BENJAMIN MUTUNGA MULUVI……...……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal against conviction and sentence in Cr. Case 190 of 2011 by the Hon. J.W. Gichimu, Resident Magistrate in Tawa delivered on 13th September 2011)

JUDGEMENT

The appellant, **Benjamin Mutunga Muluvi**, was charged with the offence of Rape contrary to section 3 (1) as read with sub-section 3 of the Sexual Offences Act and an alternative charge of committing an indecent act with an adult contrary to section 11 (A) of the same Act. The particulars of the charge were that on 23rd May 2011 in Mbooni East District within Makueni County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **M. M** without her consent.

The particulars of the alternative count were that on the same day and place, he intentionally and unlawfully did an indecent act to M.M by touching her private parts namely vagina with his penis without her consent. The appellant denied the charges and he was tried.

The prosecution called Four (4) prosecution witnesses. In brief their evidence was as follows.

PW1, **M.M**, is the complainant. On the 23rd May 2011, she went to fetch water at a river after which she headed back home. While inside the kitchen, the appellant came and forced her to the ground removed her underpants and lay on top of her, he proceeded to remove his trouser, inserted his penis into her vagina and raped her. He left thereafter. She was wearing a skirt and a blouse which blouse became dirty when she was forced on the ground. She identified the appellant adding that she knew him.

PW2, **J.K.M** left Pw1 who is her sister-in-law at home when she took her cattle to graze. When she came back home, she found the appellant leaving her kitchen. Pw1 then informed her that the appellant had removed her underpants and raped her. Pw1 further informed her, that the appellant removed her blouse, lay it on the floor and lay her on it. When PW2 walked in, PW1 did not have her blouse and underpants on. She recognized the appellant as he was 20 meters away and it was during the day.

PW2 added that the blouse was dirty and had semen on it as the appellant had used it to wipe himself. She went and reported the matter to the chief who referred her to the police. She proceeded with PW1 to Mbumbuni police station taking with them the blouse and underpants, where she was received by Pw3 **PC Davis Sigei**, who also received the underpants and blouse he then sent them to hospital where Pw1 was treated and they went back to the police station where they were issued with the P3 form. She identified the appellant whom she said was her neighbor.

PW4, **Geoffrey Mutie,** the clinical officer attended to Pw1 on 24th May 2011 and filled her P3 form. He relied on treatment cards dated 23rd May 2011 issued to Pw1. Pw1 informed him that she had been raped but had changed clothes. She was mentally retarded and was on a follow up at Makueni district hospital. Age of injury was 5 hours. On examination, the libira minora, monor and cervix had no injury. The hymen was broken; there was a whitish discharge in the vagina. A high vaginal swab showed presence of

spermatozoa. He opined that there was penetration.

The trial court found that a prima facie case had been established and the appellant was put on his defence. He opted to give an unsworn statement. He stated that on 24th October 2011, he visited Pw2 to inquire about a motorcycle which had hit him while she was riding on it as pillion passenger but she could not identify the rider.

The learned magistrate having considered and evaluated the evidence on record was satisfied that the prosecution had proved its case against the appellant to the required standard. Accordingly he convicted him and sentenced him to twenty five (25) years in prison.

The appellant was aggrieved by the conviction and sentence aforesaid and hence preferred this appeal on four (4) grounds to wit; that the learned magistrate erred in law and fact by convicting him by relying on the purported visual identification of Pw1 and Pw2 which was doubtful and questionable, that the trial magistrate was impressed with the mode of his arrest on the charge sheet was defective and finally, that the trial magistrate did not consider the time that the crime happened and poor identification.

When the appeal came before me on 9th July 2012, for hearing the appellant opted to canvass the same by way of written submissions.

On his part, **Mr. Mukofu,** learned State Counsel orally submitted that Pw2 found the appellant at the scene of crime. He was exiting the kitchen where the complainant was. She found the complainant without clothes and her blouse was torn. Pw2 and Pw1 corroborated the complainant's evidence in terms of the sequence of events. The evidence was corroborated by Pw 4, the clinic officer who examined the complainant 5 hours after the incident.

Before venturing into consideration of the merits or lack of them of the appeal, I think it is necessary to set out what I consider to be the approach, function and duty of this court in connection with this appeal. An appeal from the subordinate court to this court is by way of a retrial and as this court and indeed the Court of Appeal has pointed out on various occasions, it is not bound necessarily to accept the findings of fact by the court below but must re-consider the evidence, re-evaluate it and come to its own conclusion, although always bearing in mind that it has not had the advantage of the trial court in seeing and hearing witnesses. I shall bear all these injunctions in mind as I consider this appeal. In the case of **Ajode –vs- Republic Criminal Appeal No. 87 of 2004** the Court of Appeal sitting at Kisumu held that:-

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that."

PW4, **Geoffrey Mutie,** the clinical officer attended to Pw1 on 24th May 2011 and filled her P3 form. He relied on treatment cards dated 23rd May 2011 issued to Pw1. Pw1 informed him that she had been raped but had changed clothes. She was mentally retarded and was on a follow up at Makueni district hospital. Age of injury was 5 hours. On examination, the libira minora, monor and cervix had no injury. The hymen was broken; there was a whitish discharge in the vagina. A high vaginal swab showed presence of spermatozoa. He opined that there was penetration

Firstly, I would like to address the ground that the charges were defective. According to the charge sheet, the appellant was charged with-

"***Rape contrary to Section 3(1) as read with sub-section 3 of the Sexual Offences Act no. 3 of 2006."***

And an alternative charge-

"Committing an indecent Act with an adult contrary to section 11 (a) of the Sexual Offence Act no. 3 of 2006."

Section 3. of the Sexual Offences Actprovides that(1) a person is deemed to have committed the offence of rape if -

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term - intentionally and unlawfully - has the meaning assigned to it in section 43 of the Act.

I find the charges as preferred against the appellant fall within the above parameters and are in no way defective. In any case, it is imperative to note that this Court cannot direct the police on how to prefer charges especially where the offence has been provided for in the Sexual Offences Act and the Penal Code. The issue of the charge being defective was not raised by the appellant during the hearing and cannot be raised now.

Secondly in regard to the ground of identification of the appellant, Pw1 and Pw2 testimony put the appellant at the scene of the crime. They both knew the appellant quite well as he was their neighbor. The rape must have taken substantial amount of time and both the complainant and the appellant were in close proximity, as such issue of mistaken identity is highly unlikely in the circumstances. In any case, there is no evidence on record that the appellant disguised his face in any way and as such the complainant was able to identify him. Furthermore, the rape occurred during the day and both the complainant and Pw3 could not have mistaken the appellant with another person, they easily recognized him. I am satisfied that the appellant herein was identified and recognized by both complainant and Pw3. See **Kamanja –vs- Republic Criminal Appeal No. 5 of 1990** the Court of Appeal sitting at Kisumu held that:-

"On the evidence the court came to the right conclusion and was justified in convicting the appellant and rejecting his evidence. The witnesses had more than enough opportunity in seeing the appellant and recognizing his voice."

In regard to the mode of arrest, I find the manner the appellant was arrested to be to be in-consequential. Whether he was taken to the police station due to commission of another crime and was thereafter arrested for the sexual crime is not anomalous.

As a result I find that the appeal has no merit and I dismiss it in its entirety and uphold the conviction and sentence imposed.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS,** this **28th** day of **SEPTEMBER 2012.**

ASIKE- MAKHANDIA

JUDGE