



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 214 OF 2011**

**BETWEEN**

**BASILIO MWANIKI IRERI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Embu Criminal Case 180 of 2011 by E.K. Nyutu R.M on 2<sup>nd</sup> December, 2011)*

**JUDGMENT**

1. The appellant was charged with the offence of rape contrary to **section 3** of the **Sexual Offences Act**. He also faced an alternative charge of committing an indecent act with an adult contrary to **section 11(A)** of the **Sexual Offences Act**. He was convicted of the main charge of rape and was sentenced to 15 years imprisonment.
2. He now appeals against conviction and sentence. In his petition, the appellant raises three grounds of appeal which may be summarized as follows: That the offence for which he was convicted was not proved beyond reasonable doubt, that the evidence of key witnesses was not corroborated, and that the magistrate failed to consider his defence. The State supports the conviction and sentence.
3. As this is a first appeal, I am now called upon to re-evaluate the evidence and reach my own conclusions bearing in mind that I did not see or hear the evidence presented in the lower court. I have considered the evidence and read the lower court's judgment and have concluded that prosecution discharged its burden.
4. The complainant, PW 1 was a married adult with one child. She testified that on 24<sup>th</sup> January 2007 after dropping her child to school, she noticed someone following her. She had first seen the appellant digging a trench. He caught up with her and got hold of her hand, dragged her into a nearby maize farm, removed her under pant, folded her skirt, ordered her to bend and forced himself on her. After the act, the appellant ran away. He left a green hat at the scene. All this time, she was screaming. Her screams alerted another woman PW 3 who came to the scene.
5. PW 3 testified that on the material day, she heard screams from a nearby maize shamba. She went to check and found the appellant having sex with the complainant. She stated that she did not scream as she was not sure if the appellant and PW 1 were lovers. The appellant was wearing a green hat. She went away and came back later to find PW 1 crying. Her panty was on the ground. She told the complainant to leave the panty where it was and they went to look for the accused. He was found at a site where a trench was being dug and where PW 1 said she first saw him. When he was pointed out, he ran away.
6. The evidence of PW 1 and PW 2 established that the act of intercourse and penetration took place. Like the learned magistrate, I find that the evidence of PW 1 was corroborated by that of PW 2 and thus the identity of the appellant was not in doubt. PW 2 saw the appellant perform the act of intercourse. She also testified that he was wearing a green hat that was found at the scene and which was produced in evidence by PW 7, the investigating officer.

7. The lack of consent was proved by the testimony of PW 1 and the fact that she screamed thereby attracting the attention of PW 2 to the scene. The lack of consent is also corroborated by the fact that PW 1 and the appellant did not have a previous relationship. His behavior of running away upon been identified by PW 1 and PW 2 is consistent with lack of consent.
8. In his unsworn testimony, the appellant testified that on 24<sup>th</sup> January, 2011, he was at work digging water trenches and at 12.00 noon he saw two people coming towards him. One had a gun and the second had a club and the third had a whip. They assaulted him until he fell into the trench. He was put in a car and taken to the Chief Camp where he was held and later taken to Itabua police station. He stated that he was charged because he refused to take bribes. He denies raping PW1.
9. The appellant's evidence did not deal with the actual incident but focused on his arrest. He was positively identified by PW 1, PW 2, his green hat was found at the scene and no explanation was proffered for its being at the scene. Moreover, he confirmed that he was on the material day digging trenches. This puts him at the place where PW 1 first saw him.
10. On the whole therefore, the conviction was justified in light of the evidence. Likewise, the sentence of 15 years is neither harsh nor excessive to warrant interference.
11. The appeal is dismissed.

**DATED, SIGNED and DELIVERED at EMBU this 30<sup>th</sup> day of October 2013**

**D.S. MAJANJA**

**JUDGE**