REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 51 OF 2012

BETWEEN

FRANCIS KIOKO MULI ……. APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case 246 of 2011 by S.M. Mokua S.P.M on 16th March, 2013)

JUDGMENT

1. The appellant was charged and convicted by the offence or rape contrary to **section 3(1) (a) (b)** and read with **section 3(3)** of the ***Sexual Offences Act***. It was alleged that on 6th March 2011 at [Particulars Witheld] Village in Mbeere South, Embu County, he intentionally had sexual intercourse with EMK without her consent. He was sentenced to 10 years in prison. He appeals against conviction and sentence.

2. He was also charged with a 2nd count of indecent act with an adult contrary to **section 11(6)** of the ***Sexual Offences Act*** and acquitted but was convicted of a 3rd count of assault causing actual bodily harm to EMK contrary to **section 251** of the ***Penal Code***.

3. The prosecution case was that on 6th March 2011, the complainant, PW 1, had closed her kiosk and on the way home, a motor cycle emerged from behind her. The appellant was being carried by PW 4 as a pillion passenger. He was dropped where PW 2 was. PW 4 then took off. The appellant held PW 1 by hand, assaulted her dragged her into a bush by the roadside and had sexual intercourse. PW 2 was released at about 9.00 p.m whereupon she went home and informed her cousin, PW 3 what had happened. The matter was reported to the police who took statements and arrested the appellant.

4. After reviewing the evidence, the learned Magistrate convicted the appellant of the offence of rape and assault causing bodily harm. It is now the duty of this court to independently evaluate the evidence, bearing in mind that it did not see or hear the witnesses and arrive at its own conclusion.

5. In order to prove the offence of rape, under **section (3)** of the ***Sexual Offences Act***, the

prosecution must prove the following:

1. The accused intentionally and unlawfully commits an act which causes penetration into his or her genital organs.
2. The other person does not consent to penetration.
3. The consent is obtained by force or by means of threats or intimidation of any kind.

6. As regards the first issue, it is not in doubt that there was sexual intercourse which involved penetration. PW 2's testimony of intercourse is corroborated by the medical evidence of Dr Ngari, PW1, who though she examined PW 2 a week after the incidence, confirmed that she had intercourse as shown by the high vaginal swab test which had a high count of red blood cells. She also confirmed that PW 2 had bruises on the thorax and back and a cut on the right knee.These injuries were consistent with the injuries PW 2 has sustained as a result of the assault by the appellant.

7. As regards the issue of lack of consent, PW 2's testimony that she was forced to have sex is corroborated by the fact that she suffered injury as a result of the assault. Her injuries were confirmed by PW 1. Furthermore, the act of intercourse was accompanied by a struggle and the tearing of clothes. The complainant's torn petticoat, biker and a blood stained blouse were produced in evidence. This evidence points to lack of consent.

8. The critical issue then is whether the appellant committed the offence. The appellant was well known to the complainant and the issue of his identity does not arise. PW 4, the boda boda rider, confirms he dropped the appellant along the road where he met the complainant. PW 4 also knew the appellant. This evidence was sufficient to establish and prove the identity of the appellant and also locate the appellant at the scene of the crime.

9. The appellant complains that the condoms found at the scene were not tested to confirm that they were used by the appellant. In light of the other evidence, this was not necessary. In my view, the fact of the condoms only goes to confirm that there was sexual intercourse at the scene where they were found.

10. During the trial, the appellant gave unsworn testimony. His defence was that he knew the complainant as he had loaned her Ksh 5,000 to start her business on condition that she repaid it within 4 months. When he asked her for the money, she threatened him with a serious offence so he did not pursue her. He denied having committed the offence.

11. Taking the unsworn testimony into account, I agree with the learned Magistrate that it cannot stand in light of the prosecution evidence.The unsworn testimony only confirms that the appellant and complainant knew each other.

12. Having re-evaluated the evidence, I conclude that the appellant was properly convicted. The sentence is legal and provided for by law and is neither harsh nor excessive.

13. I accordingly dismiss the appeal.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013

D. S. MAJANJA

JUDGE