



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CRIMINAL APPEAL NO. 58 OF 2016**

**(Being an appeal arising from Conviction and Sentence in Kitale Criminal Case No. 4652 of 2014 delivered by C.C. Kipkorir – Resident Magistrate on 20/7/2015)**

ISAAC KIPROTICH MAIYO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**J U D G M E N T**

1. The appellant was charged with the offence of **Rape contrary to Section 3(1) (a) (c) as read with Section 3 of the Sexual Offences Act NO. 3 of 2006.** The particulars were that on the **2nd day of December 2014 at Particulars withheld within Trans Nzoia County intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of J. C. M by force and threat, without her consent.**
2. The alternative charge was **Indecent Act with an adult contrary to Section 11(A) of the Sexual Offences Act No 3 of 2006.** The particulars were that on the **2<sup>nd</sup> day of December 2014 Particulars withheld within Trans Nzoia County intentionally caused the contact between your genital organ namely penis and the genital organ namely vagina of J.C. M.**
3. The appellant was convicted and sentenced to 13 years imprisonment hence this appeal. He has raised substantial grounds of appeal in his petition but before looking at them it would be worthwhile to summarise the evidence as presented at trial.
4. **PW1 the complainant** told the court that she was heading to her place of work at around 7 am that morning. On the way in a bushy area she met the appellant who demanded money from her forcefully. She gave her her ATM card but he refused and threatened to rape her. A struggle ensued and he pulled her to a nearby bush where he proceeded to rape her. While she was being taken to the bush her bag and a container remained on the road. PW2 who was on his way saw the bag and heard a lady screaming. He rushed to the scene and found the appellant on top of the complainant and demanded that he leaves.
5. The complainant whose clothes including her pant and petticoat had been torn called for help from the passerby who then arrested the appellant and took him to Kenya Police Reservist (KPR) and later to Endebess police station. She was taken to Endebess District hospital for examination and treatment.
6. **PW2 Ero Lusike** was on his way to his place of work when she saw a womans bag on the road together with a black and green paper bag. She also heard a woman screaming **“Niokoe Nimenyongwa”**. He went there and found the appellant on top of the complainant. He told him to get up and he wore his trouser. He was then arrested by other passersby.

7. **PW3 Juma Kiprop Ndiema** was also heading to his place of work when he met the complainant on the way and told them “**Muulize ameninyongea nini.**” He said she had blood stains on her mouth and injuries on her neck. The appellant told them that he was given Kshs 300 to have sex with the complainant. They took the appellant to the Kenya Police Reservist.

8. **PW4 Judith Nanjala Nyabilia** was equally heading to work that morning with others. On the way they met the complainant who called them and asked them to ask the appellant why he had strangled her. They met the appellant who told them that the complainant had agreed to have sex with her but the complainant denied. They arrested the appellant and handed him to security officers at their place of work.

9. **PW5 Moses Barasa** was equally heading to work that morning when he met 7 people standing. A woman was crying and saying that she had been raped and pointed at the appellant. He said that the woman had no inner clothes and bleeding from the mouth. They took her to the security office.

10. **PW6 Dr Blastus Kakundi** produced the treatment notes and the P3 form on behalf of Dr Macharia who found that the complainant had sustained injuries on the right side of her neck, chest and shoulder and her fingers were swollen. Her right leg was equally swollen and had bruises. She also had discharge in her private parts and on the inner parts of thighs. He concluded that she had been raped.

11. **PW7 P.C. Stanley Chepkwony** was the investigating officer. He said that the appellant was brought by Administration Police officers and he booked the complaint. He recorded statements from the witnesses and preferred charges against the appellant.

12. When put on his defence the appellant gave sworn evidence denying the charge. He narrated how he was called by the manager *Particulars withheld* to pick a tractor from Mois Bridge on 2<sup>nd</sup> December 2014. On the way he met two people a man and a woman speaking and he passed them. Later at 10 am he heard he was being called and told that he had beaten the lady. He denied meeting her. He was arrested and later taken to Endebess police station and subsequently charged with the offence.

### **Analysis and Determination**

13. I have read extensively the proceedings herein as well as the lengthy written submissions by both the appellant and the learned state counsel. The substance of the appeal as per the grounds raised by the appellants is whether indeed penetration was proved. The appellant argues that there was no penetration and thus the charge of rape was not proved.

14. On the other hand the state supports the conviction and sentence. They argued that all the ingredients of rape were established.

15. First of all it appears from the evidence of the witnesses including the complainant that the incident took place at around 7 am when people were reporting to the work. Generally all the prosecution witnesses except the doctor and the investigating officer knew the complainant. PW2 in particular found the appellant on the act. The hand bad and the paper bag left by the complainant on the road led him to the wonder what was going on. While in that state he heard screams emanating from the bush. As he approached, he found the appellant on top of the complaint with his trousers removed.

16. Even if there were no other eye witnesses I find the evidence of PW2 very credible. The incident took place during daytime and there cannot be a case of mistaken identity. The complainant was screaming and in pain. The witnesses managed to see the injuries she had sustained including blood from the side of the mouth. Moreover the appellant was just within the vicinity and that is why the witnesses were able to inquire from him and he told them that the appellant had given him Kshs 300 so that he could have sex with her.

17. Was there penetration? According to the appellant, there was none. He barked his argument by the fact that the complainant did not tell the witnesses that she had been raped but had been strangled by the

appellant. He submitted that the medical examination did not reveal that there was rape taking into account that the complainant was not a virgin.

18. Rape has been defined under section 3(1) of the Sexual Offences Act No 3 of 2005 as an act which “**causes penetration**” and it ought to be procured by force. The court in **Republic -Vs- Oyier Criminal Appeal No. 158 of 1984 – Kisumu Court of Appeal** stated that;

***(1) The lack of consent is essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.***

***(2) To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.***

***(3) Where a woman yields through fear of death or through distress it is rape and it is not excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”***

19. In this case the complainant clearly described the struggles she went through while attempting to stop the appellant from raping her. The injuries she sustained are clearly shown by the P3 form and explained by the doctor. There was therefore all elements of coercion and duress by the appellant.

20. As to whether there was defilement, the doctor opined that;

***“ In part C of P3 form was also found to not be a virgin and she had a discharge in her private paRT and on the inner parts of thighs. Lab tests indicates there was epithelial cells which indicates that a person had been raped in a period of 24 hours. He did confirm that rape occurred and signed the P3 on 2<sup>nd</sup> December 2014.”.***

21. Clearly and contrary to the allegation by the appellant the discharge was found in the appellant private parts as well as on the inner thighs . The doctor confirmed in cross examination that the complainant had been raped because of the injuries and discharge.

22. In the premises I do not find any merit in this appeal. The appellant clearly had planned to rape the complainant which he did when he waylaid her on her way to her place of work. The petticoat and the pant produced which were torn and dirty testified as much. PW2 found him in the act.

23. The appeal is hereby dismissed.

Delivered on this 27<sup>th</sup> day of July, 2017.

**H.K. CHEMITEI**

**JUDGE**

**In the presence of;**

**Kakoi for the respondent**

**Appellant – present**

**Kirong/Silvia – Court Assistants**

**H.K. CHEMITEI**

**JUDGE**

**27/7/2017**