



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL CASE NO. 358 OF 2008**

**DANIEL MUCHIRA GITAHU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the original conviction and sentence by S. N. Mbungi Senior Resident Magistrate in the Kangema Resident Magistrate's Criminal Case No.106 'B' of 2007 delivered on 19<sup>th</sup> October 2007 at Kangema)*

**JUDGMENT**

The appellant herein, **DANIEL MUCHIRA GITAHU** was tried on a charge of rape contrary to *Section 5 (1)* of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count of indecent assault on a female contrary to *Section 11 (1)* of the Sexual Offences Act No. 3 of 2006. After undergoing a full trial, the Appellant was convicted on the main charge and was sentenced to serve 10 years imprisonment. The Appellant was aggrieved hence this appeal.

On appeal the Appellant listed the following grounds in his Petition:

1. *That I had pleaded not guilty to the charge.*
2. *That the imposed sentence is harsh and excessive in regard I am first offender whilst evidence of good character is admissible in respect to section 56 of the Evidence Act.*
3. *That the considered and decided sentence is illegal if it could be meant for rehabilitation purpose.*
4. *That the learned trial magistrate misdirected himself in imposing such a stiff sentence on I the accused, without considering the entire evidence adduced by the prosecution case which could have necessitated a lesser severe sentence.*
5. *That the imposed sentence is harsh and oppressive in regard I wasn't given a reasonable time in respect to section 77 (1) of the constitution of Kenya, thus resulted to unfair trial.*
6. *And that I wish being present during the hearing of this appeal.*

A careful perusal of the aforesaid grounds will reveal that the Appellant is only appealing against sentence. He has raised one main ground that the sentence meted out against him was harsh and excessive. He has also complained that he was held by the Police in custody before being taken to Court beyond the 14 days period set by the old constitution.

The background of this appeal appears to be short and straightforward. It is alleged that on the 18<sup>th</sup> day of April 2007 at about 12.05 a.m. at W[...] Sub-location in Murang'a District within Central province, the Appellant unlawfully and indecently assaulted T.N.M. by touching her private parts. A total of four witnesses testified in support of the prosecution's case. The Complainant recalled that on the fateful night, she opened her door when she heard a knock. She was immediately held on her neck and as a result she fell down. The assailant is said to have had sexual intercourse with the complainant. By that time, the complainant said she did not have her pants on. The complainant alleged that when raping her, the assailant asked her whether she knew him and for fear of her life she told him she did not know him. The assailant is said to have left after committing the offence. The complainant said she recognized the voice of her assailant to be that of the Appellant who was her neighbour. She said she had known him for over 10 years. S.M. (P.W. 2) told the trial court that the complainant (P.W.1) his sister told him that the Appellant had raped her. P.C. Maurice Oganda (P.W. 3) told this court that he is the one who received the report from the complainant. The Appellant was later arrested. Paul Mwangi Gathogo (P.W. 4), a clinical officer who examined the complainant produced the P3 form which indicated that there was evidence of penetration and that there was traces of sperm.

When placed on his defence, the appellant elected to keep quiet. The trial magistrate concluded that the Appellant was recognized by the complainant through his voice. He also formed an opinion that the complainant was a truthful witness.

On appeal, the Appellant was of the view that the sentence was harsh and excessive and that his constitutional rights were breached. Mr. Makura, learned Senior State Counsel, opposed the appeal on the ground that there was overwhelming evidence to sustain a conviction. Mr. Makura further pointed out that the period the Appellant was held in Police custody was not inordinately long and that the Police did not blatantly breach the Constitution. Mr. Makura stated that the Appellant should have been convicted under *Section 5(1)* instead of *Section 8* of the Sexual Offences Act No. 3 of 2006. The defect is said to be curable under *Section 382* of the Criminal Procedure Code.

Let me start by stating that the Appellant did not intend to challenge the conviction right from the beginning. The Appellant has stated that his constitutional rights were breached, in that he was held in Police custody beyond 24 hours. To be fair to the prosecution, this is an issue which the Appellant should have first raised at the trial court. He chose to keep quiet only to raise the issue on appeal. With respect I will on my part infer that the Appellant had waived that right when he failed to raise the issue before the trial court. He even failed to interrogate the investigating officer nor the arresting officer on the issue.

Let me start by stating that the suggestion by Mr. Makura that the Appellant should have been sentenced under Section 8 of the Sexual Offences Act cannot stand because the aforesaid section relates to the offences of defilement and not rape. The Appellant was sentenced on the correct section of the Act. The remaining issue is whether or not the sentence was harsh and excessive. *Section 5 (2)* of the Sexual Offences Act No. 3 of 2006, prescribes the minimum sentence for such an offence to be 10 years which sentence may be enhanced to life imprisonment. The Appellant here was given the minimum sentence of 10 years. It is therefore obvious that the Appellant's appeal has no merit. It is dismissed in its entirety.

***Dated and delivered at Nyeri this 17<sup>th</sup> day of June 2011.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of the Appellant and Mr. Makura for the State.