



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Appeal 260 of 2004**

**K.M .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant herein K M, was tried on a charge of rape contrary to Section 140 of the Penal Code. He also faced an alternative charge of indecent assault on a female contrary to Section 144(1) of the penal code. After undergoing a trial, the appellant was convicted on the main charge of rape and sentenced to serve 8 years imprisonment with hard labour. Being aggrieved, the appellant preferred this appeal.

In his petition of appeal, the appellant enumerated six grounds of appeal which may be summarized to three main grounds: First that the prosecution did not establish its case beyond reasonable doubt. Secondly that the trial magistrate did not properly consider the appellant's defence and finally that the sentence slapped on the appellant was harsh and excessive.

The prosecution's case before the trial court was supported by the evidence of four witnesses. It is the evidence of M D M (P.W.1) that on 16<sup>th</sup> July 2004. She was asleep with her 8 months old baby in her matrimonial house when at 2.00 a.m. the appellant knocked her door. P.W.1's husband (P.W.3) was away in Mombasa. The complainant (P.W.1) opened the door and gave the appellant a torch she had requested from her. It is at that moment that the appellant pulled P.W.1 and dragged her to his house. P.W.1 said that the appellant took a knife and threatened to stab her if she resisted his moves to have sex with her. It is said the appellant removed P.W.1's clothes which included her underpants and thereafter had sexual intercourse with her without her consent. The appellant is said to have spent about two (2) hours with the complainant. In the morning P.W.1 reported the incident to M D K (P.W.2), her mother. P.W.2 advised P.W.1 to wait for M M (P.W.3), her husband. P.W.3 said that when he arrived home on 20<sup>th</sup> July 2004, he did not find his wife (P.W.1). He later learnt that P.W.1 had gone to her parent's home after being raped by the appellant. P.W.3 said that the appellant was his uncle who resided within his homestead. P.W.3 reported the incident to the area Assistant Chief after which the police were informed. The appellant approached P.W.3 to settle the dispute out of court. P.C. Kaindi (P.W.4) received and booked the report on 20<sup>th</sup> July 2004 made to him by P.W.1, P.W.3 and the accused.

When placed on his defence, the appellant claimed that he was not in good terms with the complainant (P.W.1), because he claimed she was a person of bad behaviour. He claimed she asked for permission to visit her parents but did not return to her matrimonial home, but only came back with her mother to collect her baby's clothes after which they (P.W.1 and P.W.2) left.

After evaluating the evidence, the trial magistrate came to the conclusion that the complainant's (P.W.1's) evidence was credible and very consistent and proceeded to believe it. The trial magistrate found that there was penetration by the appellant against the consent of the complainant. The trial magistrate also found the appellant's defence to be a fabrication to hide the truth.

On appeal, Mr. Monda, learned Senior State Counsel, urged this court to dismiss the appeal because the evidence of the complainant were credible.

I have considered the written submissions filed and relied by the appellant and the oral submissions presented by Mr. Monda learned State Counsel. I have also carefully re-evaluated the evidence tendered before the trial court. There is no denial that the complainant (P.W.1) and the appellant lived together within the same homestead. There is also no dispute that the appellant and the complainant met on 16<sup>th</sup> July 2004. The appellant was convicted for the offence of rape contrary to Section 140 of the penal code. The definition of rape is given under Section 139 of the penal code (now repealed) as follows:-

**“any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by any means or threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.”**

In this case it is the prosecution’s case that the appellant used threats to coerce the complainant to have sexual intercourse with her. The trial magistrate formed the opinion that though the doctor formed the opinion that there was no rape, there was penetration. I am convinced that the trial magistrate misdirected herself on this issue. There was no cogent evidence to establish that finding. The burden of proof in criminal cases is throughout on the prosecution. I have reconsidered the evidence tendered and there is no iota of evidence connecting the appellant with the offence he was convicted for. It is the word of the complainant (P.W.1) against that of the appellant. The appellant had alleged in his unsworn statement of defence that he was not in good relationship with the complainant because she was of bad behaviour. He claimed that there was bad blood between him and the complainant. Can the appellant’s defence be said to be an attempt to hide the truth? I do not think so. It is possible that there was a grudge between the appellant and the complainant. Why didn’t the complainant rush to hospital for medical examination? She visited hospital after two days. There was no nexus between the offence of rape and the appellant. Her delay to visit a medical facility, destroyed the entire evidence to link the appellant with the offence. In my view there was doubt. There was no proof beyond reasonable doubt. I also agree that the trial magistrate wrongly rejected the appellant’s defence. In my assessment of the appellant’s defence, I am convinced that the same created some doubt on the complainant’s case as a whole.

In the end I am satisfied that the appeal must succeed. I allow the appeal by quashing the conviction and by setting aside the sentence. The appellant be released forthwith unless lawfully held.

**Dated and delivered at Mombasa this 29<sup>th</sup> day of July 2008.**

**J. K. SERGON**

**J U D G E**