

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 512 OF 2013

(Appeal from conviction and sentence in Murang'a CM Criminal Case No 32 of 2013 – J. J. Masiga, RM)

JULIUS MWANGI KINYANGANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **Julius Mwangi Kinyanganya**, was convicted after trial of two offences. The first was **rape** contrary to **section 3(1) (a) & (b) and (3) of the Sexual Offences Act, No. 3 of 2006**. It was alleged that in the night of 22/12/2012 at **[particulars withheld] Village, Kambirwa Location within Murang'a County** he intentionally and unlawfully caused his penis to penetrate the vagina of one **D W** by use of force. For this offence he was sentenced to serve ten (10) years imprisonment. The second offence was **committing an indecent act with an adult** contrary to **section 11A** of the same Act. The particulars here were that at the same time and place he intentionally touched the vagina of the same person with his penis against her will. He was sentenced to serve five (5) years imprisonment for this offence. The learned trial magistrate ordered that both sentences should run **consecutively**.

2. The Appellant appealed against both convictions and sentences. In the course of hearing however he withdrew his appeal against the conviction and sentence in the first count. He pursued only the appeal against the conviction and sentence in the second count. His withdrawal of the appeal against the conviction and sentence in the first count was well-advised. He was convicted upon good and sound evidence placed before the trial court. In the course of raping the complainant he badly assaulted her, in the process doing her grievous harm by knocking out two of her teeth. Perhaps he should also have been charged with doing grievous harm to the complainant. That charge would not have been duplex to the charge of rape. Anyways, he got the minimum ten (10) years imprisonment permitted by the law in the event of a custodial sentence for rape. Learned Prosecution Counsel had given notice that he would seek enhancement of that sentence should the appeal against the conviction be dismissed.

3. As for the second count, learned Prosecution Counsel supported the conviction and sentence. That charge was however clearly duplex to the charge in count one. When raping the complainant as charged in count one the Appellant's penis must of necessity have intentionally touched the vagina of the complainant against her will! That is how penetration was achieved. That indecent act was thus committed in the course of execution of the rape, an offence that the Appellant was already charged with and for which he was convicted.

4. The charge in count two was therefore bad for duplicity. The conviction for that count is hereby quashed and the sentence of five (5) years imprisonment imposed against the Appellant set aside. It will now not be necessary for me to say anything on the order of the trial court that the sentences it imposed do run consecutively.

5. As already pointed out, the Appellant's appeal against conviction and sentence in count one was withdrawn. He shall therefore serve his sentence of ten (10) years imprisonment for that offence. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF JUNE 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 12TH DAY OF JUNE 2015