



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

CRA. NO. 219 OF 2001

JOSPHAT MWENDA PLAINTIFF

VERSUS

REPUBLIC DEFENDANT

**(Appeal from original conviction and sentence in original Criminal Case No. 1905 of
2000 of the
Resident Magistrate's Court at Meru)**

JUDGMENT OF THE COURT

The appellant, JOSPHAT MWENDA was charged and tried before the Chief Magistrate, Meru with two counts. In count one he was charged with rape contrary to section 140 of the Penal Code Chapter 63 Laws of Kenya and in count two he was charged and tried for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. It was alleged that on the night of 11th/12th September, 2000 at Kiameru Village in Meru Central District of Eastern Province, he had carnal knowledge of Hellen Gacheri thereby occasioning her actual bodily harm.

The trial court convicted him after a full trial on both counts and sentenced him to imprisonment with hard labour for 4 years and 2 strokes of the cane on the first count and to imprisonment for 2 years on the second count. Both sentences were to run concurrently. Being dissatisfied with the decision of the Resident Magistrate, Mr. N.H. Oundu, the appellant filed a Petition of Appeal on 6.7.2001 against both conviction and sentence of four (4) years imposed upon him on 28.6.2001. From the record, the appeal was admitted for hearing on 13.2.2002. On the 20.2.2002 the appeal was fixed for hearing on 27.3.2002.

A production order was to issue for the appellant. There is no record as to what may have transpired on 27.3.2002 when the appeal was supposed to be heard. On 18.6.2002, at the criminal registry, the appeal was fixed for hearing on 29.7.2002. A production order for the appellant and hearing notice to the state to issue. There is no record of what may have transpired on 29.7.2002, and whether indeed, the file was placed before the judge.

On 27.11.2002, the appeal was placed before Hon. Mr. Justice Kasanga Mulwa when Mr. Muteti for the respondent informed the court that he had not been served with all the papers. The appeal was then fixed for hearing on 28.1.2003 with an order to the Deputy Registrar to serve the state with the appeal papers. On 28.1.2003, both parties appeared before the judge. Since the respondent had not been served with the record, despite the court order dated 27.11.2002, the appeal could not proceed, and was fixed for mention on 30.1.2003. On that 30.1.2003, both parties again appeared before Hon. Mr. Justice Kasanga Mulwa and because the respondent had not been served with the records, the hearing could not proceed.

Hearing was set down for 28.5.2003. On 28.5.2003, Mr. Muteti for the respondent once again informed the court that they still had not been served with the records but that if he would be supplied with the records that same day, he would be ready to proceed with the appeal. However, the appeal did not proceed on that day and the same was fixed for hearing on 29.5.2003 provided the proceedings were typed and/or verified. On that same date, there was another order for hearing of the appeal on 23.6.2003. On 23.6.2003, Mr. Muteti for the state and the appellant, appearing in person appeared before Hon. Mr. Justice Kasanga Mulwa when the court noted that the earlier orders of 28.5.2003 to provide typed and/or verified copies of proceedings was not complied with. The appeal was fixed for mention on 28.7.2003. There is no record to show what happened on 28.7.2003

. On 22.9.2003, Mr. Ondari for the state informed the court that the respondent now had the record. Hearing was fixed for 24.11.2003 but there is no record until 29.4.2004 when the appeal was fixed for hearing on 27.5.2004. On the 27.5.2004, appellant did not appear. Mr. Oluoch asked for time to confirm if appellant was ready to pursue his appeal. Mention was slated for 8.7.2004 but again the appellant did not appear when the appeal came up for mention on 8.7.2004. There was another mention on 30.9.2004 but the appellant who was thought to have probably completed his jail term did not appear. A further mention was fixed for 25.10.2004. On that day, Mr. Muteti for the state informed the court that there was no information as to whether or not the appellant was still interested in pursuing his appeal or not. A further mention was fixed for 28.10.2004 with an order that the officer in charge Meru G.K. Prison to personally appear and explain the status of the appellant. On 28.10.2004 Mr. Muteti informed the court that he understood that the appellant had completed his jail term. He applied for summons to the appellant through Meru Police O.C.S. and asked for mention on 9.12.2004. On the 9.12.2004 there was no concrete information on the whereabouts of the appellant, but Mr. Muteti asked the court to deal with the appeal in accordance with section 354(3) of the Criminal Procedure Code (CPC). In this regard, Mr. Muteti cited the Court of Appeal decision in Criminal Appeal No. 54 of 2004 – JOSEPH KINOTI V. R. (unreported). In that case, the Court of Appeal held that where the appellant failed to appear, on the date for the hearing of an appeal, the appellate court has still to proceed to consider the appeal and if satisfied that there is no sufficient ground for interfering, dismiss the appeal or deal with it in the manner prescribed by section 354(3) of the CPC. The reason for their lordships holding was that there is no provision in the CPC for summary dismissal of an appeal.

I have considered the petition of appeal before me in which the appellant has appealed against both conviction and sentence. I have also considered the fact that there are no submissions in support of the petition of appeal although I note that there is no mandatory requirement under section 354 of the CPC for such submissions on the part of either the appellant or the respondent personally or through their advocates. I have also considered the law and especially the provisions of section 354 of the CPC. I am satisfied that from the evidence on record, there is no sufficient ground to compel me to interfere with both the conviction and the sentence of the learned trial magistrate.

In his judgment, the learned trial magistrate found as a fact that though the offence was committed at night, the complainant who knew the appellant well was able to identify him properly and she confirmed that the appellant was one of the assailants who had followed the complainant from the house of one Zipporah Mbui and raped her, leaving her unconscious and inflicting other serious injuries upon her. The learned trial magistrate remarked as follows in part of the judgment:-

“The people who raped her are the same people who followed her from Zipporah’s house. She knew them before. The accused was one of them. Though it was at night, I find that the identification of the accused is beyond doubt and indeed, water-tight. Having been properly identified at the scene, the accused could not be elsewhere and the alibi cannot withstand the evidence by the prosecution. If the accused had not seen the complainant, he could not be talking of her being too drunk to know who raped her.”

That was the kind of evidence upon which the appellant was convicted and sentenced to four (4) years imprisonment. I have myself carefully and independently considered the whole evidence adduced by the prosecution, and also carefully considered the judgment of the learned trial magistrate and find that I would have no reason to want to interfere with the said judgment.

In the result, I dismiss the appeal as the same has no merit.

It is so ordered.

Dated and delivered at Meru this 25th day of January 2005.

RUTH N. SITATI

Ag JUDGE