



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL 130 OF 2003

EMILIO MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with 3 counts and alternative charge. Main charge is housebreaking and stealing contrary to Section 304 (1) and Section 279 Penal Code. The second count is Rape contrary to section 140 Penal Code with alternative charge of indecent Assault on a female Contrary to Section 144 (1) Penal Code.

The third count was Assault causing actual bodily harm contrary to Section 251 Penal Code. The accused was convicted on count 1 and count 2. The third count was found not to be proved and on the same he was acquitted. At the hearing of this appeal the state conceded the appeal on count 2 on the ground that the charge sheet was fatally defective because it omitted in its particulars the word “**unlawful**” which word is vital ingredient in describing the offence of Rape. I have read section 139 Penal Code where the definition of the offence is contained and I agree with State Counsel that this charge is fatally defective. The appeal on count II is therefore allowed.

There are then two counts remaining charge outstanding and the state has prayed that the alternate count of indecent assault be dealt with since there is sufficient evidence to prove the offence. The appellant addressing the court stated that his ground 5 of appeal be conducted. The OB from Ishiara Police Station be called up in this appeal. After argument the court rejected this ground and asked the appellant to proceed with his appeal. Prosecution evidence was that on 23/6/2003 the complainant (PW1) was asleep in her house and at 2 am she heard dogs barking outside. She heard someone greeting her. He told her that he was Muriithi. He said he was bringing blood for dogs, having been sent by one victor. She recognized the voice for he is a distant relative. They exchanged words. Complainant refused to open her door for him. However appellant hit the door with stones and the door gave way. He entered the house threw and pushed complainant through the window. The appellant had sexual intercourse with the complainant and she became unconscious. She later came at 3.am and reported the matter to the home of Njeru she was given painkillers.

In the morning she reported the matter to Ishiara Police Post and later she was treated at Ishiara District Hospital. She produced P3 form. In her house she found her radio missing. The radio was recovered from the accused’s room. She testified that her pant was blood stained. She identified her radio. The

radio was also positively identified by PW2 her son. The radio was recovered by PW3 Officer of Administration Police in the house of the family of appellant in the room occupied by the appellant.

PW4 is the police officer who received the complaint from the complainant. He referred her to hospital where she was admitted for 4 days.

PW4 visited the scene and found a container. He looked at the door and found it was broken. He collected exhibits and produced them in court as exhibits.

Upon considering the above evidence the Trial Magistrate put the accused on his defence. Appellant gave unsworn statement. He talked of activities happening on 29/6/2003 not on 23/6/2003 he was arrested. He did not mention on any issue regarding the charges raised against him. The charge sheet shows he was arrested on 30/6/2003 one day before what he talks about in his unsworn statement with regard to count I. There is evidence that he broke the door of the complainant's house and therein stole a radio which was positively identified. On this count with 2 limbs he was sentence to 4 years imprisonment on each limb.

I see no reason to interfere as the offence was proved excepted to say that the two terms of imprisonment shall run concurrently having arisen out of same transaction. Regarding the alternative charge of indecent assault on female. A P3 form was produced showing there was discharge and injuries in the complainant's private parts proves that her private parts were interfered with. This supports the evidence given by PW1 that the Appellant touched her private parts. I find this offence proved and I convict the appellant accordingly.

I have noted the appellant was treated as first offer but he was not remorseful. He offered no mitigation statement. This offence carries a maximum sentence of 21 years imprisonment with hard labour. In the circumstances of this case I sentence the appellant on this charge to imprisonment for seven 7 years with hard labour. The up short of this appeal is that:-

1. Appellant is unsuccessful in the main charge. Sentence shall remain the same but shall run concurrently
2. The appellant's appeal under count 2 is allowed.
3. Appellant is convicted on the alternate charge and sentenced to seven (7) years imprisonment with hard labour.

It is so ordered.

Dated this 28th February, 2007.

J. N. KHAMINWA

JUDGE

28/2/2007

Appellant in court

Kimathi for State Counsel

Judgment read in open court.

J. N. KHAMINWA

JUDGE