



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO.149 OF 2011**

**LESIIT, J**

**JAMES MBAABU M'ITONGA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence of Chief Magistrate S.M. KITHINJI Principal Magistrate at NKUBU, criminal case No. 1922 of 2007).*

**JUDGEMENT**

1. The Applicant **JAMES MBAABU M'ITONGA** was facing one count of attempted rape contrary to section 4 of the Sexual Offences Act. He was found guilty and convicted of the offence. He was then sentenced to 8 years (eight) imprisonment.
2. The Appellant was aggrieved by the conviction and sentence. He filed this appeal and relied on six grounds of appeal which are:

**(i) That the trial magistrate erred in both law and facts by convicting and sentencing me without putting due consideration that I pleaded not guilty to the charges.**

**(ii) That the learned trial magistrate erred in law and facts in failing to find that contradictory statements were made in court.**

**(iii) That the learned trial magistrate misdirected himself and overlooked the fact that the doctor stated in court that the complainant had very minor injuries but the learned trial magistrate did not consider the fact that this was a cooked up story and that the complainants goats had destroyed the appellants shamba.**

**(iv) That the learned trial magistrate erred in law and facts in misdirecting and overlooking the facts that the sworn statement given in court by the complainant that she was robbed two underpants Ksh.750/- mobile phone and a trouser but her sister stated that she had given her 200/- none of these property was produced in court to support her evidence but only trousers collected from her house.**

**(v) That the learned trial magistrate erred in law and facts and misdirected himself by passing a custodial sentence to the appellants in hearsay evidence.**

**(vi) That the learned trial magistrate erred in law and facts that the doctor who did examination stated that the complainant had no injuries in her private part nor was she slept with leaves a lot to be desired but instead alleged that injuries was inflicted on the neck and how comes the PW4 who was recording the statement on the OB could not see any injuries as alleged by the doctor.**

3. When the appeal case up for hearing the appellant submitted that he was only challenging the sentence. In his oral submissions the appellant submitted that he had reformed since his incarceration and that he had learnt carpentry trade and had a Grade Test. He urged court to consider he was a family man with a wife and children and was also an orphan.
4. Mr. Mungai was the State Counsel representing the State in this appeal counsel urged the court to consider the minimum and maximum sentence for the offence charged and the time served. Counsel was non specific on the sentence prescribed for the offence and non committal on state's position on this appeal.
5. I have considered this appeal. The Appellant challenges only the sentence. He was convicted of attempted Rape contrary to Section 4 of the Sexual Offences Act under that section a person convicted of that offence is liable to imprisonment for a period not less than 5 years, which may be enhanced to life.
6. There is no cross appeal by the state and therefore enhancement does not arise.
7. I have considered the circumstances of the offence. The Appellant attacked the complainant as she returned home from the shops and forcedly dragged her to a coffee plantation and if it was not for the intervention of a passerby the complainant would not have been rescued from this attack. The Appellant pleads for mercy saying that he has reformed and saying he has learned a trait that will enable him to be of use to himself, his family and the community at large.
8. I have considered that he has served a period of 3 ½ years in prison which is less than half his sentence. Given his remorsefulness for what he did I will allow his appeal by setting aside the sentence of 8 years imprisonment and substituting it with an imprisonment for a term of six years from the date of sentence in the lower court.

**DATED SIGNED AND DELIVERED AT MERU THIS 3<sup>rd</sup> DAY OF APRIL 2014.**

**J. LESIIT**

**JUDGE**