



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA. NO. 47 OF 2018

PETER MUTUKU MUNG'ATU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged with offence of Rape contrary to Section 3(1) (a) (b) (3) of the Sexual Offence Act No. 3 of 2006.
2. Particulars being that on the 4th day of October, 2016 at Kaiti village, Kitaingo Sub-location, Kitaingo location within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of J M J without her consent.
3. He pleaded not guilty and matter went to full trial.
4. The Appellant was found guilty and sentenced to serve ten (10) years imprisonment.
5. Being aggrieved by the said verdict, the Appellant lodged instant appeal and set out the following grounds:-
 - 1) ***That*** he pleaded not guilty to the charges.
 - 2) ***That*** the corroboration of evidence as was held by the trial court was not met.
 - 3) ***That*** the trial court failed to give his defense adequate consideration.
 - 4) ***That*** the prosecution case was riddled with lots of malice, contradictions and inconsistency that could have been looked upon before arising the decision to convict.
 - 5) ***That*** the learned magistrate failed to observe, analyze and evaluate the entire evidence and find that there was no evidence to convict.
6. The parties agreed to canvass appeal via Submissions but only Appellant who filed, but Respondent did not comply.
7. The State Counsel Ms. Owenga relied on evidence on record.

APPELLANT SUBMISSIONS

8. The submissions are in form of mitigations not the challenge of the conviction. He submits that he is remorseful for offence he was accused of committing.
9. He was a first offender. He says he has fatherly responsibility to provide for his children being a single parent.
10. He says he is a resourceful person as he has been rehabilitated. He seeks court to reduce sentence or order a non-custodial sentence.

ISSUES, ANALYSIS AND DETERMINATION

11. Rape is defined under Section 3 of Sexual Offence Act. Which states:-

(1) A person commits the offence termed rape if:-

- a) He or she intentionally and 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.**

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in Section 43 of this Act.

(3) A person guilty of an offence under this Section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

12. In the case of **David Mwangi Njoroge –Vs- Republic (2015) eKLR**. The court held that, for the offence of rape to be established the following elements must be demonstrated:-

ü The intentional and unlawful penetration of the genital organ of a person by another.

ü The absence of consent.

ü Where consent is obtained by force or by means of threat or by intimidation of any kind.

13. The Trial Magistrate after analysis and evaluation of evidence on record did not have any doubt that the accused had a sexual intercourse with the Complainant.

14. The Complainant stated that the intercourse was forced upon her after the accused wrestled her down and then she was injured on the hand and the elbow due to the fall in the struggle.

15. She called the evidence of the doctor who produced the medical treatment card.

16. The treatment card showed that the Complainant reported the matter and stated that she was assaulted on the 4th October, 2016 by a person known to her and was injured on the hand and the elbow.

17. The examination on the 4th October showed that the Complainant had a cut wound on the right hand and also on the left elbow posteriorly.

18. On the 11th October, the card shows she went for checkup was found to be stressed and also the

doctor observed that she could be suffering from post-traumatic stress disorder PTSD.

19. This piece of evidence corroborated the Complainant's evidence that she did not consent to the sex with the accused person.

20. The Trial Court had the opportunity to observe the demeanor of both the accused and the complainant.

21. The Trial Magistrate also observed that the accused never wanted this matter to proceed in the first place and feigned illness when the examination in chief of the Complainant was taken and then had nothing to ask.

22. When she was stood down and the accused taken to hospital he still could not ask questions as he also feigned illness and this caused the court to rule that he was not ready to cross examine and accused was deemed to have waived his right to cross examination.

23. Secondly, the accused had told court that the offence occurred on 6th October, 2016 and then changed the narrative on defense to Ben 10th October, 2016 both dates were found by Trial Court impossible.

24. The Appellant submissions during hearing of the appeal are mere mitigations and abandoned the contest on the conviction.

25. He says that he was a first offender. He says he has fatherly responsibility to provide for his children being a single parent.

26. He says he is a resourceful person as he has been rehabilitated.

27. He seeks court to reduce sentence or order a non-custodial sentence.

28. The provisions under which the Appellant was charged provide that;

A person guilty of an offence under this Section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

29. The 10 years sentence is the minimum and this court has no power to reduce the sentence meted out to the Appellant.

30. Thus the court makes the following orders ;

- ***Appeal is dismissed, the conviction is upheld and the sentence confirmed.***

SIGNED, DATED AND DELIVERED THIS 19TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE