



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO 23 OF 2018**

**FREDRICK GITARI MURIITHI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original Sentence in Nanyuki CM Sexual Offence Case No 43 of 2017 – L Mutai, CM)***

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

1. The Appellant herein, **MARTIN KIMATHI MBIU**, was charged in the main count with **rape** contrary to **section 3(1)(a) & (3)** of the **Sexual Offences Act**. It was alleged in the particulars of the offence that on 26/08/2017 in Buuri Sub-County within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of one NM without her consent.

2. On 28/08/2017 the Appellant pleaded not guilty to the charge and the case was fixed for hearing. However, on 14/09/2017 the Appellant informed the court that he wished to change his plea and the matter was fixed for change of plea on 19/09/2017. Before the charge was read to the Appellant again, the court prosecutor applied that he be escorted to hospital for medical assessment of his mental status, and the trial court so directed.

3. On 09/10/2017 the trial court noted that a medical report on the Appellant had been filed; it stated that he was not fit to plead, and that he had been put on mediation pending a review in three week's time.

4. On 01/11/2017 the trial court directed that the Appellant be escorted to hospital again to be reviewed and a progress report on his treatment to be filed. On 15/11/2017 the court noted that a progress report had been filed, and that it recommended that the Appellant be admitted at **Mathare Mental Hospital** for better treatment. The court so directed.

5. It appears from the record of the trial court that the Appellant was never escorted to Mathare Mental Hospital, but a medical report from the **Provincial General Hospital, Nyeri** dated 04/01/2018 was filed. It stated that the Appellant had "**Psychosis in Remission**" and that his mental status was currently normal and he was fit to plead and stand trial. The Consultant Psychiatrist who made the report however, recommended that he should continue with treatment. To all this the Appellant stated that he has always been normal.

6. On 05/01/2018 the charge was read and explained to the Appellant three (3) times; he pleaded guilty all those three times. A plea of guilty was entered. Facts of the case were narrated by the prosecutor. The Appellant fully admitted the facts and he was duly convicted.

7. As for sentencing, a probation report stated that a step-brother of the Appellant and a village elder said that he had portrayed traits of mental instability from a young age though his parents never sought medical help for him. The trial court observed that though he had pleaded guilty and appeared to understand the proceedings,

***“...there is a likelihood that at the time the offence was committed he was not capable of knowing what he was doing.”***

8. On 23/01/2018 the court sentenced the Appellant to

***“... be detained at the Nanyuki G K Prison pending the President's pleasure.”***

Though the Appellant appealed against both conviction and sentence, at hearing of the appeal he stated that he had an issue only with the sentence. He said he wanted to be sentenced to a definite term of imprisonment which he can serve and get out. He further stated that he had never been hospitalized for any mental illness prior to the charge, and that he had been fit mentally throughout. He also said that before his arrest he was married to one Elizabeth Mukiri and that they had 2 children – TM (aged about 6 years) and PK (aged about 3 years).

9. Learned prosecution counsel for the Respondent submitted that the trial court appeared to speculate (without medical evidence) that the Appellant could have been of unsound mind when he committed the offence, and that therefore the sentence of indefinite detention at the President's pleasure was not well founded as there was no medical or other evidence of the unsoundness of the Appellant's mind at the time of commission of the offence. Counsel observed that before this court the Appellant has insisted throughout that he is and has been of normal mental status, and that indeed he appeared quite normal and answered all questions put to him by the court properly and without difficulty.

10. As already seen, the Appellant's case never proceeded to trial, and he therefor never offered the defence of insanity or lunacy. Beyond the speculation by the trial court that the Appellant could have been of unsound mind when he committed the offence, there was no such finding of fact, and there could not have been as there was no medical or other evidence of insanity.

11. Having accepted the Appellant's plea of guilty, the foundation of which acceptance was the opinion by a Consultant Psychiatrist that the Appellant was fit to plead and stand trial, the trial court should have sentenced the Appellant in the normal manner and not order his indefinite detention at the President's pleasure.

12. I will therefore partially allow the appeal against sentence by setting aside the order for his detention at the President's pleasure. I will now proceed to sentence him. In doing so I have considered the circumstances of the commission of the offence and the fact that the Appellant is a first offender who pleaded guilty. I will sentence him to seven (7) years imprisonment effective from the date of his sentencing by the trial court – that is 23/01/2018. It is so ordered.

13. The appeal against conviction, which the Appellant abandoned, is hereby dismissed.

**DATED AND SIGNED AT NANYUKI THIS 5<sup>TH</sup> DAY OF MAY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 13<sup>TH</sup> DAY OF MAY 2021**