



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 201 OF 2011
NICHOLAS MUTUA KIVUNZYA APPELLANT
VERSUS
REPUBLIC
(Being an appeal from the sentence of Hon. J.W. Gichimu R.M delivered
on 26/7/2011 in Tawa Resident Magistrate Criminal Case No. 116 of 2011)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Nicholas Mutua Kivunzya** was charged with the offence of **gang rape** contrary to **section 10** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 9th day of April 2011 at **Iiani Sub-location, Tulimani Location** in **Mbooni West District**, within **Makueni County**, in association with another before court intentionally and unlawfully caused his penis to penetrate the vagina of **Maria Mutave Nzioki** without her consent.

2. In the alternative, the Appellant was charged with the offence of committing an **indecent act** with an adult contrary to **section 11 (A)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 9th day of April 2011 at **Iiani Sub-location, Tulimani Location** in **Mbooni West District** within **Makueni County** intentionally did an indecent act to **Maria Mutave Nzioki** by touching the vagina with his penis against her will.

3. The case of the prosecution was that on 9/4/2011 at about 11.00 p.m., the complainant, **PW1 Maria Mutave Nzioki** a farmer at **Iiani Sub-location** was asleep in her house. She heard noise outside and went to the window with a torch and shone the torch outside through an opening on the window. She saw the Appellant and another person outside. She asked the Appellant who was a neighbour what he was doing at her home at night. The Appellant then removed a piece of iron sheet from the window and jumped into the house. The Appellant held the complainant and fell her on the ground. The Appellant then cut off the complainant's underpants with a knife then

- proceeded to have sexual intercourse with the complainant two times. The complainant's neck was strangled and her mouth blocked. After the Appellant was through he held the complainant and his accomplice also had sex two times with the complainant.
4. The complainant screamed and neighbours came to her rescue. The culprits however jumped out of the window and ran away. The following day, a head cap belonging to the appellant was found inside the complainant's house. A report was made to the police. The complainant was issued with a P3 form and treated at **Mbooni District Hospital**.
 5. In his defence the Appellant gave unsworn evidence. He did not call any witnesses. The Appellant described himself as a casual labourer. He stated that on the material day he went on with his work as usual. That at 4.00 p.m. he visited the complainant who was his relative and was sick. He further testified that in the evening he went to the bar for some drinks and returned to his house at about 8.30 p.m. After dinner he went to sleep. The following day he was going on with his usual activities when two police officers and a village elder came and arrested him. He was alleged to have raped the complainant but denied the allegation. He was then shown a head cap that was suspected to be his. The Appellant lead the police to the house of another suspect who had also been mentioned by the complainant. The two were escorted to the police station and subsequently charged with the offence herein.
 6. The trial magistrate considered the evidence adduced in court and convicted and sentenced the Appellant to 15 years imprisonment. The accomplice was acquitted. The Appellant was dissatisfied with both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the prosecution case was not proved beyond reasonable doubts.**
 - v. **That the burden of proof was shifted.**
 - v. **That the trial was unfair.**
 - v. **That the defence case was not given adequate consideration.**
 - vi. **That the sentence was harsh.**
 7. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**
 8. The complainant (PW1) in her evidence narrated to the court how she was gang raped by two men. The complainant named the Appellant as one of the culprits. Although the offence took place at night, it was the complainant's evidence that she flashed her torch outside through an opening at the window and saw the Appellant who she knew as her neighbour and conversed with him, asking him what he was doing at her home at night. According to the complainant, it was the Appellant who strangled her, covered her mouth, cut off her underpants with a knife and raped her. The complainant also identified a head cap dropped in her house was the Appellant's property. The head cap and the torn underpants were produced in court as exhibits.
 9. PW3 **Martin Kileke Makumbi** is one of the complainant's neighbour who proceeded to the scene after hearing the complainant's screams. PW3 testified that the complainant named the Appellant as one of her attackers and also told them about the recovery of the head cap. According to PW3's evidence, he also used to see the Appellant wearing the said head cap.
 10. PW2 **Benedeta Nthenya Nzioki** a daughter to the Appellant also identified the head cap as the one she had seen the Appellant wearing earlier on the same day and noted the writing on it. The head cap with the words "**gold top**" was produced as an exhibit the Investigating Officer, PW4 **Cpl. Joshua Mwirichia**.
 11. The Appellant in his defence talked about his arrest and the head cap which was suspected to be his. The head cap though not unique has been linked to the Appellant by the complainant (PW1), her daughter (PW2) and the neighbour (PW3) who used to see the Appellant wearing the same. The trial magistrate was satisfied that the head cap belonged to the Appellant. The trial magistrate was also satisfied that the complainant's evidence was that of recognition. I find the circumstances favoured positive recognition as the complainant shone torch light on the attackers. I have no reason to differ with the trial magistrate who also had the benefit of observing the demeanour of the witnesses.
 12. PW5 **Dr Mulwa Andrew Mutera's** evidence confirmed that penetration had taken place. He testified that there was presence of spermatozoa and injury on the complainant's genitalia.

13. With the foregoing, I find no merit in the appeal. The sentence is within the law. Consequently, I dismiss the appeal and uphold the conviction and sentence.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of February 2014.

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B. THURANIRA JADEN

JUDGE