



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.12 OF 2017**

**JOHN MUIRURI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No 620 of 2015 – W J Gichimu, PM***

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

1. The Appellant herein, **JOHN MUIRURI**, was convicted after trial of *rape* contrary to **section 3(1)(a) & (b) and (3)** of the *Sexual Offences Act, No 4 of 2006*. It was alleged that on 28/06/2015 in Laikipia County, he intentionally and unlawfully caused his penis to penetrate the vagina of one CN, aged 57 years, without her consent. On 01/12/2015 he was sentenced to fifteen (15) years imprisonment. He has appealed against both conviction and sentence.

2. In his original petition of appeal the Appellant raised the following complaints –

(i) That the trial court erred in basing his conviction upon the testimony of the complainant, which testimony was “...riddled with contradictions and inconsistencies.”

(ii) That the testimonies of the other prosecution witnesses were not reliable at all.

(iii) That the trial court wrongly rejected the Appellant’s alibi defence.

3. In his written submissions the Appellant raised the following further grounds of appeal –

(iv) That the prosecution failed to call other witnesses who should have been called.

(v) That the charge against him was not proved beyond reasonable doubt.

4. Learned counsel for the Respondent supported the conviction. He submitted that all the ingredients of the offence were proved beyond reasonable doubt.

5. I have read through the record of the trial court in order to evaluate the evidence tendered 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 myself, and I have given due allowance for that fact. I have also given due consideration to the Appellant’s written submissions and learned counsel’s oral ones.

6. Although the attack upon the complainant took place at night, the Appellant was actually caught in the act as he was raping the complainant. He was found on top of the complainant who was lying on her back with her clothes pulled up to her chest and her panties removed and biker torn.

7. The complainant had just been a passenger on the Appellant’s motor bike, and he had diverted into a side road that led to a thicket where he stopped, pulled her from the bike and dragged her to the ground. He then proceeded to partially undress her, tied up her hands and then forcibly penetrated her. Members of the public came upon the scene before he was able to finish.

8. The complainant’s testimony was clear and unambiguous. The Appellant was apprehended at the scene of the crime while on top of the complainant and was made to sit near her as she lay on the ground. He never left the scene before he was arrested. He was arrested by members of the public who also assaulted him, before handing him over to the police who arrived shortly thereafter.

9. There thus cannot be any doubt at all about the identity of the person who raped the complainant.

10. That the complainant was indeed raped also cannot be in doubt. Her testimony was clear and candid about the Appellant inserting his penis into her vagina. Medical evidence indeed established that there was penetration by the lacerations in the vagina and the injuries on the labia minora (the inner lips of the vagina). The Appellant may not have had time to ejaculate into her, but that does not derogate from the fact of penetration.

11. Finally, there clearly was no consent of the complainant for the sexual act perpetrated by the Appellant, who took advantage of an elderly lady who was unfortunately going home at night.

12. The evidence adduced by the prosecution established beyond reasonable doubt the offence of rape charged. The Appellant's defence was clearly an afterthought that did not succeed in raising any reasonable doubt. That defence was properly rejected by the trial court.

13. Upon my own evaluation of the evidence placed before the trial court, I find that the Appellant was convicted upon good and sound evidence; the conviction is safe. There is no merit in the appeal against conviction, and the same is hereby dismissed.

14. As for the sentence, the same was not only lawful, but also richly deserved and probably on the lower side given the circumstances of the offence. I do not find it manifestly harsh or excessive, and I have no reason to interfere with it.

15. In the event the Appellant's appeal is hereby dismissed in its entirety. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 14TH DAY OF OCTOBER 2021**