



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 54 OF 2013

JOHN WACHIRA MUTHIKE APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE CHIEF MAGISTRATE'S COURT AT
KERUGOYA (H.N. NDUNG'U – S.P.M) IN CRIMINAL CASE NO. 647 OF 2011 DELIVERED**

ON 30TH JANUARY, 2012)

JUDGMENT

The appellant JOHN WACHIRA MUTHIKE was on 30th January 2012 convicted by H.N. NDUNG'U (Senior Principal Magistrate) for the offence of rape of a person with mental disability contrary to **Section 7 of the Sexual Offences Act No. 3 of 2006**. He was sentenced to serve ten (10) years imprisonment.

He has now appealed against both the conviction and sentence raising seven (7) grounds of appeal which I have considered together with his written submissions.

The State through Mr. Omayo State Counsel opposed the appeal adding that the evidence was water-tight as the appellant was caught lying on complainant.

This being the first appellate Court, it is my duty, to re-consider the evidence afresh though bearing in mind that un-like the trial Court, I did not have the benefit of seeing the witnesses testify.

The first ground of appeal is that the trial magistrate erred in law and in fact by misguiding herself that appellant committed the offence yet the complainant had exonerated him by telling the Court that someone else had raped her.

In her testimony in the trial Court, the complainant (CWW) gave very brief evidence which I reproduce below:-

“I come from[Particulars Witheld]. I recall on 20th July 2011. I was on my way home from my aunties place. It was a Wednesday and I was on my way home from my aunties place. On the way I was raped by the accused person John Wachira and another known as Kinyua (witness) is not able to identify the accused person. A certain young man then came and told those men not to rape me. He went and reported the matter at Kutus Police Patrol Base. Later I was taken to Kerugoya District. I see my treatment notes. Police

took me to hospital. That is all”.

It would appear from the above testimony that although the complainant did not identify the appellant in the dock, she nonetheless gave his name as John. She did not specifically exonerate the appellant as alleged. It must be noted that the trial magistrate had by 20th September 2011 prior to the trial made a finding that the complainant appeared to be an imbecile and the charge sheet was amended accordingly.

If there was any doubt about who raped the appellant, there was the evidence of JOHN NJENGA MIGWI (PW2) who told the Court that at about 12.30 p.m. on 20th July 2011 while drawing water, he heard screams in the mango trees and decided to check. He climbed on his handcart and saw a person lying on top of another. He recognized that person as the appellant whom he then saw stand up and zip his trouser and proceeded to hide behind a mango tree urging the witness not to let him be jailed as he (appellant) was only talking to the girl. He took the girl to Kutus Patrol Base. The complainant was taken to Kerugoya District Hospital on the same day and she complained of having been raped and upon examination, the Clinical officer HEZRON MACHARIA (PW3) found she had a tear in the genitalia which was oozing fresh blood. Her labia minora and majora were normal but her hymen was absent though no spermatozoa was noted. The evidence of JOHN NJENGA MIGWI (PW2) taken together with that of the Clinical officer (PW3) show that the appellant was not only seen lying on the complainant and thereafter zip his trouser but also moments later, her genitalia was examined and found oozing fresh blood. The appellant was in fact caught in the act. The appellant has stated that the evidence of JOHN NJENGA MIGWI was un-reliable and also the Court relied on the evidence of a single witness. True the complainant was found to be an imbecile but her evidence that she was raped was ably corroborated by that of the eye witness JOHN NJENGA MIGWI (PW2) who saw the appellant lying on complainant. Medical evidence also supports the charge and the fact that the appellant was not taken for medical examination does not assist him because HIV tests were negative and since it is not suggested that the complainant was infected with any sexually transmitted disease, a medical examination of appellant would have served no purpose.

The appellant has also complained that no exhibits were produced. Failure to produce exhibits is not necessarily fatal to a prosecution case. Each case turns on its own particular circumstances. In any event, the Clinical officer produced the P3 Form and notes as Exhibits 1 and 2 respectively.

Lastly, the appellant states that his defence was not considered. I have looked at the judgment and the trial magistrate dealt with his defence as follows:-

“ I have also considered his defence/denial but find that the evidence adduced against him is overwhelming and what he did” he is simply trying to deny

What the trial magistrate was saying was that notwithstanding the appellant’s defence in which he had narrated how he worked till 6 p.m. on the day in question only to be arrested the following day for this offence, the trial Court found that the prosecution case against him was overwhelming. For my part, I am equally satisfied that on that evidence, his conviction was inevitable.

On sentence, the prison term of ten (10) years is mandatory and the trial magistrate had no discretion in the matter.

Ultimately therefore, the appeal against conviction and sentence lacks merit and is dismissed.

B.N. OLAO

JUDGE

10TH DECEMBER, 2013

10/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant

Mr. Sitati State Counsel

Language – English/Kiswahili

COURT: Judgment delivered this 10th day of December, 2013 in open Court.

Appellant present

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk

Right of appeal explained.

B.N. OLAO

JUDGE

10TH DECEMBER, 2013