



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 111 OF 2008**

FREDRICK KABURU MBAKA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From the original conviction and sentence in criminal case No.2045 of 2006 of P. Ngare, Senior Resident Magistrate's court at Chuka)*

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

The Appellant FREDRICK KABURU MBAKA was tried by Senior Resident Magistrate at Chuka P.Ngare (S.R.M) on a charge of robbery with violence contrary to Section 296(2), of the Penal code, with alternative charge to count one of indecent act with an adult contrary to Section 11(6) of the Sexual Offences Act No.3 of 2006. The Appellant was convicted of count 1, of gang rape and sentenced to 20years imprisonment and acquitted on count II of robbery with violence.

The particulars of the charge were that on the 5<sup>th</sup> day of August, 2006 at 3.00 a.m. in Meru South District within Eastern Province jointly with others not before court gang raped R.M.

The alternative charge states the Appellant jointly with others on 5<sup>th</sup> day of August, at 3.00 a.m in Meru South District within Eastern Province, jointly with others not before court, committed an act of indecency with an adult namely R.M.by touching her private parts namely breast and vagina.

The evidence adduced against the applicant was that on the night of 05/08/2006 at 3.00 a.m R.M, the complainant, was asleep in her home and was with her children, who were all minors. That she heard people calling from outside for her to open the door. That she recognized one of the voices to be that of the Appellant. She declined to open. The door was broken and entry gained. They went to where she was sleeping. Appellant slapped her and pulled her to the ground. The gang then raped her in turns after which they ordered her to take them to her neighbour's home and she complied. At her neighbour's place she managed to run away. The Appellant and his gang sensed danger and also ran away.

In course of attack the gang stole the complainants radio, cups, knife, lamp worth Ksh.2800/= and cash Kshs.350/=. The Appellant was later arrested and charged.

When the appeal came for hearing the learned State Counsel Mr. Musau informed the court that he was conceding the appeal. His reasons for conceding the appeal was that the incident took place at night at 3.00 a.m and that meant identification was an issue in this case. That source of light was torch whose intensity is not known. There was also talk of moonlight whose intensity is not known. He submitted in the circumstances at the time of the offence the conditions were not conducive to positive identification.

He further submitted in case of rape penetration is a very important ingredient of the offence. That the medical evidence produced at the trial by Dr. Garama does not prove penetration. He was specific in saying there was no evidence of sexual assault. The prerequisite ingredient has not been proved and the conviction of the Appellant on the count 1 was not safe.

The Appellant on his part put in written submissions and relied on grounds of appeal. He submitted his defence was not considered at the trial court.

The Appellant amongst his grounds of appeal, stated that identification and recognition and the scene were not free from possibility of error under the prevailing circumstances.

PW1 Dr. N. Garama testified that he filed the P3 form and that there was no evidence of sexual assault. I have examined the P3 form produced as Exhibit 1 and noted Section "C" is blank, showing that the Doctor found no evidence of sexual assault.

PW2 testified that gang broke into her house at 3.00 a.m. She testified there were torch lights. That she recognized their voices. They were

seeing flashing themselves.

I have reevaluated the evidence and analyzed the same. It is clear from the evidence of doctor and P3 form that there was no rape. I agree with State Counsel the ingredients of rape were not proved in this case as there was no penetration nor was there any evidence of sexual assault.

I have also noted that offence was committed at night. The source of light is said to be torch lights. The intensity of light has not been disclosed. It has not been disclosed how long the light was shone. The complainant did not give any physical features of the members of the gang or their names. In the circumstances I find the conditions were not conducive for a proper identification.

I further find identification aside the offence with which the Appellant was convicted with was not committed as the doctor found no evidence of sexual assault.

I therefore find the learned State Counsel was right to have conceded the appeal.

Accordingly, the appeal is allowed, conviction is quashed and sentence set aside. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully withheld.

DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>th</sup> DAY OF DECEMBER, 2011.

**J. A. MAKAU**  
**JUDGE**

**Delivered in Open Court in the presence of:**

1. Mr. Musau for State
2. Fredrick Kaburu Mbaka Appellant in Person.

**J. A. MAKAU**  
**JUDGE**