



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 18 OF 2010**

**BETWEEN**

**LEONARD NJERU.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Siakago Criminal Case No. 2210 of 2006 by Hon. S.M. Mokua PM on 16<sup>th</sup> February, 2010)*

**JUDGMENT**

1. The appellant, **Leonard Njeru** was charged with the offence of rape contrary to **section 3(1)(b)(c)** as read with **section 3(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence are that on the 2<sup>nd</sup> day of December 2006 at Gachoka market within Mbeere district intentionally and unlawfully had sexual intercourse with one S.N. without her consent.
2. The prosecution evidence was that on 2<sup>nd</sup> December 2006, the complainant, PW1 went to Nectar Bar in Gachoka market and took one bottle of beer and left at about 11.00pm. At the stage, someone carried her into the bush and had sexual intercourse with her. Her screams attracted people, who turned out to be police officers who came to the scene. The officers, who had torches, found the accused on top of the complainant. She recognizes the appellant when police officers emerged and pulled him off her. She was thereafter referred to Embu Provincial Hospital for examination and was issued with a P3 form.
3. In cross-examination, PW1 admitted that she know the appellant. She denied that she spoke to the appellant at the bar or left the bar with him. She also stated that she did not see him inside the bar. She testified there was no reason for her to have sexual intercourse with the appellant in the bush as her home was close by.
4. PW2, a village elder, was headed home at about 11.00 pm on the material day when he heard screams and followed the direction where they emanated. He saw some people having sexual intercourse and reported the matter at Gachoka Patrol base. He testified that while in the company of police officers, he was able to see what was going on. The police officers physically took the suspect off the complainant and was apprehended and taken to Gachoka Patrol base. It was his testimony that he recognized the accused when he was taken off the complainant.
5. PW3, PC Abdalla Machafu told the trial court on the material day at about 11.00 pm while at Gachoka Patrol Base he was woken up by PW2 who informed him that someone was being

attacked around Necta area. In the company of Corporal Ngere, PW5, and PW2, they proceeded to the scene. They could hear some noise as though someone was being strangled. They found the appellant having sexual intercourse with the complainant. PW3 then pulled the appellant off the complainant. The complainant was naked and he urged her to go home and dress. This account was corroborated by that of PW5 that he was called by a member of public about an attack on Necta area. When he proceeded to the area, in the company of PW2 and PW3, he heard screams from a woman some 50 metres from the scene of the incident. He saw the appellant lying on top of the complainant and asked PW3 to pull off the appellant from the complainant. PW3's recovered 3 condoms from the scene as well as the appellant's identity card, a small bible and a hat which belonged to the appellant.

6. PW4 is the doctor who filled the complainant's P3 form. She had pain on the throat and on the right side of the chest. She had bruises on her elbows. The injuries according to medical assessment were caused by a blunt object. There were no lacerations on the genitalia. No vaginal swab was done. The complainant was given analgesics and drugs against sexually transmitted diseases. The doctor assessed the degree of injury as harm.
7. When put to his defence, the appellant denied committing the offence. In his sworn defence, he told the Court that the sexual intercourse was consensual and that the complainant wanted to fix him for failing to give her money. It was his case that it was in fact the complainant who purchased condoms and that they had agreed to have sex at a cost of Kshs. 200.
8. The trial court appraised this evidence and found the appellant guilty as charged and sentenced him to ten (10) years imprisonment. He appeals against conviction and sentence. The appeal is grounded on the failure by the learned magistrate to consider the contradictions in the evidence and the relationship between the parties. He also contends that his defence was not considered. The State supports the conviction and sentence.
9. The offence of rape is defined in the following terms at **section 3** of the *Sexual offences Act*; "A person commits the offence termed rape if—
  - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
  - (b) the other person does not consent to the penetration; or
  - (c) the consent is obtained by force or by means of threats or intimidation of any kind."

In order to prove the offence of rape, two elements must be satisfied; that there was penetration which is intentional and unlawful and that there was no consent from the victim or that such consent was not freely obtained.

10. The duty of the first appellate court is to evaluate the evidence afresh and make independent conclusions bearing in mind that it did not see or hear the testimony. My assessment of the totality of the evidence reveals that there was penetration. This evidence of PW1 is corroborated by the evidence of PW2, PW3 and PW5 who all witnessed the appellant in the very act and the appellant being pulled off from the complainant. I therefore find that the element of penetration is proved. I also find that the appellant was positively identified. He was caught in the act by PW2, PW3 and PW5. His items were also recovered at the scene. Moreover, any claim of mistaken identity is removed by the fact that the appellant was known by PW1 and PW2 prior to the commission of the offence hence the evidence was really one of recognition in the circumstances.
11. The other issue is whether the penetration was consensual. The screaming of PW1 attracted PW2 and later PW3 and PW5 to the area are consistent with the fact that there was no consent. Further, her injuries on the neck and elbow which were confirmed by the medical doctor, PW4, are also consistent with the use of force and the lack consent.

12. Like the trial court, I find the appellant's defence of a prior arrangement to be incredible. If anything, it is corroborative of the fact that the appellant was at the scene at the material time and had sexual intercourse with the complainant.
13. Before this court, the appellant filed a document titled, "*Mitigation Appeal*." In the document he states that at the material time he was drunk and therefore not in control of his mental faculties. He requests the court to reduce the sentence imposed on him. The issue of the appellant's state of mind is being raised for the first time on appeal. The issue of the appellant's state of mind is a matter of evidence. It ought to have been raised and considered at the trial. As this is an appeal, I decline to entertain that line of submission.
14. I am satisfied that from the evidence on record, the elements constituting the offence of rape were proved by the prosecution to the required standard and the trial court was correct in convicting the appellant of the charge.
15. I have noted the appellant's plea of mitigation and expression of remorse in his written submissions. However, the court's discretion in sentencing is limited as the minimum statutory sentence under **section 3(3)** of the *Sexual Offences Act* is 10 years imprisonment for the offence of rape. As such, the sentence imposed by the trial court is legal. It is neither harsh nor excessive as to warrant this court's interference.
16. The appellant's conviction and sentence are affirmed. Consequently the appeal is dismissed.

**DATED, SIGNED and DELIVERED** at EMBU this 9<sup>th</sup> day of January 2014.

**D. S. MAJANJA**

**JUDGE**