



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 65 OF 2007

FREDRICK MURIITHI RIKIRANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence by R. A. A. Otieno Senior Resident Magistrate, in the Nyeri Chief Magistrate's Criminal Case No.2481 of 2004 delivered on 17th May 2006 at Nyeri)

JUDGMENT

LEONARD KINYUA IRIMA and **FREDRICK MURIITHI RUKIRANGI**, the appellant herein, were tried on a charge of attempted robbery contrary to *Section 297* of the Penal Code. After undergoing a full trial, Leonard Kinyua Irima was acquitted but Fredrick Muriithi Rukirangi was convicted under *Section 297 (1)* of the Penal Code and sentenced to six (6) years imprisonment. The Appellant was aggrieved hence this appeal.

On appeal, he put forward the following grounds:

- 1. That the learned trial magistrate made an error in finding attempted rape as established where as no element of the same was established.***
- 2. That the learned trial magistrate failed in not analyzing the mode of arrest in connection with the commission of the offence.***
- 3. That the complainant hardly saw me whilst the commission of the offence while the person who effected the arrest wasn't there equally.***
- 4. That the learned trial magistrate made an error in shifting the burden of proof.***

When the appeal came up for hearing, the Appellant abandoned the grounds of appeal against the conviction and indicated that he was only pursuing the appeal as against sentence. The Appellant's main complaint is that the sentence meted out against him was harsh and excessive. Mr. Makura, learned Senior State Counsel, did not indicate whether or not he would oppose the appeal.

Before considering the merits of the appeal, let me set out in brief the case that was before the trial

court. The prosecution's case was supported by the evidence of six witnesses. Anne Njoki (P.W.2), the complainant told the trial court that on 18th July 2004 at about 8.00 p.m. she closed her shop and walked home. On the way she heard some footsteps behind her. She put on her torch but before she could flash it on that direction she was hit on the back and fell down. She screamed but someone covered her mouth with his fingers while demanding to be given some money. She became unconscious. Members of the public came to her rescue when they heard her screams. **Joseph Muita Hiuhu** (P.W.3) said he rushed to the scene of where heard some screams on 18th July 2004 at 8.30 p.m. where he found a man and a woman struggling. The man fled and P.W.3 gave a chase. P.W.3 caught up with that man. People responded to the distress calls of P.W.3. With the help of a torch P.W.3 was able to recognize that person as Fredrick Muriithi Rukirangi, the Appellant herein. P.W.3 said the Appellant, was a regular customer to his shop. The Appellant was taken to Ndathi Police Station where he was re-arrested by **Boniface Munyao** (P.W.6). P.W.2 had told P.W.3 that she had bitten one of her assailants' fingers. P.W.3 said the Appellant had no visible injuries. David Kabui Gachange (P.W.4) said that on 18th July 2004 at 8.30 p.m. he heard screams. He responded by visiting the scene whereupon he found the Complainant (P.W.2) lying down and bleeding from the lips, upper left arm and at the back of the hand. **Boniface Macharia** (P.W.5) told the trial court that on 21st July 2004 he went to search for a suspect who had been bitten by P.W.2. He managed to arrest Leonard Kinyua Irima on the basis that he had tooth marks on his middle and ring fingers. P.W.2 was taken for treatment. She was examined by Peter Karanja (P.W.1) who filled the P3 form indicating that P.W.2 had injuries on the neck, left arm and on the left knee. He formed the opinion that the injuries were caused by a blunt object.

When placed on his defence, the Appellant claimed P.W.3, a brother to P.W.2 had a grudge against him which arose over a debt he owed to him. He alleged that the charges were a fabrication to fix him.

The trial magistrate considered the evidence from both sides and came to the conclusion that the Appellant was placed at the scene of crime. She dismissed the Appellant's defence as a mere denial. This Court has only been urged to determine the appeal as against sentence and no more. The question is whether the sentence is harsh or excessive? The record shows that the trial magistrate considered the Appellant's mitigation and the fact that he was a first offender – before pronouncing the sentence of six (6) years imprisonment. The maximum sentence for an offence under *Section 297 (1)* of the Penal Code is seven (7) years. Despite the fact that the learned Senior Resident Magistrate acknowledged that the Appellant was a first offender she still went ahead to sentence the Appellant to six (6) out of the seven years maximum sentence prescribed. The learned magistrate was of the view that the offence was serious. I think the learned Senior Resident Magistrate applied the wrong principle in this case thus she gave a harsh sentence which in my view is manifestly excessive for a first offender. The law enjoins courts to mete out lighter sentences for first offenders which the trial magistrate failed to heed. For the above reasons, I am entitled to interfere with the order on sentence. I find the appeal as against sentence to be with merit. I allow the appeal by setting aside the sentence of six (6) years and substitute with a sentence of four(4) years. If the Appellant has been serving since 17th May 2006, it means he has served the entire period. Consequently the Appellant should be set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 25th day of March 2011.

J. K. SERGON
JUDGE

In open court in the presence of the Appellants and in the presence of Miss Ngalyuka for the State.