that she screamed three times. Her grandmother who is said to have been in a house only ten metres away from the complainant's house did not testify and therefore nobody could tell whether she heard the screams or not. Her testimony could also have been invaluable to corroborate the complainant's testimony that she informed her of what transpired shortly past midnight on the material day. Not that the complainant's evidence required corroboration in this sense but it is notable that it is the complainant's grandmother who is alleged to have first been told of the complainant's assault before she referred the complainant to her aunt; it was alleged that it is this aunt who informed the complainant's father and who in turn reported the matter to the police. For the sake of consistency, it would have been useful to the prosecution case to hear from complainant's grandmother on whether she heard any sort of commotion at the early hours of the material day and whether the complainant informed her of what transpired. It would also have been useful to hear from the complainant's aunt who is alleged to have informed the complainant's father of the attack on the complainant. As matters stand the evidence that the complainant's father was informed by his sister of the complainant's attack remains hearsay.

It must be noted that the complainant not only shared a bedroom with her fifteen-year old brother but a few hours before they had shared a bed and therefore much as it had been established there were traces of spermatozoa and a whitish discharge in the complainant's vagina, the possibility that the brother was the source of these tissues could not be ruled out in the absence of any evidence to the contrary.

Again, the complainant testified that the appellant accessed their bedroom through the window which apparently had no lock and thus the intruder "just pushed it". This evidence contradicted her own brother's evidence who testified in cross-examination that he could not tell how the appellant gained entry into their room because the window had been locked; he also testified they locked the window and slept after the appellant left. The investigations officer who visited the scene never suggested in her evidence that the window was not lockable. It follows that the complainant's evidence on the state of their bedroom window was doubtful and this in my humble view would raise doubt on the credibility of her evidence as a whole.

Her father's evidence in this regard did not help matters; he testified that the complainant told him that she found a man in her room but that he could not tell whether she told him that the man entered the room through the window. Surely if the complainant was certain of how the intruder entered the room, I cannot see why she could not have told her father so; and if she did, the complainant's father could not be heard to say that he did not know what his daughter told him.

For the foregoing reasons, I am persuaded that the conviction of the appellant was not safe; there were several material gaps in the prosecution case that ought not to have gone unnoticed. I am inclined to conclude that the appellant's appeal is meritorious and I hereby allow it. His conviction is quashed and sentence set aside. He is set at liberty unless he is lawfully held.

**Signed, dated and delivered in open court this 30<sup>th</sup> January, 2017**

Ngaah Jairus

**JUDGE**