**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 65 OF 2015**

**M S M.....….....….....….....APPELLANT**

**VERSUS**

**REPUBLIC …….....…… RESPONDENT**

*(Being an appeal from the original conviction and sentence in* ***Mutomo Senior Resident Magistrate's Court Criminal Case (S. O.) No. 8 of 2014*** *by* ***Hon. Sandra Ogot R M on 25/07/14)***

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

1. **M S M,** the Appellant was charged with the offence of **Rape** contrary to **Section 3(1)(a)(c)(3)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **29th** day of **March, 2014** at **9.00 p.m.,** in **Mutomo District** within **Kitui County,** he intentionally and unlawfully caused his penis to penetrate the vagina of **P N M** by use of force and threats.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(6)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence being that on the **29th** day of **March, 2014** at **9.00 p.m.,** in **Mutomo District** within **Kitui County,** he intentionally touched the private parts namely buttocks and vagina of **P N M** aged **26 years** with his penis against her will.

3. He was tried, convicted on the principal charge and sentenced to serve **ten (10) years imprisonment.**

4. Being dissatisfied with the conviction and sentence he appealed on grounds that:

- The charge sheet was defective.
- DNA test was not conducted on samples of both parties.
- Existence of a grudge between the parties was ignored.
- Bias on the part of the magistrate made her shift the burden of proof to the Appellant.

5. Facts of the case were that on the **29th March, 2014** at about **9.30 p.m.,** PW1, **P N M,** a housewife was from the kitchen going to the bedroom when she heard the sound of the door being pulled. The hurricane (chimney) lamp was on but she lit a torch and saw a person she recognized as **S** a nephew to her husband, the Appellant, standing at the door. He threatened to injure her with a knife that he was holding unless she gave in to his demand. He pushed her onto the floor, removed his pair of jeans and tore her panty. He had sexual intercourse with her as he held the knife, an episode that took approximately one (1) hour. On completion of the act he took his clothes and ran off. She locked the door and slept until morning. At

6.00 a.m. she rang her co-wife, PW2, **M D** who advised her to report the matter to the police. At the police station she was referred to hospital where she underwent treatment and a P3 form filled by PW3 **Daniel Mulwa.** The Appellant was arrested by PW4 **No. 61821 P C Alfred Lesang.**

6. When put on his defence the Appellant stated that prior to marrying his uncle the Complainant was his lover. At one point in time he encountered her and sought to know if it was fair for her to marry his uncle but she claimed she was not aware of their relationship and he stopped associating with her. He went home following his mother's demise and buried her on **8th March, 2014.** He opposed the family's decision to give custody of his younger sister to the Complainant and his uncle. On **19th March, 2014** he saw the Complainant talking to his fiancée whereafter he learnt that she had been tarnishing his good name. As a result they disagreed. The Complainant acted by calling his uncle and he learnt of their intention to have him arrested. He attempted to travel back to the coast region but was arrested while on the way.

7. The State opposed the appeal through State Counsel, **Ms. Amojong** who submitted that PW1, the Complainant clearly identified the Appellant as the person who attacked her, pushed her down, and removed her underpants prior to raping her as there was a lamp that was on and a torch that was lit. He was a person well known to her. The examination conducted by PW3, a qualified Clinical Officer revealed that the Complainant had lacerations and there was presence of spermatozoa. The allegation raised by the Appellant of existence of a grudge between him and the Complainant was not substantiated. She called upon the court to uphold the conviction and sentence by dismissing the appeal.

8. This being the first appeal, I am duty-bound to re-evaluate evidence adduced at trial afresh and come up with my own conclusions bearing in mind the fact that I had no opportunity to either seeing or hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

9. I have considered submissions by the Appellant and the response thereto by the State.

10. The Appellant has averred that the charge was defective. The charge was framed contrary to **Section 3(1)(a)(c)(3)** of the **Sexual Offences Act** that provides thus:

> ***"(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;***
>
> ***(c) the consent is obtained by force or by means of threats or intimidation of any kind.***
>
> ***(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."***

The charge as framed captures ingredients stipulated in the aforementioned provision of the law. There was an omission due to failure to indicate ***".....as read with Section 3(3)...."*** as submitted, however the omission is curable under **Section 382** of the **Criminal Procedure Code** that provides thus:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

The charge was read to the Appellant who denied it. He was taken through trial having fully understood what he was being accused of. He participated in the trial by cross-examining witnesses who testified at length. He concluded his case by adducing evidence in his defence. **(Also see Amedi Omurunga vs. Republic (2014) eKLR).** In the premises the omission did not occasion a failure of justice.

11. It has been stated by the Appellant that no DNA examination was conducted to establish if indeed he was the perpetrator of the offence. In the case of **Aml vs. Republic (2012) eKLR (Mombasa)** the court was of the view that:

> ***"The fact of rape or defilement is not proved by way of a DNA test but way of evidence."***

12. Evidence adduced by the Complainant that she was violated sexually was confirmed by medical evidence adduced. She was examined by a Clinical Officer, PW3 who found that she sustained laceration of labia minora. Laboratory tests carried out revealed the presence of spermatozoa and numerous red blood cells. He concluded that the presence of lacerations, red blood cells and spermatozoa was conclusive of rape. This evidence *perse* established the fact that a male genital organ penetrated the Complainant's female genitalia and ejaculated the protective fluid. In the premises DNA test was not necessary.

13. The offence was committed at night. Inside the house, according to the Complainant was a lit chimney lamp. She had a torch that was lit which aided her in seeing her assailant. The person was her relative by virtue of marriage, her husband's nephew. This was therefore a case of recognition. In the case of **Maitanyi vs. Republic (1986) KLR 198, 201** the court held:

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight ..... It is at least essential to ascertain the nature of light available, what sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care....."***

14. In this case there was light emanating from a chimney lamp. Then, the Complainant had a lit torch that she used to see the intruder. This person per evidence adduced was well known to her and even as he engaged in sexual intercourse with her he talked to her uttering threats, she was not mistaken as to his identity.

15. The grudge alluded to according to the Appellant was emanating from the allegation that she was previously his lover but ended up marrying his uncle. Due to the shameful act, she wanted him out of the way. The allegation that she had been tarnishing his good name was hearsay and inadmissible in evidence. It is admitted that the Complainant was staying with the Appellant's younger sister but the Appellant opposed the idea stating that she was a bad person. There was however nothing of substance stated that would prompt the Complainant frame up the Appellant.

16. In his defence and even through cross-examination the Appellant sought to prove that it was not the first time the Complainant engaged in coitus with him. The issue therefore to be determined is whether there was consent to the act that happened.

17. This is a matter where the Appellant ambushed the Complainant as she prepared to go to bed. He used force to push her down onto the floor. He threatened to stab her with a knife. There was no consent to the act that caused penetration into her genital organ.

18. In disregarding the defence put up the trial magistrate found the defence put up as mere allegations. No evidence was adduced to suggest that the Appellant's uncles wanted him out of their home hence the alleged frame up. The allegation that the magistrate was biased was farfetched therefore that ground of appeal must fail. The sentence imposed is the minimum prescribed sentence for the offence.

19. From the foregoing it is apparent that the appeal is devoid of merit. The same is dismissed in its entirety.

20. It is so ordered.

**Dated, Signed** and **Delivered** at **Kitui** this **16th** day of **March,** 20**16.**

**L. N. MUTENDE**

**JUDGE**