



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 113 OF 2011**

**MAKAU SUA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original Conviction and sentence in Tawa Resident Magistrate's Court  
Criminal Case No. 103 of 2007 by Hon. S.O. Temu, SRM on 29/6/2010)*

**JUDGMENT**

1. **Makau Sua**, the appellant was charged with the offence of rape contrary to **Section 3(1)** as read with **sub-section (3)** of the **Sexual Offences Act, 2006**. Particulars are that on the 6<sup>th</sup> day of April, 2007 in **Makueni** District within the **Eastern Province**, intentionally and unlawfully had carnal knowledge of **NM** without her consent.
2. In the alternative he was charged with the offence of committing an indecent act on a female contrary to **Section 6** of the **Sexual Offences Act No. 3 of 2006**. **Particulars withheld** thereof being that on the 6<sup>th</sup> day of April, 2007 in **Makueni District** within the Eastern Province, intentionally and unlawfully did an indecent act on **NM** by touching her private parts..
3. The facts of the case were that on the 6<sup>th</sup> April, 2007, **PW1 NM**, the complainant was inside the house when the appellant entered, held her, took her to bed and had carnal knowledge of her. She screamed and he ran away. Neighbours answered her call of distress and searched for the appellant. He was arrested and taken to the Police Station. The complainant was examined by **Dr. John Mutunga** who found her having sustained lacerations and spermatozoa were present in the discharge found in her vagina. The appellant was charged.
4. In his defence the appellant stated that on the material date he worked as a labourer until 5.00pm. He returned home showered and went to meet his friends. He returned home and slept. He was woken up at 2.00am and accused of raping PW1. Thereafter he was charged.
5. At the end of the trial, the court found him guilty, convicted him of the main count and sentenced him to ten (10) Years imprisonment.
6. Being aggrieved by the conviction and sentence the appellant appealed on the ground that:-
  - i. The burden of proof was not discharged by the prosecution;
  - ii. The P3 form was filled while the trial was ongoing which was irregular;
  - iii. The medical evidence was not satisfactory having been presented by the Clinical Officer
  - iv. There was material contradiction in the evidence of PW1 and PW2.
  - v. The appellant's arrest was not satisfactory and his fundamental rights to a fair trial as enshrined in **Article 25(1)** of the **Constitution** were violated.
7. This being the first appeal, my duty as a court is to re-evaluate the evidence, draw my own

- inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial court. (*See Okeno versus Republic (1972) E.A. 32*).
8. It is argued that the P3 form was filled in questionable circumstances as the trial was ongoing. The appellant was arraigned in court on the 13<sup>th</sup> April, 2007, the offence having been alleged to have been committed on the 6<sup>th</sup> April, 2007. The P3 form was filled on the 4<sup>th</sup> May, 2007 when the trial was ongoing. **PW4, Dr Mutunga** stated that he used treatment notes issued to the complainant. The treatment card was produced in evidence (*exhibits 1*). It indicates that the complainant sought treatment on the 6/4/2007 following allegations of having been raped. That notwithstanding, this is a case of rape and in the case of *Kassim Ali versus Republic - Criminal Appeal No. 84 of 2005 (Mombasa)* the Court stated thus.

***“...(the) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence“.***

Failure to fill the P3 prior to the trial commencing was inconsequential to the prosecution’s case.

9. **Dr Mutunga** was a Medical Doctor qualified to fill the P3 form. Even if he had been a clinical officer he would still have been qualified to discharge the duty.
10. It is submitted that the circumstances in which the appellant was arrested were unsatisfactory. **PW3, No. 70846 P.C. Francis Muigai** stated that the appellant was arrested by members of the public and taken to the Police Station at about 2.40am. The appellant in his defence did not dispute the fact of arrest and indeed stated that he was arrested at 2.00am while in his house. The ground of appeal holds no water and must fail.
11. Although the appellant raised a ground of his rights having been violated, his submissions were silent on this particular allegation. Therefore, the ground was baseless.
12. To prove the case, **PW1** the complainant stated that the appellant entered the house, held her, pushed her onto the bed and had carnal knowledge of her. She screamed and he fled. **PW2, Mutune Mwanzia** saw the appellant entering the house and soon thereafter he heard **PW1** screaming faintly. He crept into the house slowly but the appellant fled. Having recognized him he was able to identify him. He was taken to the complainant who identified him.
13. The complainant on being examined it was established that there was spermatozoa in the discharge that came from her vagina. This was evidence of a male genital organ having penetrated her genital organ.
14. The complainant said she was forced on to the bed by the appellant. It is for that reason that she screamed attracting the attention of **PW2**. This meant that the act was committed in a coercive manner. This was an unlawful and intentional act. (**Vide Section 43(1) (a) of the Sexual Offences Act, 2006**). The act of penetration committed against the appellant was rape. The appellant’s defence was considered and correctly disregarded by the trial magistrate.
15. The sentence imposed was the minimum prescribed sentence for the offence.
16. From the foregoing the appeal lacks merit. It is dismissed in its entirety.
17. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>th</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**