



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 30 OF 2015

JOHN MAINA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.191 of 2014 of the Principal Magistrate's Court at Kangema by Hon. E.M Kagoni – Senior Resident Magistrate)

JUDGMENT

The appellant, **JOHN MAINA MWANGI**, was convicted for the offence of rape contrary to section 3 (1) (b) 2 (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between December 2013 and May 2014 at **[particulars withheld]** village, Mathioya District of Murang'a County, intentionally and unlawfully caused his penis to penetrate the vagina of **B N M** a person with mental disability without her consent.

He was sentenced to serve ten years imprisonment.

He now appeals against both conviction and sentence.

The appellant was in person. He raised four grounds of appeal which can be compressed into one as follows:

That the learned trial magistrate erred in law and in fact by failing to appreciate that the sexual intercourse was consensual.

The state opposed the appeal through Mr. Njeru, the learned counsel.

Briefly the facts of this case are as follows:

When the complainant's mother discovered that she was expectant, she was asked who was responsible and she implicated the appellant.

In his defence the appellant contended that they were lovers and that they intended to marry.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

The charge was wrongly drafted. It ought to have read:

" contrary to section 3 (1) as read with section 3(3) of the ..."

My perusal of the record however indicate that the appellant was not prejudiced in any way for he understood the charges and fully participated in the trial.

The evidence of the witnesses is to the effect that the complainant was not in a position to form informed decision to consent. The medical evidence adduced showed that at the time of her examination, she had a blade of grass in her genitalia. This in my opinion buttressed the contention that she was incapable of giving consent. Though a medical examination on her capacity to consent would have been the best, am satisfied that the evidence on record including the observation by the learned trial magistrate is clear; she had no capacity to give consent.

The appellant ought to have taken note that he was dealing with a person with mental disability. The appeal is therefore dismissed.

DATED at MURANG'A this 24th day of June 2016

KIARIE WAWERU KIARIE

JUDGE