



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO.78 OF 2012

PETER MUTUAAPPELLANT/ APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court, Criminal Case No. 112/12 by Hon. S.K. Mutai on 7/6/2011)

JUDGMENT

1. **Peter Mutua** hereinafter "*the appellant*" was charged with the offence of rape contrary to section 3(1) (a) (b) (3) of the Sexual Offences Act. No. 3 of 2006. The particulars thereof being that on the 4th day of June, 2012 at about 3.00pm at [*particulars withheld*] Village, Kyangu location in Mutomo District within the Kitui County, intentionally and unlawfully caused his penis to penetrate the vagina of **SM** without her consent.
2. In the alternative he 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. Particulars thereof being that on the 4th day of June, 2012 at about 3.00pm at [*particulars withheld*] Village Kyangu location in Mutomo District within the Kitui County, unlawful assaulted **SM** thereby occasioning her actual bodily harm.
3. He was convicted on his own plea of guilty on both the main charge and the alternative count and the court sentenced him to serve ten (10) years imprisonment on the main count and three (3) years imprisonment on the alternative count.
4. Being dissatisfied by the conviction and sentence the appellant now appeals on the grounds that the plea was equivocal; the trial magistrate erred in law and fact by not being specific as to which charge he convicted on; and he failed to note that the P3 form had been produced in evidence as an exhibit.
5. The State Counsel, **Mr. Mwangi** conceded to the appeal. He submitted that the magistrate erred in law by convicting and sentencing the appellant on two (2) counts. He however, urged the court to act under section 354(3) of the Criminal Procedure Code by setting aside the sentence on the alternative count and uphold the main count. In making his submissions he alluded to the provisions of section 282 of the Criminal Procedure Code.
6. I have carefully considered rival submissions of the appellant and State Counsel and the record of the Lower Court.
7. It is apparent that when the main charge was read to the appellant he stated in response as follows;-

“It is true”.

The magistrate who ought to have caused facts of the case presented at that stage proceeded to read the alternative to the appellant whereby he also admitted the charge.

8. Facts of the case were presented and he stated as follows;-

“Facts are true”.

The court then proceeded to convict him on his plea of guilty. In his mitigation, the appellant offered to compensate the complainant for the act done.

9. The appellant was sentenced to ten (10) years imprisonment on the main charge and three (3) years imprisonment on the alternative count that was referred to as the second count.
10. It was erroneous on the part of the court to convict the appellant on both the main charge and the alternative count.
11. However, taking into consideration the fact that the appellant offered to compensate the complainant for the heinous act that he had committed the irregularity in the proceedings aforestated did not occasion any injustice (vide section 382 of the Criminal Procedure Code.)
12. In the premises it calls upon this court to do justice. I therefore quash the conviction and sentence on the alternative count and uphold the conviction on the main charge.
13. Regarding sentence, a person guilty of an offence of rape is liable upon conviction to imprisonment for a term of which shall not be less than ten(10) years but which may be enhanced to imprisonment for life (*vide section 3(3) of the Sexual Offences Act No. 3 of 2006*). The appellant was sentenced to ten (10) years imprisonment. This offence is serious. The sentence imposed was within the law.
14. The appeal having partially succeeded, the appellant shall serve the ten (10) years imprisonment term imposed.
15. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 10TH day of SEPTEMBER, 2013.

L.N. MUTENDE

JUDGE