

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NUMBER 215 OF 2011

BETWEEN

SIMON MUTUKU MUSYOKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case number 843 of 2010 by S.M. Mokuu P.M. on 29.11.11)

JUDGMENT

1. The appellant Simon Mutuku Musyoka was charged with the offence of rape contrary to **section 3(1) (a) (c)** as read with **section 3(3)** of the *Sexual Offences Act*. The particulars were that on 24th October, 2010 at [Particulars Withheld]village within Mbeere South, Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of E M N without her consent. He was also charged with an alternative count of an indecent act with an adult contrary to **section 11(6)** of the *Sexual Offences Act*. He was convicted on the main charge of rape and sentenced to a term of 30 years in prison. He appeals against the conviction and sentence.
2. The prosecution case was on 24th October, 2010, the complainant, PW 1 was at a party at about 12.00 p.m. She decided to leave the function. She testified that the appellant followed her and made sexual advances to her which she rebuffed. He then pushed her to the ground and began to have sex with her. PW 1 testified that she had an epileptic attack and upon regaining consciousness, she did not have her clothes on. Two ladies unknown to her were standing next to her. They assisted her to dress.
3. One of the two ladies, PW 4 testified that on the material day at about midday, she was from church and at a bushy place along the road she found the appellant having sex with the complainant. She stated that the complainant had epilepsy. The accused told her that the complainant was his friend. He put on his trousers and ran away. PW 4 decided to call the other lady, PW 5, she proceeded to the scene and found the complainant's pant lowered and the appellant running away from the scene. The two ladies assisted the complainant.
4. As the appellant was running away from the scene, he was seen by PW 6, running past his fence. When the appellant was asked where he was going, he stated he was going to Kitololoni. Members of the public then pursued the appellant who was apprehended and taken to Miondoni Patrol Base. PW 3, a police officer confirmed that on 24th October 2010 at about 12.00 noon, the appellant was brought to the Patrol Base by members of the public whereupon he was arrested.
5. The complainant also reported at the Police Base at about noon. PW 3 testified that she had difficulties walking and her statement was recorded. She was given a P3 form and referred to Mbeere Hospital. On 25th October 2010, PW 5 took both the appellant and the complainant to Hospital where they were seen by the Clinical Officer, John Mwangi, PW2. He conducted an examination of the complainant and he found that she had blood in her vaginal area.
6. The learned Magistrate, on the basis of the evidence, I have outlined found that the prosecution

had proved its case beyond reasonable doubt. The learned Magistrate believed the complainant, an adult aged, 21 had the capacity to consent to sexual intercourse and that she did not consent. That there was indeed sexual intercourse confirmed by the medical evidence which showed blood stains on the vaginal area. The fact of intercourse was corroborated by PW 4 and PW 5 who actually witnessed the act.

7. The learned Magistrate also concluded that the appellant was clearly identified as the incident took place at midday. It was witnessed by PW 1 and PW 4 and PW 6 saw him running away from the scene.
8. Based on the clear eye witness evidence, the learned Magistrate dismissed the appellant's unsworn testimony denying the offence.
9. The appellant has attacked his conviction and sentence on the following grounds. That the magistrate relied on inconsistent and uncorroborated evidence. That the medical officer who testified found that there was no spermatozoa hence there was no penetration. That the medical examination of the complainant revealed that she was HIV positive and had venereal disease yet the appellant was HIV negative and had no venereal infection. Finally, that complainant's torn clothes were not produced in court.
10. I have re-evaluated the evidence on record bearing in mind the duty of the first appellate court. The act of penetration was proved by the PW1 and corroborated by PW4 and PW5. The lack of spermatozoa is not of itself conclusive of lack of penetration nor is the fact that the appellant did not contract an infection from the victim. Similarly, the lack of consent was proved by the testimony of PW1 who testified that she rebuffed the appellant's advances while PW6 saw the appellant running away from the scene. The fact that the prosecution did not avail PW1's torn clothes in my view did not shake the prosecution case.
11. I find that the appeal has no merit. It is dismissed.

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

D. S. MAJANJA

JUDGE