



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 223 OF 2011

BETWEEN

LETO MACHAKI MBITI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case No 60 of 2011 by S.M. Mokua P.M on 9th December, 2011)

JUDGMENT

1. This appeal arises from a conviction and sentence imposed on the appellant for the offence of rape contrary to **section 3(1) (a)** of the **Sexual Offences Act**. He was sentenced to life imprisonment. The particulars of the offence was that on 22nd January, 2011 at about 9.00 am at Riandu location, Mbeere District within Embu County he caused his penis to penetrate the vagina of PNN without her consent.
2. Prosecution case was that PNN, the complainant, PW 1, aged 18 years was headed to church on 22nd January 2011 at about 9.00am. She testified that on the way, she met a man armed with a panga. The man accused her of defecating in the bush. She denied the accusation but the man got hold of her hand, blocked her way and pulled her onto the bush allegedly to show her where she had defecated. When she tried to resist, he raised the panga. She began crying as she was led into the bush while being threatened with the panga. The man then pulled up her skirt and inserted his penis into her vagina. After he was through with the sexual act, he asked her to leave. As she was leaving, she met a man who told her he had seen her attacker and all that happened to her. The complainant went to the nearest homestead where she reported the incident to a lady there and her husband.
3. PW 3, was the man who saw the sexual intercourse take place between the complainant and appellant. He testified that he was on the way to visit a friend when he heard noise from a bush. He stated that he saw the man on top without trousers, in a yellow T-shirt and a muslim type hat. He stayed about 50 meters from the scene and after 15 minutes he saw the complainant emerge crying. He then saw the appellant running away. He met the complainant and escorted her to the near homestead. He testified that the person he had seen re-emerged dressed in a red T-shirt. He said he knew the appellant as well as his homestead.
4. The Assistant Chief, PW 4 testified that he received a call from PW 5 who informed him about the incident. He caused the arrest of the appellant, brought him to Siakago Police Station and

- accompanied the complainant to Mbeere hospital for examination.
5. PW 2, a Clinical Officer, produced the P3 form on behalf of a colleague under **section 77(1)** of the **Evidence Act**. According to the P3 form, PW 1 was seen on the same date of the incident. The clinical officer confirmed that PW 1's clothes were torn and soaked with a whitish substance. He noted that the hymen was broken and there was presence of discharge on the genitalia.
 6. In his unsworn testimony, the appellant denied the offence. He alleged that the reason for his arrest was that he was being victimized by a neighbour who saw him when the incident took place and once the offence was reported, the neighbours took it that he was the accused.
 7. The learned Magistrate was satisfied that the prosecution had discharged its burden of proof by proving all the elements required to prove the offence of rape. The appellant contends that he was convicted on the basis of uncorroborated and contradictory evidence.
 8. This is a first appeal and the obligation of the court is to re-evaluate the evidence and come to its own conclusion noting that it neither heard nor saw the witnesses. I have evaluated the evidence and I am satisfied that the appellant was guilty of the offence with which he was accused. PW 1 evidence was clear and convincing. The incident took place in clear daylight. She did not know the appellant. The evidence of the complainant was corroborated by the eye witness, PW 3 who knew the complainant. The consistency of the evidence of the complainant is also supported by her immediate report to the neighbouring homestead and her identifying the appellant as the perpetrator even though he had changed his T-shirt.
 9. The appellant complained that the prosecution failed to prove that the complainant was 18 years. The complainant herself testified that she was 18 years. The complainant's produced her birth notification as exhibit 6 and which showed she was born on 23rd September 1992. This means that at the time of the offence, the complainant was 19 years and therefore an adult. The age was therefore proved beyond reasonable doubt. The conviction of the appellant rested on solid ground.
 10. The sentence likewise was based on the consideration that he had been convicted of previous offences including two rape conviction for which he had served sentence. In the circumstances, life imprisonment was neither harsh nor excessive.
 11. I find no reason to allow the appeal. It is dismissed.

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

D. S MAJANJA

JUDGE