



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

CRIMINAL APPEAL 95 OF 2003

FRANCIS MURIITHI KARUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with offence of Rape contrary to section 140 Penal Code in that on 23/3/2003 at Kiangdegwa village Kirinyaga District unlawfully had carnal knowledge of complainant without her consent. PW1 a clinical officer gave evidence that he examined the Appellant on 31/3/2003. Appellant was treated for gonorrhoea after urine analysis.

PW2 the complainant gave evidence and told the court that on 23/3/2003 she met the Appellant whom she knew sitting on a road side resting. She talked to him and passed him walking on to her home. Soon after she heard someone pull her washing bag from behind. She turned back and saw it was the appellant. He said he wanted to have sex with her. She was not able to say anything because at the same time the appellant hit her with a fist on the chest and she fell down. She is an asthma sufferer, she was breathing with difficulty and she could not scream. He undressed her private parts by pulling her pant. He forced himself upon her and had sex with her by force.

PW5 clinical officer examined the complainant six hours after the incident. He completed P3 form and filed it as exhibit. The complainant was found to have venereal infection and the pus cells. The appellant was examined by a different doctor and found to have venereal disease. PW3 was at the scene immediately and saw the appellant running away to his bicycle. She was informed by the complainant of the attack and rape on her she saw her clothes were soiled. Complaint also reported the matter to her mother PW4. In his unsworn statement the appellant denied the offence and said she reported him because he refused to give her bags of rice.

I have examined the evidence as recorded. I have also considered the grounds of appeal filed on behalf of the Appellant./ It is my considered finding that the complainant's evidence was corroborated by the evidence of PW3 who came to the scene immediately even before appellant had left. The circumstances at the scene are consistent with an act of rape. Medical evidence also confirms that the appellant had had intercourse with the complainant hence her being found to be infected with same venereal disease as he was suffering. The complainant has given good explanation why she did not then scream that she was asthmatic and when she was hit in the chest she had difficulties in breathing and could not shout. PW3 said she afterwards heard her scream. This was when the Appellant was moving away to his bicycle. The

evidence of Clinical Officer is clear on examination should that a high vaginal swab was taken meaning that the examination should intercourse had taken place. The complainant was not a young woman but adult and did not claim to be a virgin. The allegation of grudge is not believable. The incident took place in an open space during the day and it appears to me not to be a situation where the complainant was discussing how to obtain bags of rice. It is not true that the Trial Magistrate failed to make a finding of case to answer. The record shows that she referred a Section 211 CPC and said it was complied with. On the whole, I do not find any merit in the grounds of Appeal filed by appellant.

However the maximum sentence for rape is life imprisonment considering the circumstances and that the appellant was a first offender. And that he was a young man of 27 years. I set aside the sentence by the Trial Magistrate on those grounds and substitute with a lesser sentence of imprisonment for the period of 25 years from the date of first conviction.

Appeal is dismissed otherwise.

Dated this 1st March, 2007.

J. N. KHAMINWA

JUDGE

1/3/2007

Khaminwa – Judge

Njue – Clerk

Kimathi for State

Appellant present in person

Judgment read in open court.

J. N. KHAMINWA

JUDGE