



**REPUBLIC OF KENYA**

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

**HCCR. MISC. APPL. NO. 242 OF 2017**

**BRIAN MWENDWA MUSEMBI.....RESPONDENT**

**-VERSUS-**

**REPUBLIC.....APPELLANT**

**JUDGEMENT**

**INTRODUCTION**

1. The Appellant was charged with two counts:-

**COUNT I: RAPE CONTRARY TO SECTION 3 (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

2. Particulars of the offence being that on 1<sup>st</sup> November 2014, at [particulars withheld] Township in Nzau district of Makueni County, intentionally and unlawfully caused his male genital organ namely penis to penetrate in the female genital organ namely vagina of D N M aged 27 years old.

3. Alternative Charge was COMMITTING AN INDECENT ACT CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCE ACT NO. 3 OF 2006.

4. On the night of 1<sup>st</sup> November 2014, at [particulars withheld] Township in Nzau District of Makueni County willfully and unlawfully touched the vagina of D N M using his penis.

**5. COUNT II: ROBBERY CONTRARY TO SECTION 296 (1) OF THE PENAL CODE.**

6. Particulars being that on the 1<sup>st</sup> November 2014, at [particulars withheld] Township in Nzau District of Makueni County robbed D N M of Kshs.370/= and Itel mobile phone valued at Kshs.3400/= and immediately before or immediately after the time of such robbery used actual violence to the said D N.

7. He pleaded not guilty to the charge and matter went into full trial and he was convicted with offence of robbery Contrary to Section 296 (1) of the Penal Code and was sentenced to serve three years imprisonment.

8. Being aggrieved by the above verdict he appealed and set out grounds of appeal titled as “**mitigation grounds of appeal**” filed on 02/08/2017.

1. **That** he pleaded not guilty to the charges.

2. **That** he is just a first offender who has never been caught in the wrong side of the law before hence prays for leniency.

3. **That** after a deep soul searching, he is remorseful, repentant and regret his act.

4. **That** he is now fully rehabilitated and has learned his lesson, the value to hard work, honesty and integrity in one’s life.

5. **That** he undertake to eschew criminal act in future.

6. **That**he implore the Hon. Court to review the sentence under the powers conferred to it under Article 165 (7) of the Constitution of the republic of Kenya -2010. Hence reduce the sentence if it may deem fit.

7. **That** he is ready to comply with any measures the Hon. court may deem fit in his circumstance.

9. In the above grounds, he only sought the court to reduce the sentence.

10. During the hearing, he lodged another set of mitigation grounds of appeal in which he introduced a new ground to wit. He was not informed of fundamental rights as provided by Article 50 (2) (g) Constitution of Kenya.

11. He did not tender any submissions.

12. The Prosecution/Respondent urged court to dismiss the appeal as the sentence was lawful.

13. The duty of the first Appellate Court is to evaluate the evidence and arrive at its own conclusion.

14. The prosecution case was founded on the testimony of two witnesses.

15. PW1 (**D N M**) is the complainant. She testified that on 01/11/2014 at about 9.42 p.m., she came from work and went to buy kerosene at nearby shops. On the way, the complainant met the accused who started to touch her. The accused took her mobile phone from the pocket of the complainant's clothes and Kshs.370/= from the Complainant's hands. The complainant was holding the money with her hands as she was going to buy kerosene.

16. The accused also put his hand into the complainant's biker, pushed her by her head, bent her over, laid on her, lifted her skirt and raped her. The complainant struggled but the accused overpowered her.

17. After raping the complainant, the accused took her lesso, used it to wipe himself and left with the lesso. The complainant reported the matter to Emali police station on the same night and was referred to hospital. She went to hospital and was treated. She was issued with a P3 form which was filed on 03/11/2014 at Sultan Hamud Sub-county Hospital.

18. PW1 further stated in evidence that sometimes later she heard noise near her house, went to check and found that it is the same person who had raped her earlier who had been caught for stealing.

19. The complainant identified the person who had been caught stealing as the same person who raped her earlier.

20. PW2 (**Doctor Charles Mwendwa Mutisya**) examined the complainant and filed her P3 form on 03/11/2014 at Sultan Hamud Sub-County Hospital. The complainant alleged to have been raped by someone known to her. She had bruise on her right leg. The hymen was broken but the labia major and minora were normal. There was no presence of blood or discharge in the complainant's genitalia. The doctor formed the opinion that it was difficult to ascertain if the complainant had been raped or not or if she had been involved in consensual sex.

21. PW2 produced the P3 form as an exhibit (P.exh 1). In page 3 of the P3 form it is stated that the labia majora, minora was normal, the vagina walls were normal, hymen broken. There was no blood and no discharge from the genitalia. The doctor concluded that it is hard to conclude whether forcefully penetration occurred.

22. In page 2 of the P3 form, the doctor indicated that there was a bruise on the complainant's leg and the probable type of weapon causing that injury was a blunt object. The degree of injury was harm.

23. On close of prosecution case the Appellant was put on his defense and he gave unsworn statement and did not call any witness. He stated that on 10/11/2014 as he (accused) was going to work in a construction site he met with a person who was wearing the accused's jacket which had been stolen. The accused demanded to know from that person where he had got the jacket from.

24. The accused told the person to accompany him to Emali police station to explain how he got the jacket. They went to Emali police station shouting and were locked up in cells. The other person was released on the same date (i.e. 10/11/2014 at about 4.00 p.m. The accused remained in cells from 10/11/2014 up to 18/11/2014 when he was charged in court. The accused stated that he did not commit the offence and urged the court to acquit him.

25. After going through the evidence on record, I find the issue are:-

- ***Whether the offence of robbery contrary to Section 296 (1) penal code was proved beyond reasonable doubt.***

- ***Whether the Appellant was awarded fair trial?***

- ***Was sentence excessive?***

26. The court will start by rehearsing the PW1 evidence as recorded in **proceedings page 10-11.**

***"I recall 01/11/2014, at 9.42 p.m., I left work and got home and found my children and I learnt that there was no paraffin and I went back to buy at a petrol station near where I work. I however did not reach as I met Brian Mwendwa and he began to get hold of me. He found I did not have money as I was holding the money.***

*He then went into my pocket and took my phone sand took also the money I had it was Kshs.370/=. He then put his hand into my biker and then pushed me by the head and bend me over. I was wearing a skirt and a biker and he lifted my skirt and within no time I left him rape me as I had struggled with him to no avail.*

*He raped me and finished. He then took my lessso and used it to wipe himself and left with the lessso. I then went and reported at Emali police station. I went to hospital and I was examined.*

*Sometimes later I heard noises near out house and I went to check and found the accused again had been caught for stealing and I identified him as the person who had raped me. I was issued with a P3 form. It is before the court today. P3 form hereby marked as MFI – 1.*

*I never recovered my phone and money. I did not know Brian before by name but I used to see him.”*

#### **CROSS-EXAMINATION BY THE ACCUSED IN KISWAHILI**

*“I met with you and you began to touch me. You pushed me over and bend me over. I have not lied to the court. You held me and I struggled and became helpless such that I could not scream.”*

*“You at first took my phone then money and then raped me. I did not report to a shopkeeper, I went to the police station straight. I asked around to find out who you are. I knew you used to plait hair and I asked people based on that.*

*I did not ask “Mugoka” people if they had seen someone passing by. Many people pass there. After you let go off me I screamed and people came. I walked to the station slowly. I was normal and I saw you.”*

27. The PW1 was the only witness in the case of the robbery.
28. The people who allegedly appeared after she screamed were not called not even a single one to indicate whether she named the assailant.
29. The investigation officer, arresting officer or even an officer who received report was not called to confirm how the report was made and whether she knew the Appellant.
30. The offence is alleged to have occurred at 9.42 p.m. at night and no evidence of any kind of light has been adduced.
31. She did not know accused by name but alleges to have found accused arrested for offence of stealing elsewhere and identified him.
32. The instant matter as reflected by the record was poorly conducted to the extent that it cannot meet the threshold of a fair trial as set out in the Constitution. First no evidence statements of witness was supplied to accused at any time. No parade was conducted for suspect to be identified.
33. No officer testified as to why the Appellant was arrested and to confirm whether any report was made.
34. The P3 produced by PW2 says the report was made on 02/11/2014 at 3.00 p.m. offence is stated to have occurred on 02/11/2014 at 21:30 hours.
35. The allegation noted was “rape”. She alleged to have been sexually assaulted.
36. P3 was filed on 03/11/2014 and talked of injuries of two days. No treatment note was produced nor did PW1 state that she was treated.
37. Just like the rape charge collapsed, the robbery charge was doomed to fail.
38. The entire trial was a fuss and ought to have failed.
39. In sum the court finds that **the appeal succeeds, conviction is quashed and sentence set aside.**
40. **The Appellant shall be set at liberty unless otherwise lawfully held.**

**DATED, DELIVERED, SIGNED THIS 8<sup>TH</sup> DAY OF OCTOBER, 2018, IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**