



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 493 OF 2002

(From Original Conviction and Sentence in Criminal Case NO 1356 of 2000
of the Resident Magistrate Court at Kikuyu)

FRANCIS MUNGAI MUTUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant Francis Mungai Mutemba was convicted of the offence of Rape c/s140 of the Penal code and sentenced to seven years imprisonment with hard labour. Being aggrieved by the said conviction and sentence he appealed.

In his petition of appeal the appellant complained that he was not examine by the doctor to prove that he was the assailant; that the alleged attack was at night which made identification very difficult. That he was convicted on the evidence of a single(identifying) witness which was not corroborated and that a watchman who allegedly saw him and shone a torch on his face was never called to give evidence.

In arriving at the conviction the learned trial magistrate had the following to say:

“The complainant said she saw the accused person while he was lying on her. Pw2 who heard the complainant screaming and went for her rescue said she saw the accused person running away. She said the watchman who was with her flashed his torch and she recognized the accused person who was known to her prior to the incident.

I find that the accused person was properly identified. The complainant’s evidence is corroborated by that of Pw2....”

I have made an independent evaluation of the evidence adduced before the learned trial magistrate. The alleged offence took place at night. The complainant placed the time at 11.30pm. The scene was dark and going by her own evidence, she was hit at the back of head with what appeared to be a piece of wood. She fell down ad was dragged for a distance by her assailant.

Although she said she saw her assailant during he rape ordeal, she does not say what aided her to identify him. After the incident the assailant ran away.

The watchman who allegedly flashed his torch towards the assailant was not called to give evidence. Although Pw2 said she saw the appellant when he watchman flashed his torch, the intensity of the light was material. There is no evidence to that effect. Possibility of mistaken identity cannot be ruled out.

The doctors evidence was material – however his findings were negative.

The learned counsel for the Republic conceded the appeal and, with respect, I agree. The evidence was too weak and inadequate to support the conviction which I find was most unsafe.

Accordingly, this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of April 2002.

A. MBOGHOLI MSAGHA

JUDGE

Judgment delivered in the absence of the appellant.