REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 158 OF 2012

PETER MUASA VALA……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentence in Chief Magistrate's Court – Machakos, Criminal Case No. 1164 of 2011 by Hon. P.N. Gesora Senior Principal Magistrate on 4th July, 2012)

J U D G M E N T

The charge brought against the appellant herein was that of Rape contrary to **Section 3(1) (a) (b) 3** of the **Sexual Offences Act No. of 2006.**

The particulars of the offence were that on the 2nd day of February, 2009 at *[particulars withheld]* village in Kyawange location within Mwala District of the Eastern province, intentionally and unlawfully caused his penis to penetrate the vagina of **J N M** without her consent.

The appellant is also faced with an alternative charge of committing an Indecent Act with an adult contrary to **Section 11(a**) of the **Sexual offences Act No. 3 of 2006.**

The appellant pleaded not guilty to the charge and the case proceeded wherein the prosecution called six (6) witnesses in support of the charge. At the close of the prosecution's case, the appellant was put on his defence and at the end of the trial he was found guilty and sentenced to serve fifteen (15) years imprisonment. He has appealed to this court against the conviction and the sentence and has set fourth four (4) grounds of appeal together with an additional amended grounds of appeal which he handed to the court on the date the appeal was heard.

The summary of the evidence adduced in the lower court was that on the 2nd February, 2009 the complainant (PW1) was sent to the river by **J M M.** She saw someone behind her whom she identified as the appellant. The appellant held her neck and as she reached the river he caught her from behind, he did not talk to her, struggled her and put her down and was trying to remove her clothes. He abused her and hit her on the face. He then removed her panty, unbuttoned his trouser and raped her. He took ten minutes rapping her and he did it once. He asked the complainant if she knew him to which the complainant replied **"No",** he wiped himself with his hands and went away.

The complainant pretended she was going to pick sukuma and on being satisfied that the appellant had gone, she climbed on the river bank and told **Muthui Musyoka** that she had been raped by the appellant who she mentioned by name. The complainant and the said **Muthui Musyoka** left together to look for the appellant whom they saw and **Muthui Musyoka** chased him but he entered the river. The

complainant asked **Muthui** for the number to her brother's husband who she called. She was taken to the AP's camp and later to hospital and treated at Masii, was issued with a P3 form. The appellant was later arrested after sometime because he disappeared shortly after committing the offence. The complainant knew the appellant before the date of the offence.

Agnes Mutuku Nzioka testified as PW3, she told the court how on 2nd February, 2009 at about 10.30a.m, she was at home milking when the complainant told her that she had been raped by **Muasa** *(the appellant herein).* She left work and went to the road which was 30 meters from her home. She took the complainant to the hospital. In cross-examination she told the court that she saw the appellant pass-by on that day but he disappeared.

PW4 (J M M) is the mother-in-law to the complainant. She is the one who had sent her to the market on the material day. She was informed by one **Benson** that the complainant had been raped by the appellant. She met the complainant and told her to go to hospital, she followed her and thereafter she reported to the police.

PW2 Mary Muvonja a clinical officer in Mwala filled the P3 form for the complainant on 3rd February, 2009, the complainant told her that she had been raped. She complained of multiple scratch marks on the face, head and the neck and her right eye was red. Of importance to note from her findings was that when urine was examined it was found with spermatozoa.

On cross-examination he told the court that she examined the complainant two hours after the event and her private parts had sperms.

PW6 Cpl. Moses Matuange investigated the case. He received the report of rape that was made by the complainant. He took the statements of the complainant and the witnesses, he looked for the appellant but could not find him as he had disappeared, it was not until July, 2009 that he resurfaced and he arranged for his arrest and he charged him with the offence of rape.

During the hearing of the appeal, the appellant told the court that he was relying on the amended grounds of appeal and on the submissions but in the interest of justice, the court will consider both sets of grounds of appeal. The appellant has relied on the three (3) main grounds of appeal which are set out hereunder.

1. ***The trial magistrate erred in law and in fact by failing to observe that the appellant was not medically examined and the spermatozoa, detected in the complainant's genital organ was not established as to its origin.***

2. ***That the defence statement was not considered as required by the law.***

3. ***That the learned trial magistrate erred in law and in fact and misdirected himself by failing to observe that the case for the prosecution was not proved beyond reasonable doubt.***

4. ***The appellant is a first offender and pray for leniency.***

5. ***The appellant is deeply remorseful and repentant of his act.***

6. ***The appellant has deeply reformed and is rehabilitated through the Prison Reform Programme.***

7. ***The appellant is a sole bread winner for his family that he is married to a housewife and that he takes care of his aged single parent.***

8. ***He prays to court to treat the period served as punishment and reduce the sentence to period served.***

The court has carefully considered the evidence on record, the submissions by the appellant and **Mr. Machagu** for the State, and will proceed to consider the grounds of appeal.

On the first ground of appeal this court is guided by the Court of Appeal decision in the case of ***Aml vs Republic (2012) eKLR (Mombasa)*** where the court held;

> ***"The fact of rape or defilement is not proved by the way of DNA test but by way of evidence. This was further affirmed in the case of Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 Mombasa where the court stated;***
>
> ***"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by way of oral evidence of a victim of rape or by circumstantial evidence and so is the offence of defilement (…emphasis mine)"***

The evidence of the complainant placed the appellant as the one who defiled her. She knew him before the date of the offence, it was during the day and the complainant gave the name of the appellant to the police and to PW3, as the one who had defiled her. This ground is therefore baseless and is accordingly rejected.

On the second ground that the defence of the appellant was not considered, this court finds that the same was considered by the trial court on page 24 of the judgment. He gave a defence of alibi which the trial court rejected as a made up story which bore no truth. I find that the lower court was right in rejecting the defence and therefore this ground also fails.

On the third ground of appeal, I find that the prosecution's case was proved beyond any reasonable doubt. The evidence of the complainant was overwhelming on the events that took place on the 2nd day of February, 2009 concerning the case before the court. She clearly identified the appellant as the person who raped her and gave her name to PW3 who accompanied her to trace the appellant but on seeing them, he took off and only returned a year later. The evidence was corroborated by the medical evidence produced by PW2 the clinical officer who examined the complainant only two hours after the offence was committed.

As for grounds 4, 5 6, 7 and 8 of the appeal, this court has considered the sentiments of the appellant but as the court found in the case of ***Wanjama vs Republic (1971) E.A 493***

> ***"An appellate court may interfere with the sentence if it is found to be harsh and excessive or where it is found that the trial magistrate took into account irrelevant or immaterial factors or overlooked important factors"***

The said grounds are not material to this appeal.

For the reasons stated above, this court finds no reasons to interfere with the conviction and the sentence. The appeal is found lacking in merit and is hereby dismissed.

It is so ordered.

Dated and **Signed** at **Machakos** this **18th** day of **August, 2015**

LUCY NJUGUNA

JUDGE

Delivered at **Machakos** this **21st** day of **September, 2015**

PAULINE NYAMWEYA

JUDGE