

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.120 OF 2015

JAMES MWITI M'MWONGO.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No. 2161 of 2015 of the Principal Magistrate's Court at Tigania by Hon. P.M Wechuli – Resident Magistrate)

JUDGMENT

The appellant, **JAMES MWITI M'MWONGO**, was convicted in three counts. In count one he was charge with an offence of rape contrary to section 3 (1) (a)(c) (3) (sic) of the Sexual Offences Act No. 3 of 2006.

In count two the charge was indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No.3 of 2006 while in count three the charge was assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the offence were that on 22nd September 2015 at [particulars withheld] , Tigania East District of Meru County, intentionally and unlawfully caused his penis to penetrate the vagina of **B M C**. On the same day place and time he inserted a knife into her vagina against her will. He also unlawfully assaulted the complainant.

The appellant was found guilty of the offences and sentenced to serve 20 years imprisonment in count one, 5 years imprisonment in count two and 3 years imprisonment in count 3. The sentences were ordered to run consecutively. He had appealed against both conviction and sentence, but at the time of hearing he chose to abandon his appeal on conviction. I will therefore address the issue of sentence only.

Before I address the issue of sentence, I wish to observe that the charge in count one was wrongly drafted. It ought to have read:

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

I however find that the appellant was not prejudiced for he understood the charge against him. The defect is therefore curable under section 382 of the Criminal Procedure Code.

What was listed as count two ought to have been an alternative charge to count one. Once there was a conviction in count one, then the trial magistrate was to leave the alternative charge without making a finding. It was erroneous therefore to convict and sentence him on the count. I therefore quash the conviction in respect of count two and set aside the sentence.

I have looked at the evidence on how the rape was perpetrated. I am satisfied that the sentence in count one is commensurate to the heinous act. I will not disturb the sentence.

The offence in count one and what is indicated as count three was committed in the same transaction. The proper order was for the sentence to run concurrently.

I am therefore vacating the order of the learned trial magistrate and substitute it with another as follows:

The sentence in count one and three to run concurrently. To this extent the appeal of the appellant succeeds.

DATED at Meru this 20th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE