



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO: 27 OF 2016

[From Original Conviction and Sentence in Criminal Case No: 5864 of 2011 of The Chief Magistrate's Court at Thika]

JULIUS NJUGUNA MWANGI.....APPELLANT

-V E R S U S-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgement of **Criminal Appeal No. 27 of 2016**. The Appellant is **JULIUS NGUJUNA MWANGI**. He was initially charged at the lower court at **Thika** in Criminal Case No. **5864** of **2011**.

2. He was charged with gang rape contrary to **Section 10** of The Sexual Offences Act, No. **3** of **2006**.

Particulars thereof were that on **23rd November, 2011** in **Muranga County** within the Republic of Kenya in association with another not before court and common intention caused penetration by use of your genital organ namely penis into the vagina of **D W K** in turns.

3. Alternative charge, was the charge of indecent act contrary to **Section 11 (6)** of the Sexual Offences Act No. **3** of **2006**.

Particulars thereof were that on **23rd of November, 2011** in **Muranga County**, unlawfully and intentionally caused a contact by use of your genital organ (vagina) of **D W K**.

4. He pleaded **NOT GUILTY** on **15/12/2011** before court No. **5** in **Thika**. The trial ensued. The prosecution availed **four** witnesses. The accused was put on his defence.

5. By the judgment of the court, the trial magistrate convicted the accused person and accordingly sentenced him to **15** years imprisonment.

6. THE APPEAL

Being aggrieved and dissatisfied, the appellant has appealed against both the conviction and the sentence. He is unrepresented.

7. HIS GROUNDS OF APPEAL are:

1. **That** the sentence **13** years imprisonment is rather too harsh and excessive and pray for a reduction of the same.
2. **That** I am very much remorseful and wish this Honourable Court to grant me pardon by reduction of the sentence imposed.
3. **That** I crave that the remainder of the sentence be served under Community Service Order (CSO)

Further Supplementary Grounds of Appeal by the Appellant:

4. **That** the trial magistrate convicted me by relying on evidence of **PW2**, which is of doubtful value as she couldn't tell the difference between the appellant and his brother.

5. **That** the prosecution failed to prove the case beyond reasonable doubt as I did not undergo medical treatment to link me to the offence.

8. SUBMISSIONS

By the prosecution, **Mr. Kinyanjui**. I oppose the appeal on the following grounds:

1. The ingredients of the offence, of gang rape, was proved that: there was sexual activism between the appellant and the complainant.

This was confirmed by medical evidence tendered by **PW4**. The narration by the complainant was confirmed by both **PW4** - the doctor & **PW2** – the mother. There was blood stains on the pants of **PW1** and puss cells was present.

The hymen was broken. This therefore, proves beyond doubt that the penetration took place.

2. The appellant and the complainant were known to each other, they were neighbours. Therefore, there is no doubt as to the identification.

3. There was consent to the three sexual activism. This is demonstrated when the complainant **PW1** – explained how the ordeal took place and in particular, how her hands were held as the offence was being committed. That she was being forcefully led to the bush by the appellant in the company of another person. This therefore, confirms that there was no consent.

In this regard, the complainant testified that there was no consent during cross-examination.

4. Lastly, in the offence of gang rape, there must be more than one person. This was so proved by the evidence of **PW1** and confirmed by evidence of **PW2** who narrated how the incident **PW1**.....and also that **PW2** know to the appellant.

5. The defence of the appellant was a mere denial. And during mitigation, the appellant stated that he would never repeat the offence again.

6. We therefore, oppose the appeal for those reasons. We urge the court to dismiss the same.

9. By the Appellant

1. My conviction revolved on the identification. This is doubtful as **PW1** referred to the brother of the appellant as the appellant.
2. The investigations were substandard.
3. That if medical records on the appellant were done, it would have helped to prove that he was involved in the offence. It was not done.
4. The difference in the opinion should cause this court to allow my appeal.

10. THE FIRST APPELLATE COURT

The first appellate court's duty is to read the proceedings of the trial court and re-evaluate the evidence and come to its own conclusions, taking into account that he neither saw nor heard the witnesses Viva Voce. **See Okeno -Vs- Republic [1972] E.A. page 32.**

11. Questions for Determinations

1. Was there penetration of the appellant's penis into the vagina of the complainant i.e. **D W K**?
2. Was the appellant known through recognition/identification?
3. Was consent to this intercourse absent?

12. Proceedings: Analysis

It was the narrative of the complainant, **D W K** that on **23rd November, 2011** in Muranga was accosted by a neighbour **JULIUS NJUGUNA MWANGI** whom she knew and recognized together with another male person whom she did not know.

D was going to a funeral in the neighbourhood. The two men forcefully took **D** into the bush and gang raped her in turns, one holding her hand down as the other sexually raped her. She screamed although she is epileptic.

The accused was arrested and charged with the offence of gang rape. **PW2** evidence demonstrated how she was pinned down by the accused and raped in turn. She did not recognize the other person. They removed her under clothes and sexually assaulted her.

PW4 – produced treatment notes as **P Exhibit I**. He testified that the private parts of the complainant had rough-edges and the vagina was

tender and painful. Therefore, there was vaginal penetration as the hymen was broken.

This incident occurred at day time. **PW2** therefore know the accused as a neighbour.

And since she was forcefully held, there was no consent.

13. **FINDINGS**

For those reasons, there is no merit in the appeal. The court upholds the conviction and sentence. Therefore, the appeal is hereby dismissed.

Right of Appeal – **14** days.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED AT KIAMBU BY:

THIS 18TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....**the Appellant**

.....**for Respondent**

.....**for Court Assistant**