



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

**CRIMINAL APPEAL NO. 125 OF 2019**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**PETER MWITI GICHURU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, PM dated 23<sup>rd</sup> June 2019 at the Magistrates Court at Tigania in Sexual Offence Case No. 1 of 2019)*

**JUDGMENT**

1. The appellant, **PETER MWITI GICHURU**, was charged and convicted on a count of rape contrary to **section 3(1) (a) and (b) and (3)** of the **Sexual Offences Act, 2006** ('the Act'). The particulars of the offence were that on 2<sup>nd</sup> January 2019 in [particulars withheld] Village in Tigania East District within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of IG without her consent.

2. The appellant was sentenced to serve 20 years' imprisonment. He now appeals against conviction and sentence. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and to come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). In order to deal with the issues raised in the appeal, it is important to outline the evidence presented before the subordinate court.

3. The complainant, IG, PW 1, testified that she was 21 years old and narrated as follows:

*On 2<sup>nd</sup> January 2019, I recall that I was having a shave at a barber shop and when I was through I began walking home at around 7.00pm. Peter began following me from behind and on a path that branched off towards my home Peter grabbed my hand and pulled me into a maize plantation. As I tried to scream, Peter covered my mouth with his palm and threw me to the ground where after he removed my clothes. Peter penetrated my vagina with his penis. When he was through Peter put on his clothes and left. I did not tell anyone what happened because Peter threatened and warned me against revealing the incident. However, the following morning I informed my aunt SK (PW 3) what had happened and it is she who took me to the police station to report the incident. I then went to the hospital for examination and treatment.*

4. The complainant's aunt, PW 3, testified that on 2<sup>nd</sup> January 2019 at about 6.00pm, she was informed by her daughter that PW 1 had gone to have a shave. She went to look for her and found her standing by the road. She returned home and all appeared well. In the morning she observed PW 1's clothes were soiled on the back. She asked her what had transpired and PW 1 narrated her ordeal and took her to the spot where the incident took place. She took PW 1 to the police station and later to the hospital.

5. PW 2 produced the P3 medical form and the Post Rape Care (PRC) form on behalf of the clinical officer who examined PW 1 on 3<sup>rd</sup> January 2019. The clinical officer noted that PW 1's clothes were soiled and she had whitish discharge on her external genitalia. Her hymen was broken with inflammation on the external genitalia. The urinalysis test revealed epithelial cells. He confirmed that there was penetration.

6. The investigating officer, PW 4, recalled that on 3<sup>rd</sup> January 2019, PW 3 came to the police station with PW 1 to report the incident of rape. He testified that PW 1 was mentally challenged. He referred the complainant to the hospital and proceeded to record statements. He also took possession of the complainant's blouse and skirt which had vegetation stains on the back.

7. The appellant denied the offence when put on his defence. In his unsworn statement, he stated he was arrested by the chief as a result of differences with PW 3 over money that his father gave her.

8. The appellant contests the conviction primarily on the ground that the prosecution failed to prove its case and that the evidence was contradictory and inconsistent and that he was not identified as the assailant. He also contended that the prosecution failed to call a vital

witness. He also claimed that the investigation was shoddy and the medical report did not link him to the offence. The respondent supports the conviction on the ground that the prosecution proved all the ingredients of the offence of rape.

9. The ingredients of rape which the prosecution must prove are set out in **section 3(1)** of the **Sexual Offences Act, 2006**;

*A person commits the offence termed rape if –*

*(a) He or she intentionally or unlawfully commits an act which causes penetration with his or her genital organs.*

*(b) The other person does not consent to the penetration; or*

*(c) The consent is obtained by force or by means of threats or intimidation of any kind.*

10. From the evidence I have outlined, I find that the prosecution proved the essential elements of rape. PW 1 narrated how the appellant attacked her. Her testimony was corroborated by the fact that her clothes which were produced in evidence were soiled at the back. Further, she informed PW 3 of her ordeal at the earliest opportunity. All this points to the fact that the act of penetration was not with the consent of PW 1.

11. The appellant complained that the medical evidence did not implicate him and it was necessary for a DNA test to be done. As the Court of Appeal noted in **Geoffrey Kioji v Republic NYR Crim. App. No. 270 of 2010 (UR)**;

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to **section 124 of the Evidence Act, Cap 80 Laws of Kenya**, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

12. As to whether the appellant was the assailant, the evidence is that the incident took place early in the evening and the appellant was a person well known to her, a fact the appellant admitted in evidence. The appellant's defence that he was framed was not tenable and was an afterthought, as the matter was not put to PW 3 in cross-examination.

13. The appellant complained that the local chief to whom the incident was reported, was not called as a witness. The law is that the prosecution need not call all witnesses to prove a fact but where a witness is necessary, the failure to call a witness may lead to the court making an adverse inference (see **Bukenya v Uganda [1972] EA 562**). In this case, the chief was informed of the incident after PW 2 and he would add nothing to the prosecution case.

14. From the totality of the evidence, I find that the prosecution proved all the elements of the offence of rape.

15. The mandatory minimum sentence for the offence of rape under **section 3(3)** of the **Sexual Offences Act** is not less than 10 years which may be enhanced to life imprisonment. It is now clear that mandatory minimum sentences are unconstitutional following the decision of the Supreme Court in **Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR** and subsequent decisions of the Court of Appeal in among other cases **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR**.

16. Having considered the circumstances of the case, I allow the appeal to the extent only that I set aside the sentence of 20 years' imprisonment and reduce the same to 10 years' imprisonment.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at MERU this 8<sup>th</sup> day of JUNE 2020.**

**A. MABEYA**

**JUDGE**

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.