



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 161 OF 2012
JOHN MUTUA NDAMBUKI.....APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. D.G Karani

Principal Magistrate delivered on 22/03/2012 in Kithimani Principal Magistrate

Sexual Offence Act Case No. 4 of 2012)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **John Mutua Ndambuki** was charged with the offence of **rape** contrary to **section 3 (1) (a) (b) & (c)** as read with **section 3 (3)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 21st day of March 2012 at around 5.00 a.m. at **[particulars withheld]** area in **Yatta District** of the **Machakos County** intentionally and unlawfully caused his penis to penetrate the vagina of **B W N** by use of force, intimidation and threats.

2. In count II 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 2007 (2006)**.

3. The particulars of the offence were that on the 21st day of March 2012 at around 5.00 a.m. at **[particulars withheld]** area in **Yatta District** of the **Machakos County**, intentionally touched the vagina of **B W N** with his penis against her will.

4. When the Appellant was arraigned before the trial court, he pleaded guilty to the 1st count. The facts were read out to the Appellant and he admitted the same as correct. The Appellant was found guilty on his own plea and convicted and sentenced to serve 20 years imprisonment.

5. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- **That section 207 (i) of the Criminal Procedure Code was not complied with by the trial magistrate during the taking of the plea.**
- **That the Appellant was not cautioned before being convicted on a plea of guilty.**
- **That the mitigations proved the innocence of the Appellant.**
- **That the Appellant did not understand the facts of the case.**

6. During the hearing of the appeal, the Appellant relied on his written submissions and a Memorandum of Appeal in which the Appellant states that he wished to withdraw the appeal on conviction and instead appeal on sentence only. The Appellant then proceeded to offer his mitigation and applied for leniency.

7. The learned counsel for the State opposed the appeal. It was submitted that the plea was unequivocal and the charge was read out in a language understood by the Appellant and that the sentence is within the law.

8. The record clearly indicates that there was English/Kiswahili interpretation and the Appellant participated in the court process. The Appellant pleaded guilty. The facts were read out to the Appellant who accepted the same as correct. The plea was unequivocal and the provisions of **section 207 (1) and (2) of the Criminal Procedure Code** were fully complied with by the court. Although reflecting the offences as count I and count II as opposed to alternative counts was duplex, no prejudice was occasioned to the Appellant as he only pleaded and was convicted and sentenced for only for the offence reflected as count I.

9. The Appellant offered no mitigation prior to him being sentenced. The Appellant in his written submissions has stated that he is now remorseful and has reformed while in prison. However, the sentence of 20 years is within the law.

10. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 20th day of February 2014.

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B. THURANIRA JADEN

JUDGE