



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITUI**  
**CRIMINAL APPEAL NO. 29 OF 2018**

**NGONDI VERE MUKALATYO.....APPELLANT**

**- VERSUS -**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appellant Ngondi Vere Mukalatyo was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act Cap. 62A Laws of Kenya.
2. The complainant testified that on 20<sup>th</sup> June 2017 at about 1pm she had visited her child to take lunch at school.
3. On the way back she met the appellant who followed her home jumped over the fence forced her to a chicken enclosure where he attempted to rape her by strangling her, tearing her pant, forcing himself on her by removing his penis and rubbing it against her dress and finally ejaculating on her dress and legs.
4. The appellant denied committing the offence. He tendered unsworn testimony. He claimed he had worked for the complainant as well as the neighbour one Kilonzo. He stated that when he fenced Kilonzo's land as well as the complainant, she accused him of shifting the boundary. The appellant claimed the complainant framed him to avoid paying him and for shifting the boundary.
5. After full trial the appellant was found guilty, convicted and sentenced to serve 20 years' imprisonment.
6. Being unhappy of the decision of the trial court he appeals complaining –
  - (1) **The prosecution's case was not proved as required by law.**
  - (2) **The defence was not considered.**
7. Parties were directed to canvass appeal via submissions.

**APPELLANT'S SUBMISSIONS:**

8. The appellant submitted that the learned trial magistrate erred both in law and facts by convicting him without considering his strong defence which could beat the prosecution's evidence.

9. The trial magistrate never considered that this was a single evidence of the complainant. The complainant PW1 proved very well that she was alone at the scene and although she deceived the court that she screamed and nobody responded, this is not enough.

10. He cited the case of *Maitanyi vs Republic KLR 198* the court stated that:

***“3. the court must remind itself of the danger of relying on the evidence of a single identification witness. It is not enough to or for the court to warn itself after making the decision...it must do so when the evidence is being considered and before decision is made.***

***4. failure to undertake enquiry of careful testing is an error of law, and such evidence cannot safely support a conviction.”***

11. The appellant submitted that there was no prove of penetration. Proof of ejaculation by examining the appellant and the said sperm. He relied on the case of *Demkeri Ramsham Pamoya vs Republic Criminal Appeal No. 106 of 1950 EA* where it was held that:

***“It is difficult to distinguish, the truth from untruth, and to who was telling the truth and untruth in an evidence where the evidence is single.”***

12. It is his submission that his evidence was strong enough to beat the prosecution’s evidence since even the court in denying the same did not value his defence as an afterthought defence but relied on the fact that it was a mere denial of the case without considering the fact that he ejaculated on the clothes of PW1 was not proved.

#### **RESPONDENT’S SUBMISSIONS:**

13. The respondent submitted that **PW1 MK** testified that on 20/6/2017 at about 1pm as she was returning home after visiting her child’s school, she noticed the appellant following her but managed to enter her compound closing the gate behind her.

14. She testified that suddenly she saw the appellant jumping over the fence and caught up with her holding both her hands. That she tried to scream but nobody responded. She testified that the appellant then tried to lift up her dress and in the process tore her underpants, pressing himself on her. In the struggle she said, the appellant soiled her dress with his semen before bolting and escaping. It was her testimony that she had known the appellant since he worked at a nearby school as a casual worker.

15. **PW2 FK** confirmed that on the 20/6/2017 she received a text message from PW1 complaining that someone had tried to rape her. She testified that she saw the complainant’s cloth soiled with spermatozoa and informed the police and the Assistant Chief before she sought the help of Musili Stephen (PW3). She confirmed that indeed it was PW3 who eventually managed to get hold of the appellant. She identified the yellow dress as MFI-2 and the torn underpants as MFI-1. She stated that the appellant never worked for her.

16. **PW3 Musili Stephen** confirmed that he was called by PW2 the mother, informing him of the incident PW1 had encountered. That, acting on the tips given by PW1 and the description managed to spot the appellant at 6pm and upon confronting him, the appellant did not deny having done the act but appealed to have the matter settled amicably by offering to part with Kshs.1,500/-. It was his testimony that he refused and took him to the police.

17. **PW4 Dr. Kiema Mwango** gave the report done by Dr. Abdalla who filled the P3 form confirming that indeed the complainant was treated over the scratch marks on her neck on the 22/6/2017 and also presented him with a white underpant with a yellow soiled dress that had some colourless stains.

18. **PW5 No. 66147 Cpl. Lucy Murira** confirmed that a report was made at the police station on 21/6/2017 at 8am and issued them with the P3 form for onward transmission to the hospital. She

confirmed having received the torn pant belonging to the complainant. She also received the yellow dress with stains and produced them as exhibit 1 and 2 respectively. She confirmed that the appellant was arrested by members of the public.

19. After the conclusion of the case the appellant was found guilty. He was sentenced to serve 20 years' imprisonment.

20. The respondent submitted that the appellant was positively identified and placed at the scene of crime. Further, the respondent submitted that the exhibits tendered in evidence confirmed that the act took place.

21. It is the respondent's submission that the appellant never denied knowledge of the complainant but only stated that he worked for them and that he was framed since they wanted to avoid paying his dues which fact was vehemently refuted by PW1's mother in-law.

22. The respondent submitted that the appellant herein was caught in the very act and fled the scene upon accomplishing his mission.

### **ISSUES, ANALYSIS AND DETERMINATION**

23. After going through the evidence on record and parties submissions, I find the issues are; **whether the ingredients of the offence were proved beyond doubt? Whether the appellant was identified as the culprit? and whether the appellant defence was considered?**

24. Justice Asike-Makhandi (as he then was) in the case of *Abraham Otieno vs Republic, High Court Criminal Appeal No. 53 of 2009, Kisii* put it more succinctly when he said:-

***“For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such a manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but for one reason or another something happens which compels him to stop, again that would be good evidence of attempted rape.”***

25. The prosecution must prove the offence beyond reasonable doubt. The prosecution must prove the appellant attempted to do an act that would cause the penetration of his genital organ into the genital organ of the complainant.

26. The prosecution's evidence is that the complainant identified the appellant as they met in daytime. The complainant stated that the appellant was well known to her as he fenced a Secondary School nearby.

27. PW2 and PW3 confirmed they knew the appellant did casual work and PW3 confirmed that, that day 20/6/17 they had fenced the Secondary School near PW3's home together. The complainant produced a torn pant and a yellow stained dress which had clear stains as well as dirt stains.

28. PW2 confirmed seeing wet stains on the complainant's legs and clothes. The complainant was examined by Dr. Abdalla and the P3 form and treatment notes produced by PW4 confirmed that indeed the complainant sustained strangulation marks on the neck.

29. The appellant claimed that he was framed. The complainant's evidence is consistent and tangible. Her claim that the appellant rubbed his penis on her clothes until he ejaculated is corroborated by the white clear stains on her yellow dress and the torn pant produced as exhibits.

30. PW2's her mother in-law confirmed that when she saw the complainant a few minutes after the incident she had clear stains on her dress and on the legs on the front and back.

31. I do find that the prosecution's evidence was weighty against the appellant's. The acts described by the complainant proved the appellant had both the intent and he begun to manifest his intent to cause his penis to penetrate the vagina of the complainant by tearing her pant, removing his penis and rubbing himself against the complainant until he ejaculated. There was no evidence that the complainant did frame the accused.

32. Thus the court finds no merit in the appeal and makes the following orders;

*i) The appeal is dismissed, conviction is affirmed and sentence confirmed.*

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**