



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 99 OF 2012**

**(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court in criminal case NO. 3387 of 2010 delivered on 19/9/2012 by J.M. Nang'ea Senior Principal Magistrate)**

**SIMON NG'ANG'A MUREITHI ALIAS SAMMY....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

1. The appellant was charged with the offence of Rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 19<sup>th</sup> day of April 2011 in Trans Nzoia County intentionally and unlawfully caused his penis to penetrate the vagina of C.C. without her consent.
2. The second count was grievous harm contrary to Section 234 of the Penal Code. The particulars were that on the 19<sup>th</sup> day of April 2011 in Trans Nzoia County unlawfully did grievous harm to CC.
3. He was convicted and sentenced to 10 years imprisonment hence this suit. He has filed this appeal citing several grounds and before looking at the same together with his written submissions it shall be worthwhile to examine the evidence as presented during trial.
4. **PW1 the complainant** testified that she was asleep in her house on 19/4/2010 at around 4.00 am when someone forcefully gained entry into her house. She woke up and in the state of confusion saw the torch and someone demanding that she was going to have sex with her. He then strangled her and all her attempts to free herself were curtailed. She felt a knife in his pocket. She managed to free herself and she ran out screaming and calling her mother who lived nearby to come to her aid.
5. The assailant pursued her till outside and still continued to attempt to rape her. He was wearing an inner wear. Her mother met them on the way but she was helpless to help her. She however rushed to get assistance from a police reservist.
6. Meanwhile the complainant as well as the appellant went back to the house where he proceeded to rape her. The door was locked from inside and her mother together with the Kenya Police Reservist knocked the door opened and she succeeded in getting out. The appellant was locked inside the house but when her child cried her mother PW2 opened the door which enabled the appellant to rush out and disappeared into the darkness.
7. The following day she reported the matter at Kesogon police station where she was issued with a P3 form which was later filled at Kitale District hospital. She was treated at the said hospital as well.
8. The appellant then disappeared and was arrested several months later. The complainant stated that she was able to identify the appellant through his voice and when they were struggling all through and his general appearance. He was her neighbour.
9. **PW2 DC** the complainant's mother testified that she was asleep at around 10.00 pm when she heard the screams from PW1 saying that someone wants to kill her. She rushed and on the way met the two and with the help of her torch, she saw the appellant on top of the complainant. She said that she had his underwear minus his trouser. Her attempt to stop him assaulting the complainant were futile and he sought assistance from Kenya Police Reservist.
10. When she came with the Kenya Police Reservist the two were already in PW1's house and the Kenya Police Reservist knocked the door. She saw the complainant whose blouse was full of blood. The appellant escaped when she went to open the door as the complainant's child was crying. Earlier on the Kenya Police Reservist had locked the door when the complainant managed to escape.
11. The witness testified that she identified the appellant from the light from her touch as well as the fact that he was a neighbour.

12. **PW3 Barchebo Francis** the Clinical Officer from Kitale District hospital filled the P3 form which showed that the complainant had suffered multiple injuries including cut wounds across the chin, swollen eye and inflamed eye ball. There was also inflammation of the vaginal wall. One Linus Ligare confirmed that she had been raped.

13. **PW4 Stephen Sakwa Salim** a police reservist testified of how at around 10.30 pm on 19/4/2010 PW2 came to his place and sought assistance concerning her daughter who was being assaulted. They went to the house where they could hear someone weeping inside. He called but nobody responded. He then kicked the door and the same gave way. PW2 flashed her torch and he recognised the appellant whom he called Mureithi's son. The complainant came out and had been injured on her face which was bleeding. The appellant however managed to escape. Later he heard that the suspect had been arrested and he recorded his statement.

14. **PW5 CPL Stephen Were** from Kapsara police station carried out the investigation after the complainant came to the station. He said that he issued her with P3 form which was filled. The appellant then disappeared and was arrested in Kiambu after the police had circulated his name.

15. When put on his defence the appellant gave unsworn evidence denying the charge. He only described how he was arrested by 2 AP officers from his home at Sinyerere on 17/12/2010 and taken to Kesogon police station and later Kitale Police station.

#### **Analysis and Determination**

16. The issues raised in the appellant's grounds of appeal are general in nature and basically attacks the entire prosecution evidence as being inconsistent with the evidence as presented.

17. Having read the evidence on record as well as the appellant's submissions I do not hesitate to conclude that the appellant contrary to the submissions on record participated in the offence. I do not see any reason to find that PW1, PW2 and PW4 failed to recognise the assailant. They all agree that they had torches and that the appellant was a neighbour. Infact the complainant stated that she could identify the appellant through his voice. The appellant did not suggest that he was never a neighbour to the witnesses.

18. Secondly, the injuries sustained by the complainant as per her evidence as well as the P3 form produced corroborated the fact that the complainant was raped. What else would the appellant been doing with the complainant from her house, right to the bushes outside and back to the house. PW2 stated that the appellant was minus his trouser.

19. As to whether force was used in my view is not indoubt. The injuries sustained by PW1 were consistent with what she told the court and what the P3 form indicated.

20. In my view there was non consensual sex which in this case was rape.

21. The defence offered by the appellant was spurious and did not test in any way the credibility of the prosecution evidence. More importantly he did not attempt even to explain his disappearance till his arrest in Kiambu.

22. For the above reasons this appeal is dismissed.

23. I notice that the appellant was sentenced on 19/9/2012 for 10 years. He had been in custody since 20/12/2010 which is an aggregate of about 9 years or thereabouts. I belief that he has learned his lesson.

24. For the foregoing reason I order that the appellant be set free unless lawfully held.

**Delivered, signed and dated this 10<sup>th</sup> day of May 2018 at Kitale.**

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**H.K. CHEMITEI**

**JUDGE**

**10/5/18**

**In the presence of:**

**M/S Kakoi for the Respondent**

**Appellant – present**

**Court Assistant – Kirong**

**Judgment read in open court.**