**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 18 OF 2012**

ROBERT MURIITHI MUGO…….....APPELLANT

VERSUS

REPUBLIC……..……..…….....…..…..RESPONDENT

***From original conviction and sentence in Cr. Case No. 1245 of 2010 at the Chief Magistrate's Court at Embu by HON. R.M. OANDA– RM on 25TH JANUARY 2012***

**J U D G M E N T**

1. **ROBERT MURIITHI MUGO** was charged with the following offences;

**Count 1**

**Attempted Rape contrary to section 4 of the Sexual Offences Act No.3 of 2006**

The particulars as stated in the charge sheet were as follows;

> ***On the 4th day of June 2010 in Embu North District of the Eastern Province, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CWN without her consent.***

**Count II**

**Assault causing actual bodily harm contrary to section 251 of the Penal Code**

The particulars as stated in the charge sheet were as follows;

> ***On the 4th day of June 2010 in Embu North District of the Eastern Province, unlawfully assaulted CWN thereby occasioning her actual bodily harm.***

**Count III**

**Stealing contrary to section 268(1) as read with section 275 of the Penal Code**

The particulars as stated in the charge sheet were as follows;

> ***On the 4th day of June 2010 in Embu North District of the Eastern Province, stole cash kshs.4,050/= the property of CWN.***

2. The matter proceeded to full trial and he was convicted on all counts and sentenced as follows;

   Count 1 – shs.30,000/= in default five (5) years imprisonment

   Count 2 – shs.10,000/= in default two (2) years imprisonment

   Count 3 – shs.5,000/= in default one (1) year imprisonment

   The sentences were to run consecutively if the fines were not paid as is the case here.

3. He filed this appeal challenging both conviction and sentence. However when the appeal came for hearing he withdraw his appeal on conviction and pursued the one on sentence only.
4. The State opposed the appeal on sentence but at the same time Mr. Wanyonyi the learned State Counsel conceded that the sentence on count 1 was illegal. He referred this Court to the case of ***GEOFFREY WANDERI CHEGE –V- REPUBLIC NAIROBI CRIMINAL CASE NO.623/04*** and submitted that the sentences herein should not be interfered with as they were neither harsh nor excessive.
5. The Prosecution called a total of seven (7) witnesses. The complainant (PW1) and her neighbour (PW5) were walking home on 4/6/2010 at 7.20pm. They were joined by another neighbour who is the Appellant. They walked together. PW5 branched to her home while PW1 and the Appellant walked on.
6. When they reached near the Appellant's house the Appellant told her she could not leave him that way. They struggled and she made to run. The Appellant held her and threw her on the ground.
7. He threatened her against screaming. He unzipped her trouser (EXB2) which he also tore. He also tore her blouse (EXB3).
8. He took her handbag (EXB6) which contained her treatment notes (EXB7), application form (EXB4) and cash shs.4,050/=. The handbag was later found thrown on the road.
9. She screamed and he went away. PW1 was treated and the matter was reported. Dr. Godfrey Njuki (PW4) confirmed the injuries (EXB1).
10. Indeed the evidence confirms that the Appellant tried to rape PW1 and in the process assaulted her and stole from her.
11. I find the conviction on the three (3) counts to be founded on sound evidence.
12. I only have a problem with the sentence. First of all there is no provision for fines under the Sexual Offences Act. The sentence on count 1 is therefore illegal and is hereby set aside.
13. Considering that the offences in count 1 – count 3 were committed in a series and the sentence should have been given in such a manner that they could run concurrently. It follows that the options of the fines in count 2 and count 3 though lawful the default sentences are erroneous.
14. I therefore set aside the sentences in Count 2 and Count 3 as well.
15. I substitute the sentences as follows;

    Count 1 – five (5) years imprisonment

    Count 2 – two(2) years imprisonment

    Count 3 – one (1) year imprisonment

    The sentences to run concurrently from the date of conviction.

16. The appeal only succeeds on sentence to the extent explained above in paragraph 15.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 20TH DAY OF JUNE 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**M/s Mbae – State**

**Appellant**

**Njue/Kirong – C/c**