



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 162 of 2007**

**KIMANTHI MWAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 5036/2003 by Hon. V.W. Wandera, PM on 27/3/2006)*

**JUDGMENT**

1. The Appellant, **Kimanthi Mwau** was charged with the offence of rape contrary to section 140 of the Penal Code and in the alternative indecent assault on female contrary to section 144(1) of the Penal Code.
2. Particulars of the main charge are that on the 5<sup>th</sup> day of December, at *{particulars withheld}* he had carnal knowledge of **D. M. M.** without her consent.
3. In the alternative charge it was stated that on the material date he unlawfully and indecently assaulted her by touching her private parts namely vagina.
4. The Appellant denied the charges. He was tried and convicted on the main charge and sentenced to serve 14 years imprisonment.
5. Being dissatisfied with the conviction and sentence the appellant now appeals to this court.
6. The learned State Counsel supported both the conviction and sentence by contending that evidence was overwhelming.
7. Facts as presented by the prosecution are that on the 5<sup>th</sup> December, 2003, the appellant, her maternal uncle went home and sent her to purchase some sugar for preparing changaa. On her return from the shop he instructed her to keep the sugar inside the house. He was in the process of preparing changaa. He requested her to stir the illicit brew for him. She agreed. As she stirred the brew she heard a knock on the door. It turned out to be the appellant who threatened to kill her if she made any noise. She screamed. The appellant got hold of her neck, strangled her until she lost consciousness. She regained consciousness to find herself in hospital. Three (3) days later she was in pain. She could not walk. She experienced pain in her vagina; her throat was sore and painful. She was admitted in hospital until 29<sup>th</sup> December 2003.

8. PW2, **Emaculate Ndinda** had been approached by the appellant to buy for him sugar but she declined. When he sent PW1 to purchase sugar she was present. Thereafter while in the bathroom she heard a sound/thud as if something was being dropped. She dressed and rushed to check only to find PW1 lying down on the floor next to the table. Her neck was swollen. She called the mother of PW1. They encountered the appellant who out of sheer arrogance even gave them nod to take whichever action they wished. They took PW1 to hospital.

9. PW3, **J. M. M.**, the mother to the complainant and sister to the appellant was away crushing ballast (*concrete*). She was with PW1 when the appellant sent her to the shop to buy sugar. She was called from the site where she was crushing ballast by PW2. They encountered the appellant who showed no remorse. On reaching home she found PW1 on the floor, her skirt was blood stained, and her neck was swollen. They took her to the police station and reported the matter and took her to hospital.

10. PW4, **Dr. David Kaburu** examined the complainant and found her having sustained injuries. Her neck and abdomen were painful. The birth canal had blood. The vagina had blood and emitted foul smell. The vagina canal had many red blood cells. She was bleeding in the uterus.

11. In his defence the appellant stated that the charge was trumped up by his sister the complainant's mother. Her intention was to inherit his wealth since the wife was not there.

12. The appellant's grounds of appeal are summed up as follows;-

The trial magistrate erred in law and fact by:-

- Convicting him despite the prosecution having not discharged the burden of proof.
- By failing to note that crucial witnesses did not testify.
- Without ejaculation there was no rape
- By convicting him yet the charge sheet was defective.

13. I have considered the evidence on record, the judgment of the learned trial magistrate, grounds of appeal, written and oral submissions of the appellant and the learned State Counsel respectively.

14. This being the first appeal, I am required to revisit the evidence adduced before the trial court and analyse it. I have to evaluate it and come up with my own independent conclusions (*see Okeno versus Republic- Criminal Appeal No.75 of 1971*).

15. In this case the charge sheet has the date and month when the offence of rape is said to have been committed. It is however silent on the year. Section 137 of the Criminal Procedure Code; at paragraph (f) requires the time of commission of the offence to be stipulated. Time would include year. This was a defect the trial court did not note. I have noted that the trial magistrate in his judgment alluded to the year 2003. It should have been part of the particulars of the offence.

16. The particulars of the offence state-

***“On the 5<sup>th</sup> day of December, at {particulars withheld} in Machakos District within the Eastern Province had carnal knowledge of D. M. M. without her consent.”***

17. In the case of *Daniel Nyarem Achoki versus Republic [2000] E.A. 233* it was held that-

***“... a charge of rape must allege in its particulars;-***

***i. That the act of sexual intercourse was unlawful.***

ii. ***The act of sexual offence was without the consent of the woman or girl.***

***We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is “unlawful” and “without consent” and the prosecution is advised to use both. Whether the charge be one of rape under section 140 or attempted rape under section (4) of the Penal Code, the particulars must nevertheless state that the attempted unlawful carnal knowledge was without consent of the woman or girl”.***

18. The charge lacks the word “unlawful”. This was an omission on the part of the prosecution that should have been rectified by an amendment.

19. According to the evidence adduced there was corroboration of the fact that the appellant sent the complainant to purchase sugar. PW2 and PW3 did not see her upon her return. There is evidence that indeed she was sexually assaulted but the evidence that it was the appellant who strangled her until she lost consciousness where-after she was sexually assaulted is only for the victim.

20. In the case of ***Thuo versus Republic [1988] KLR 763*** the Court of Appeal referred to the well-known decision of ***Chila versus Republic [1967] E.A. 723*** where it was held-

***“The Judge should warn ... himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so, he may convict in the absence of corroboration, if he is satisfied that her evidence is truthful. If no such a warning is given then the conviction will normally be set aside unless the appellate court is satisfied that there was no failure of justice.”***

21. This was a case where the trial magistrate should have cautioned himself on that aspect prior to convicting the appellant. Having failed to do so the absence of corroboration was fatal to the prosecution’s case.

22. In the premises, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be at liberty unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 24<sup>TH</sup> day of MAY 2013.**

**L.N. MUTENDE**

**JUDGE**