



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL 74 OF 2008

HARRISON GIKUNGU GAKWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*From original conviction and sentence in Cr. Case No. 2234 of 2007 at the Resident Magistrate's Court at Baricho*

### J U D G M E N T

The Appellant herein was charged with offence of attempted rape contrary to section 4 of the Sexual Offences Act No.3 of 2006.

The particulars in the charge sheet were as follows;

**HARRISON GIKUNGU GAKWA: On the 22<sup>nd</sup> day of July, 2007 at K[...] in Kirinyaga District within Central Province, unlawfully and intentionally attempted to cause penetration with your genital organs into the private parts of L.W.M.**

He was also charged with an alternative count of Indecent Assault on a female contrary to section 144 of the Penal Code. The particulars were that:

**HARRISON GIKUNGU GAKWA: On 22<sup>nd</sup> July 2007 at K[...] Kirinyaga District within Central Province, unlawfully and indecently assaulted L.W.M by inserting fingers into her private parts.**

The matter was heard and he was convicted of the main count and sentenced to 10 years imprisonment. And being aggrieved by the Judgment he appealed against both conviction and sentence on the following grounds;

- 1. That the learned trial Magistrate erred in law and fact by putting reliance on identification alleged by PW 1 which was surrounded by doubts.***
- 2. That the trial Court erred in law and fact by putting reliance on identification alleged by P.W.4 which was not supported by identification parade to the police.***
- 3. That the learned trial Magistrate erred in both joints of law and fact by failing to consider that the***

*doctor who attended P.W.1 did not testify before the Court.*

**4. That the Court failed in facts and law by convicting the Appellant on uncorroborated evidence.**

**5. That the trial Court erred in law and fact by rejecting the Appellant's defence on no sufficient reasons.**

**6. That the learned trial Magistrate erred in law and fact when she was impressed by the Appellant's mode of arrest that he was arrested by members of the public whom were not summoned by the prosecution to clear the doubts.**

When the appeal came for hearing the Appellant presented written submissions, explaining his grounds. He raised the issue of having been arraigned in Court after 12 days ie. 22/7/2007-3/8/2007. He also submitted that the learned trial Magistrate refused to visit the scene of crime inspite of his plea. He was not well prepared for the defence. He also challenges the medical evidence.

The State through Mr. Omayo opposed the appeal saying the Appellant was well identified. And P.W.1 had clearly explained what had happened to her.

This is a first appeal and this Court has the duty to re-evaluate and reconsider the evidence adduced before the lower Court to arrive at its own decision. See;

**1. NGUI -VS- REPUBLIC [1984] 1 KLR 729**

**2. SIMIYU & ANOTHER -VS- REPUBLIC [2005] 1 KLR 192**

The Prosecution called a total of 5 witnesses. The time of incident was about 8 am on 22/7/2007. P.W.1 and P.W.3 (aged 11 years) were walking to church through some rice fields when the accused attacked P.W.1 and dropped her on the ground beating her. On seeing this P.W.3 ran away calling for help. On hearing people coming the accused went away after pulling P.W.1's pants aside and forcefully inserting his fingers in her vagina. The accused was attacked by those who came to P.W.1's rescue. He was rescued just before he was lynched. P.W.4 a clinical officer produced a P3 form (EXB2) indicating injuries which the complainant suffered. A torn pant (EXB 1) belonging to P.W.1 was produced.

The accused in his unsworn statement denied the charges. He said he had visited his sister and as he cut grass he saw a crowd led by P.W.1 coming to him. She alleged that he had tried to rape her and he was arrested. He was then charged.

The time of incident was about 8 am and P.W.1 was walking to church with P.W.2 when she was accosted by a man. It was broad daylight. After accosting her the man beat her up causing her injuries and eventually dropped her down and sat on her. On seeing this P.W.3 ran away calling for help. The attacker then pulled aside P.W.1's pant which got torn. He then forcefully inserted his fingers in her genitals and only stopped when he heard voices of people coming. P.W.1 and P.W.3 say they saw the attacker very well and they identified him as the Appellant herein. Those who came to P.W.1's rescue pursued the Appellant and arrested him. Meanwhile P.W.1 went to Miadi AP post and reported. She was accompanied to the scene by P.W.4 who found him thoroughly beaten. The mob was just about to lynch him. A fire had already been lit. He was rescued and arrested. P.W.5 confirmed that P.W.1 had been injured and she assessed the injuries as HARM. P.W.1 explained to the learned trial Magistrate the circumstances that led to the injuries she suffered and to the tearing of her underpant. She was satisfied with the evidence of the prosecution witnesses. And after considering the defence of the Appellant she found it to be unbelievable.

I am satisfied that P.W.1 and P.W.3 well identified the Appellant. He is the man who accosted, injured and tore P.W.1's pants. The only conclusion is that his intention had been to have sex with P.W.1 against her will. She was lucky to overpower him. His evidence was a mere denial and the evidence of the Prosecution was water tight. I see no reason to make me interfere with the findings of the learned trial Magistrate.

I confirm the conviction, and the sentence as the latter is lawful. The result is that the appeal is dismissed.

**DATED AND DELIVERED AT EMBU THIS 28<sup>TH</sup> DAY OF DECEMBER 2012.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of;**

M/s Macharia for State

Njue – C/c

Appellant