



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI  
CRIMINAL APPEAL NO. 427 OF 2002**

**( From original conviction and sentence in Criminal Case No. 580 of 2001  
of D.M.'S Court at Kigumo – P. MWANGULU –D.M. 11)**

**PETER MWANIKI MUTAVA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

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

**Peter Mwaniki Mutava** hereinafter referred to as the Appellant was tried and convicted by the District Magistrate Kigumo of the offence of Rape contrary to Section 140 of the Penal code. He was sentenced to serve 7 years imprisonment with hard labour plus 3 strokes of the cane. He has now appealed against his conviction and sentence.

The evidence adduced before the trial court was as follows.

On 16th June, 2001, the complainant Esther Ombogo was working as a labourer at a farm . The Appellant who was also doing casual work at the farm made advances towards the complainant but she rejected his advances.

Later when the complainant left the farm and was going back to the house she met the appellant who held her by the arm and requested to have sexual intercourse. The complainant refused but the appellant stepped on her legs, pushed her down, removed her underpants halfway, tore her clothes and had sexual intercourse with her. Thereafter the appellant disappeared into the maize plantation. The complainant reported the matter to the farm manager. He contacted Maragua Police Station and P.W.2 P.C. Susan Mutisya went to the farm and arrested the appellant. The complainant was issued with a P.3 form she was examined by P.W.3 Kenneth Njuguna a Clinical Officer at Maragua District Hospital. He found a slight bruise on her minora laboratory investigations revealed some eptitheral cells, human dirt, but no spermatozoa or pus cells.

In his defence the appellant maintained that the complainants claims were untrue.

The trial magistrate found the complainant truthful. He accepted her evidence rejected the defence and found the appellant guilty.

Learned State Counsel Mr Obuo has conceded the appeal maintaining that the offence was not proved as there was no evidence of penetration, and that the complainant's evidence was not corroborated.

I have reconsidered and re-evaluated the evidence. There was no evidence to corroborate the complainant's evidence that she had been raped. In fact the evidence of P.W.3 contradicted the complainant as he concluded from his examination of the complainant that there was no penetration. The trial magistrate ignored this apparent material contradiction.

This conviction is not safe. The appeal is therefore allowed, conviction quashed and sentence set aside. The appellant shall be set free unless otherwise lawfully held.

Dated Signed and Delivered at Nyeri this 18th day of December, 2003

**H. M. OKWENGU**

**JUDGE**