



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 83 OF 2010**

JAMES MBOYA NDONYI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**(From the Original Conviction and Sentence in the Criminal Case No. 366 of 2008 of the Resident Magistrate's Court at Wundanyi – F. Munyi, RM)**

**JUDGMENT**

James Mboya Ndonyi hereinafter referred to as “**the Appellant**” was charged before the Resident Magistrate’s Court at Wundanyi with the offence of: -

***Attempted rape contrary to Section 4 of the Sexual Offences Act No. 4 of 2006.***

The particulars of the charge are: -

***On the 18th day of September 2008 at K[...] Taita-Taveta District within Coast Province attempted to have unlawful carnal knowledge of R.S.J without her consent.***

In the alternative, he was charged with the offence of: -

***Indecent assault of a female contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.***

The particulars thereof are: -

***On the 18<sup>th</sup> day of September 2008 at K[...] in Taita-Taveta District within Coast Province, unlawfully and indecently assaulted R.S.J by touching her private part namely vagina.***

He was tried by the Learned Magistrate, F. Munyi, Resident Magistrate, convicted on the main count and sentenced to serve **five years** imprisonment. He is aggrieved and has appealed against both the conviction and the sentence.

The brief circumstances of the case are that on the 18<sup>th</sup> September, 2008 R.S.J, hereinafter referred to as “PW1 was at her house at 6.00 pm feeding her two year old child. That the Appellant went to her house. She knew him before although they are not related. That the Appellant sat at the door to the house and demanded that she (PW1) give him food and then her buttocks. She (PW1) understood that the

Appellant implied he wanted to “sleep” with her. She released the child and ran away. As she ran, the Appellant held her waist and ran after her. She released her lessa and left with him. He ran after her still. As they ran around the house, someone was passing on the road and the Appellant gave up warning her that, he had not finished with her. PW1 ran to her mother-in-law’s house and reported the incident to her. She (PW1) spent the night at her mother-in-law’s house and when her (PW1’s) husband returned home, she also reported the incident to him. That when her (PW1’s) husband went to inquire from the Appellant what he had done, the Appellant slapped him and threatened to sodomise him. The matter was reported to the village elders, who then referred them to the police where they reported the matter. The Appellant who lives about 2 kilometres from the complainant (PW1’S) home was arrested and charged.

In his defence, the Appellant told the trial court that on the 18<sup>th</sup> September, 2008 he went to survey a parcel of land at Mwengerenyi and returned home after 5 pm and that later on 23<sup>rd</sup> he was informed that, he was required to go to the main gate of Taita Estate. He went. He was to meet one Titus. He found a motor vehicle at the gate. He was told to board it. He complied. He was taken to the police station, later he learnt, there was a complaint forms one R, whom, he did not know and who had complained he attempted to rape her. He denied committing the offence.

I shall now turn to the amended grounds of appeal.

In a nutshell the Appellant alleges: -

1. ***That, the charge sheet omitted vital ingredients of the offence, that is the time of commission of the offence and the O.B. No.***
2. ***That the identification was to improper as there was little light at the scene of the crime.***
3. ***That, the prosecution’s evidence was contradictory and inconsistent and the investigating officer did not testify.***
4. ***That, essential witnesses were not called. That includes the person who was passing by the road and the village elder.***
5. ***That the defence was not well considered.***

To support the grounds of appeal, the Appellant relied entirely on written submissions he filed in Court. In opposing the appeal, the state was represented by Mr. Tanui, the Leaned State Counsel. He submitted that: -

1. ***That the charge sheet meets the requirements of Section 137 of the Criminal Procedure Code.***
2. ***That, the prosecution adduced adequate evidence to prove the case beyond reasonable doubt. That PW1, PW2 and PW3 gave consistent and corroborative evidence. That indeed PW1 knew the Appellant well, as one James Mboya and therefore the issue of mistaken identity does not arise.***
3. ***That the Appellant’s defence was considered and he was sentenced to **Five** years imprisonment.***
4. ***That the appeal has no merit and should be dismissed.***

I have considered the submissions from both the Appellant and the State Counsel and I find that: -

(1) *The Provisions of Section 137 of the Criminal Procedure Code, requires inter alia, that, the statement of the offence, describing the offence shortly, and the particulars of the offence, both in the ordinary language, shall form the content of the charge sheet. A look at the charge sheet herein complies with these basic requirements, and I concur with the submissions of the Learned State Counsel and dismiss the Appellant’s submission on the frame of the charge sheet. Even if, there were omissions, they are not such as would prejudice the Appellant’s case. Section 137 of the Criminal Procedure Code*

prohibits objection in respect of the form or contents of the charge sheet on simple or technical grounds. I dismiss that ground of appeal.

(2) As regards, the grounds of appeal on identification; I find, after re-evaluating the evidence, that although the incident is alleged to have taken place in the evening, PW1 told her husband the person who had offended her and that is why her husband went to confront the Appellant herein. If she did not identify the Appellant, how would she have made a reference to him, as one James Mboya? In her evidence she said she knew the Appellant well. She said the Appellant lives about 2 km from her house. She told the trial court, the Appellant stood at the door to her house, as he spoke to her. She was feeding her child. She cannot have been feeding the child in darkness. I concur with the findings of the Learned Magistrate that, the Appellant was positively identified.

(3) As regards, the discharge of the burden of proof, I find the evidence of PW1, PW2 and PW3 was corroborative. PW1 went straight to her mother-in-law and reported the incident as it had happened. PW2 and PW3, narrated it in the same way. Infact, PW3, confirms that, when he inquired from the Appellant as to what he did, the Appellant said **“he wanted to sleep with me (PW3)”**. It is clear, the very words the Appellant used on PW1 are the same words he spoke to PW3. He seems to have been possessed with **“sleeping with other people?”** What is the generally understanding of sleeping with another whom you have no blood or legal relationship with? In my understanding, as testified by PW1, it means to have **“sex”** with **“them”**. In deed PW1 testified that he told her (PW1) to give him **“buttocks”**. That language coupled with the actions of chasing her around, leads to only one conclusion, he wanted to forcefully have sex with her. That is to rape her.

I have gone through the Learned Trial Magistrate’s judgment, and she has fully considered the defence by the Appellant.

In conclusion I concur with the findings of the Learned trial Magistrate and find the appeal herein has no merit. I dismiss it. I confirm the conviction and uphold the sentence, which is the minimum sentence provided for by the law.

Orders accordingly.

**G.L. NZIOKA**

**JUDGE**

Dated this 6<sup>th</sup> day of March, 2012, signed and delivered at Mombasa.

**G.L. Nzioka**

**Judge**

In the presence of: -

Appellant in person

Tanui for the State

Wasamu - Court Clerk

