JOHN MWANGANI …….....APPELLANT

AND

REPUBLIC …….....RESPONDENT

[Being an appeal from the judgment of the Senior Principal Magistrate, Hon. A. Onginjo dated 28th September, 2011 at Eldoret Chief Magistrate's Court in Criminal Case No. 3601/2010].

JUDGMENT

The appellant, **John Mwangani**, was charged with rape contrary to section 3 (1) (a) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. It was alleged that the appellant, on 20th June, 2010 at [particulars withheld], in Uasin Gishu District within the Rift Valley province, unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of **S.N.**, a woman aged 18 years.

The appellant also faced an alternative count of committing an indecent assault contrary to section 11 (1) of the same Act. It was alleged, in the alternative count, that the appellant in precisely the same circumstances, same place and same date, committed an indecent act by touching the vagina of the same S.**N.** (hereinafter **"the complainant"**).

The appellant was tried before **A. Onginjo** (SPM) who, after considering the evidence presented by the prosecution, found the appellant guilty of the principal count. After regarding the appellant's mitigation, she sentenced him to ten (10) years imprisonment.

The appellant was dissatisfied with his conviction and sentence and has appealed to this court against both conviction and sentence on the primary grounds:-

- That his defence was not considered;
- That he was convicted on the testimony of minors;
- That he was not medically examined;
- That he was framed because of his poor family background; and
- That the sentence imposed upon him is harsh in the circumstances.

When the appeal came up before me for hearing, the appellant appeared in person and **Mr. Chirchir**, Learned Senior State Counsel, appeared for the State. The appellant, in his address to the Court, stated that he did not rape the complainant or anyone else and that on the date he is alleged to have committed, the offence, he was away on his business errands. **Mr. Chirchir**, on his part, submitted that the appellant was convicted on sound evidence as he was found red-handed committing the offence in broad daylight.

Briefly, the facts were as follows: In the early morning of 20th June, 2019 at about 7.00 a.m., the complainant was from a funeral near her home when the appellant grabbed her and pulled her into his maize farm and knocked her down as he threatened and warned her not to scream. He then raped her. As he did so, **Brenda Nasambu** (P.W.6) was passing by and saw the appellant lying on top of the complainant. P.W.6 ran home and informed her mother.

The appellant left the complainant, boarded his bicycle and left the scene. The complainant went to the appellant's home where she found his wife who, on being informed of what the appellant had done, advised the complainant to wash her clothes otherwise she would be punished by her mother. The appellant's wife ended up washing the complainant's soiled skirt. Later, the complainant went to her uncle's home and then to the home of one of the girls who had witnessed her ordeal.

In the interim, the complainant's mother, **C.N.**, got to know about what her daughter had gone through at about 10.a.m. She reported to the village elder **John Mmbwanga** (P.W.3), and a search for the complainant was mounted. She was found in the evening and narrated her ordeal with the appellant for which she earned a spanking.

P.K., (P.W.4), the complainant's father also got to know about the ordeal his daughter had gone through from the appellant's wife. He went to the appellant's house where he was shown the appellant's soiled jacket and the complaint's green jumber. He reported the find to P.W.3 and they both returned to the appellant's home where the said jacket and jumber were recovered.

The complainant was taken to Soy Police Station by her mother where **P.C. Namusia** (P.W.8), received their report and escorted them to Moi Teaching and Referral Hospital after issuing them with a P.3 form. **Dr. Cynthia Chemutai** (P.W.7) examined the complainant and filled the P.3 form. She observed that the complainant's hymen was torn and she discharged a whitish substance. She testified that the complainant had been abused. **Dr. Joseph Mbuya**, (P.W.5) assessed the complainant's age as 18.

The appellant was later arrested and charged as already stated above. On being put on his defence, he gave a sworn statement and put forward the defence of alibi alleging that on the material date, he was not at home as he was out on his livestock business. He added that the complainant went missing from her home for two days and when she resurfaced, she was forced by her mother to frame him.

On the above facts, the Learned Senior Principal Magistrate found that the offence of rape had been proved against the appellant as required in law and convicted him as already stated. She then sentenced him to ten (10) years imprisonment. In convicting the appellant, the Learned Senior Principal Magistrate found that the appellant had indeed had sexual intercourse with the complainant which was not consensual and that the frame-up allegation was not true.

The appellant was convicted mainly on the evidence of the complainant (P.W.1) and **Brenda Nasambu** (P.W.6). Both witnesses testified that they knew the appellant as he was their neighbour. The assault took place at about 7.00 a.m., of the material date. P.W.1 testified that as she arrived from a funeral, the appellant grabbed her, pulled her into his maize plantation and raped her. **Brenda Nasambu** (P.W.6) testified that on her way home, after fetching milk, she saw the appellant lying on top of the complainant. He was doing "**bad manners**" to her. P.W.6 testified that the appellant was her neighbour. She even described how the appellant was dressed.

The testimonies of the complainant and P.W.6 proved beyond reasonable doubt that the appellant had sexual intercourse with the complainant. But was it consensual? The Learned Senior Principal Magistrate found that it was not. I have no reason to disagree. The complainant herself testified that, she was grabbed and pulled by the appellant into his maize plantation. She further testified that the appellant ordered her not to scream and even threatened her. P.W.6 testified that when she found the appellant 'doing bad manners' to the complainant, she was telling him to leave her alone. In those premises, I find and hold, like the learned Senior Principal Magistrate, that the sexual intercourse was not consensual. In any event, the appellant did not suggest that the complainant consented.

Dr. Cynthia Chemutai Kibet (P.W.7) testified that on examining the complainant, he found that her hymen had a fresh tear which in her view, established that the complainant had been sexually abused.

The evidence of the complainant, P.W.2 and the doctor was buttressed by that of the complainant's mother (P.W.2), her father (P.W.4) and the village elder (P.W.3). P.W.2 and P.W.4 testified that the appellant's wife informed them that the appellant had had sex with the complainant. P.W.3 and P.W.4 testified that they found the complainant's soiled green jumber at the appellant's home which testimonies were not challenged by the appellant.

The complaint that the appellant was convicted on the evidence of a minor was not well taken. I say so, because **Brenda Nasambu** (P.W.6) was the only minor who testified at the trial against the appellant. She was however aged 12 years. She was therefore not a child of tender years as defined in section 2 of the Children's Act No.8 of 2001. Her evidence did not therefore have to be taken after administering of *voire dire* examination. The Learned Senior Principal Magistrate was therefore entitled to consider her evidence against the appellant.

In all those premises I have come to the conclusion that the appellant was convicted on sound evidence. His defence was, in my view, clearly displaced by the evidence adduced by the prosecution. The appeal against conviction is therefore without merit and is dismissed.

With regard to sentence, the Learned Senior Principal Magistrate had no discretion with regard to the minimum sentence she could impose on finding that the offence of rape had been committed. She indeed imposed, against the appellant, the minimum sentence of ten (10) years. In the event, the appeal against sentence is also without merit and is dismissed.

The entire appeal is accordingly dismissed.
DATED AND DELIVERED AT ELDORET

THIS 26TH DAY OF JULY, 2012.

F. AZANGALALA
JUDGE

Read in the presence of:-

John Mwangani, the appellant and **Mr. Kabaka** for the Republic.

F. AZANGALALA
JUDGE
26/7/2012.