IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 514 OF 2013

(Appeal from original Conviction and Sentence in Kangema PM's Criminal Case No 64 of 2013 (A. Nyoike Too (Mrs) Ag. SRM)

JOHN IRUNGU MUCHIRI……..……APPELLANT

VERSUS

REPUBLIC…….....……..…….…….…….RESPONDENT

J U D G M E N T

1. The Appellant in this appeal, **John Irungu Muchiri**, was convicted after trial of ***rape*** contrary to **section 3(1) (a)** of the ***Sexual Offences Act, No 3 of 2006***. The particulars of the offence were that on 06/03/2013 in Kahuhia Location within Murang'a County, he intentionally caused his penis to penetrate the vagina of one **E N G**, a person with mental disability, without her consent. He was sentenced to life imprisonment. He has appealed against both conviction and sentence. He was undefended at his trial; he was unrepresented by counsel in this appeal.

2. The Appellant's petition of appeal filed on 03/09/2013 discloses the following grounds of appeal, appropriately rephrased –

(i) That the Appellant was not medically examined to prove that he raped the complainant.

(ii) That the blood-stains allegedly found on the clothing of the complainant were never forensically examined to rule out the possibility that the complainant was experiencing her monthly periods.

(iii) That the testimony of PW2, who was the main prosecution witness, was hearsay.

(iv) That the investigation of the case was too shallow, and the conviction of the Appellant unsafe.

(v) That the sentence of life imprisonment was manifestly harsh and excessive.

3. Subsequently the Appellant filed, without leave of the court, amended grounds of appeal, in which he complained –

(i) That his fundamental right to a fair and impartial trial was violated.

(ii) That **section 150** of the ***Criminal Procedure Code*** was not complied with.

(iii) That **section 169(1)** of the same Code was not complied with.

(iv) That the evidence placed before the trial court was scant and contradictory, and could not properly found the conviction.

4. The Appellant also filed written submissions, which I have duly considered.

5. Learned counsel for the Respondent, Mr. Njeru, supported the conviction and sentence. He submitted that although the complainant was unable to testify because she was mentally incapacitated by ***Down's syndrome***, the circumstantial evidence placed before the trial court by the prosecution through the testimonies of PW2, PW3, PW4 and PW5 was so overwhelming that it irresistibly pointed to the guilt of the Appellant.

6. Counsel however conceded that the medical report on the complainant indicated only external contact, not penetration, partial or full. He urges the court, if it finds that there was no penetration, to find that there was strong evidence of an attempt to penetrate the complainant. In that case counsel opined, a conviction for attempted rape can be properly substituted under **section 4** of the Sexual Offences Act.

7. Learned Counsel also opined that an offence of defilement of an idiot contrary to **section 146** (since repealed) of the Penal Code was also proved, and could therefore be properly substituted.

8. I have read through the record of the trial court in order to evaluate the available evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however given due allowance for the fact that I neither saw nor heard the witnesses.

9. Rape is defined in section 3(1) of the Sexual Offences Act 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; (and)

(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."

10. Rape therefore is a "lack of consent" offence. The question might arise therefore whether a charge of rape can be properly laid in respect of a person who cannot give consent anyway, and whether in that case a more appropriate charge should not be laid instead – for instance sexual assault under section 5 of the Sexual Offences Act. That is why, for instance, there are the offences of defilement in respect to minors. But let that be an issue for another day.

11. I must in this appeal determine whether the charge of rape as laid against the Appellant was proved beyond reasonable doubt. As observed by the trial court, the complainant (PW1) was incapable of testifying in any way on account of her mental condition (Down's syndrome). The prosecution therefore sought to rely on the testimonies of the other witnesses, which testimonies, the prosecution urged, established circumstances which irresistibly established that the Appellant had, or attempted to have, sexual intercourse with the complainant.

12. Let us examine these testimonies. PW2 (**Joyce Njeri Kimani**) saw the Appellant with the complainant at about 1.00 p.m. when they went to her (PW 2's) hotel or kiosk where the Appellant bought for the complainant tea and a snack. After she drunk the tea and ate the snack PW2 told the complainant to go home, and apparently she went. PW2 does not state that the Appellant accompanied

her.

13. PW2 further testified that later at 3.00p.m. she saw the Appellant and the complainant together when he bought for her a mango and told her to go home. She further testified that before he bought the mango she (PW2) had observed that the Appellant's trouser was unzipped, his belt unbuckled and his shirt was open. Later she pointed out the Appellant to one **Mama Mutura** (who never testified) and also called the police.

14. PW2's next testimony – of how some primary school children had narrated how they had seen the Appellant undressing the complainant and doing something to her in a bush – was all pure hearsay. None of these children was called to testify.

15. PW3 (**PC Kirwa Birgen**) was the officer who re-arrested the Appellant from the hands of a crowd that had arrested him upon allegation that he had had sexual intercourse with a mentally incapacitated person.

16. PW4 (M M) was the complainant's mother. Her daughter was handed over back to her by PW2 who advised her to check the girl "since she was taken by a man and probably slept with…". PW4 further testified that she checked the complainant and found blood in her vagina. She took her daughter to the police and reported the matter. The complainant was then taken to hospital where she was examined and treated.

17. PW5 (**James Muthua Mwangi**) was the clinical officer who examined the complainant. He found fresh blood on her labia and on the perineum. Her labia minora and perineum were also torn. He produced in evidence her medical report (P3). He ruled out the possibility of the blood he found on the complainant's genitalia being menstrual blood.

18. Although in cross-examination PW5 stated –

> "…the genitalia was torn (labia minora) meaning there was penetration" –

he made no comment at all on the complainant's vagina (whether there were tears in its walls, whether there was a broken hymen, or whether there was anything found inside the vagina). His statement that there was penetration is not supported by his other findings!

19. PW6 (**Cpl Ouma Obogo**) was the investigating officer of the case. The sum total of his evidence was that members of the public brought the Appellant to his police post accusing him of "being with a certain girl" who was mentally retarded. Shortly thereafter a girl was brought by her relatives with allegations that she was "found being raped" by the Appellant. Both were escorted to the health centre where they were examined and discharged. Subsequently the Appellant was charged. In cross-examination he stated that he never recorded the statement of any member of the public who arrested the Appellant or alleged that they had found him raping the complainant.

20. The last prosecution witness was PW7 (**Cpl. Ouma Obogo**), who was the very same officer who testified as PW6! It is not clear on the record why he was designated as a different witness. What is clear is that he was recalled merely to produce the witness statement of another police officer, which he read into the court record! The statement of this other officer (**PC Sally Rugut**) was to the effect that she had checked the complainant's private parts and found blood stains.

21. A witness producing the witness statement of another potential witness simply amounts to a person purporting to testify in place of another witness. No basis was laid under the Evidence Act, Cap 80 or any other law for this course of proceedings. The witness statement of PC Sally Rugut was irregularly produced in evidence and amounted to nothing more than hearsay.

22. So, what do we have here? We have the Appellant being arrested by members of the public upon suspicion that he raped the complainant. But none of the persons who arrested him, or who had

allegedly found him raping her, were called to testify, and no reasons were given why they were not called.

23. Suspicion was raised by the fact that the Appellant was seen with the complainant by PW2 on two occasions within about 2 hours – on the first occasion buying her tea and a snack, and on the second occasion buying her a mango. PW2 also testified that just before he bought the mango she saw the Appellant's trouser unzipped, his belt unbuckled and his shirt open. In an open place during the day where fruits were being sold to members of the public? Apart from this scenario being highly unlikely, the Appellant could have forgotten to zip up and properly buckle up after a call of nature!

24. Apart from the testimony of PW2, there was really no other witness tending to connect the Appellant to the offence charged. Even the medical evidence was tenuous at best! The suspicion aroused by PW2's observations was not sufficient. It did not amount to circumstantial evidence leading irresistibly to the conclusion that the Appellant committed the offence charged.

25. The Appellant's conviction is entirely unsafe and cannot be upheld. I will allow the appeal, quash the conviction and set aside the sentence. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A ON THIS 23RD DAY OF JUNE 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24th DAY OF JUNE 2016