



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 204 OF 2008**

**ERICK MUTWIRI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in criminal case No.859 of 2005 of P. Ngare, Senior Resident Magistrate's court at Chuka)*

**J U D G M E N T**

The Appellant Erick Mutwiri Miriti was tried by the Senior Resident Magistrate at Chuka(P.Ngare,SRM) on charges of Robbery with violence contrary to Section 296(2), of the Penal code, rape contrary to Section 3(1) (a) as read with Section 3(3) of the Sexual Offences Act, No.3 of 2006 with alternative count of Indecent Act with an adult contrary to Section 11(6) of the Sexual Offences Act No. 3 of 2006 and, Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code.

The Appellant pleaded not guilty and the case proceeded to full trial. The Appellant was convicted on Count II of rape and sentenced to serve 10 years and also on Count III sentenced to serve 2 years imprisonment.

The evidence adduced against the Appellant was that on 17<sup>th</sup> May, 2005 in Meru south District within Eastern Province while armed with a dangerous weapon namely a panga robbed R.M Kshs.3500/- and immediately before or immediately after the time of such robbery used actual violence on the said R.M

That at the same time the Appellant intentionally and unlawfully had sexual intercourse with R.M without the consent of the said R.M which consent was obtained by force and that also on the same day and place Appellant committed an act of indecency with an adult namely R.M by touching her breast and vagina.

That on the same date and same time the Appellant unlawfully assaulted K.J thereby occasioning him actual bodily harm. After the act the complainant R.M went home and reported to her husband J.M and they reported to police. They also visited K.J and found that he had been injured on left eye and head.

The Appellant was later arrested as he was known to the complainants. He was charged with this offence.

The P3 form of R.M confirms that the labia minora stained with dust and soil particles and tender on part. Labia majora stained with few fine soils particles-scratch marks on left side. The P3 of Kathenya Jason showed that she had sustained harm.

When the appeal came for hearing the Appellant abandoned his appeal against conviction and argued the appeal against sentence.

The Appellant said that he was sentenced to serve 12 years imprisonment and pleaded with court to reduce sentence on the ground that his wife left him after his conviction and left Appellant's mother with Appellant's two children. That he had already served 7 years and his father has sold all family land to fight this appeal. He stated that he is the only son in their family.

The learned State Counsel Mr. Musau submitted that the sentence was lawful and in his view was not excessive, but he submitted that he would have no quarrel if the court would interfere with the manner the sentence would be served, otherwise he supported the sentence and conviction.

The appellate court may in an appeal against the sentence, increase or reduce sentence or alter the nature of a sentence.

In case of **Ogalo Owuora Vs Republic(1954) 21 EACA 270** it was held that sentence imposed by trial court can be altered if it is evident that it acted on the **wrong principle** or overlooked some **material factor** or if the sentence was **manifestly excessive**.

I have considered the sentence imposed upon the Appellant under Count II of rape and note the sentence for an offence of rape under Section 3(3) of the Sexual Offences Act shall not be less than ten(10) years but which may be extended to imprisonment for life.

The court was lenient to the Appellant as he was sentenced to the lowest sentence under the Section.

I have also considered sentence under Count III relating to assault and find the sentence imposed of 2 years reasonable. The trial court considered the fact that the Appellant was a first offender and sentenced him to serve 10 years imprisonment on count II and 2 years imprisonment and that on count III to run consecutively.

I have considered the period ordered to be served and order that the sentences of 10 years and 2 years respectively be served concurrently. The appeal is therefore allowed to the extent of manner of service of the imprisonment only.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED THIS 7<sup>TH</sup> DAY OF DECEMBER, 2011

**J. A. MAKAU**

**JUDGE**

**Delivered In Open Court In Presence Of:**

1. Mr. Musau for State
2. Erick Mutwiri Appellant in Person

**J. A. MAKAU**

**JUDGE**