REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 35 OF 2019

MARTIN MURATHI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki

CM Sexual Offence Case No 81 of 2018 – L Mutai, CM)

J U D G M E N T

1. The Appellant in this appeal, **MARTIN MURATHI MWANGI**, was convicted of ***rape*** contrary to **section 3(1) (a) & (b) and (3)** of the ***Sexual Offences Act, No 3 of 2006***. It was alleged in the particulars of the offence that on 13/11/2018 at hours in Laikipia Central Sub-County within Laikipia County he intentionally and unlawfully caused his penis to penetrate the vagina of one **SW** without her consent.

2. On 08/08/2019 the Appellant was sentenced to serve ten (10) years imprisonment. He has appealed against both conviction and sentence. In his petition of appeal filed on 21/08/2019 the Appellant raised the following grounds –

(i) That the evidence tendered by the prosecution was *"full of contradiction, inconsistencies and uncorroborated."*

(ii) That there was not any DNA test carried out *"to ascertain the truth of the matter."*

(iii) That the complainant's alleged attempted suicide on account of the alleged rape was false.

(iv) That the charge was not proved against the Appellant beyond reasonable doubt.

3. The Appellant subsequently filed amended grounds of appeal along with his written submissions. He raised the following additional ground –

(v) That the trial court ignored the fact that there was no medical or other evidence of penetration.

4. Learned counsel for the Respondent supported the conviction upon the ground that the charge was proved beyond reasonable doubt.

5. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for to that fact.

6. There are several aspects of this case that raise a serious doubt as to the Appellant's guilt. On the issue of penetration, though the complainant stated that it was the first time that she had had sexual intercourse, the Clinical Officer (PW3) who examined her the following day noted that she had no physical injuries or bruises in the annal area where she had complained of pain. Although her hymen was broken, PW3 noted no tears, which suggested that the hymen was not freshly broken. The Clinical Officer subsequently contradicted herself on the issue of the broken hymen when she was recalled to produce the complainant's medical report. This time round, apparently being irritated by the cross-examination by the Appellant, she stated that the hymen was freshly broken *"because she was bleeding"*. She stated further that she could not tell where the blood was from. This was a throw-back to her earlier testimony that when the complainant was allegedly raped and when she examined her, she (the complainant) was having her monthly periods.

7. The complainant testified that she was having her monthly periods when she was allegedly raped and when she was examined the following day. She also stated that she had not bathed nor changed her clothes. It is of significance that there was no evidence of any blood in her clothing or on the couch where she said she was raped.

8. Although the complainant stated that when she regained consciousness and found herself with pain in the annus and the vagina, and her panties and bikers removed and placed on the couch, she never told the police this last bit about her underwear.

9. The most disturbing aspect of this case is that the complainant stated that when the Appellant held her hand she immediately "went off", suggesting that she became unconscious, and that she was raped while unconscious and realized what had happened only when she regained consciousness. How was this? There was no evidence of the Appellant administering anything to her through the mouth or nose! There was no evidence of any medical condition on her part that would have made her become unconscious in that manner! What happened between these two? It appears to this court that consensual sexual intercourse between the complainant and the Appellant commenced, but then they heard the young girl, PW2, approaching. The Appellant then rushed out while doing up his trouser and with his shirt unbuttoned, meeting PW2 at the door.

10. PW2 then found the complainant on the couch in very compromising circumstances, who then feigned annoyance at the Appellant and an attempt at suicide. This may explain why her mother, father and uncle (to whom she allegedly reported the rape) never testified.

11. Upon my own evaluation of the evidence placed before the trial court, I am not satisfied that the charge of rape was proved against the Appellant to the required standard. The conviction is not safe and cannot be allowed to stand.

12. I will in the circumstances allow this appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 30TH DAY OF JUNE 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 1ST DAY OF JULY 2021