



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**

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

**CRIMINAL APPEAL NO. 2 OF 2018**

**BETWEEN**

**JOSEPH OMUNGA MIRUKA.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. S. Kahara, RM dated 8<sup>th</sup> January 2018 at the Principal Magistrate's Court at Keroka in Criminal Case No. 916 of 2016)*

**JUDGMENT**

1. The appellant, **JOSEPH OMUNGA MIRUKA**, was charged, convicted and sentenced to 10 years' imprisonment for the offence of rape contrary to **section 3(a), (b) and (c) and sub-section 3** of the *Sexual Offences Act*, ("the *SOA*"). The particulars were that on 31<sup>st</sup> July 2016 at [particulars withheld] Village in Masaba North District within Nyamira County, the appellant did intentionally and unlawfully cause his penis to penetrate the vagina of MBO by use of threats.

2. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify. In doing so, I shall outline the evidence before the trial court.

3. The prosecution was that on 31<sup>st</sup> July 2016 at about 5.00pm, the complainant, PW 2 and her boyfriend, PW 4, were on the way to visit PW 2's friend. When they reached the local church, the appellant came wielding a panga and started chasing them. They both ran in different directions. PW 2 recalled that when she fell, the appellant caught up with her, dragged her to a maize plantation and slapped her on the face causing her to lose consciousness. She further recalled that when she regained consciousness, she found her skirt and panty torn. She went home and told her mother, PW 3.

4. PW 3 recalled that the on the material evening she tried to call PW 2 but she was not respondent, PW 2 came home at about 8.00pm with torn and muddy clothes. She told her that she had been raped by a certain man. PW 3 took her to hospital and reported the incident to the police. PW 2 also told her that she knew who had raped her. They went to the farm where the incident had taken place. PW 4 told the court that after the separated, he went home. PW 2 called him and told him she had been raped by the appellant.

5. A clinician at Nyamira Teaching and Referral Hospital, PW 1, testified that he filled the P3 form after examining PW 2 on 2<sup>nd</sup> August 2016. He confirmed that PW 1 had been treated at Masaba District Hospital. The key observation was that she had tenderness on the lumbar region and the hymen was broken. The laboratory tests revealed pus and epithelial cells. PW 1 opined that she had been raped.

6. In his defence, the appellant, in his unsworn statement, denied the offence, he told the court that on the material time, he was from work at 6.00pm. He went home to eat and then proceeded to work in a farm as a watchman whereupon he was arrested and taken to the police station.

7. Based on this evidence the trial magistrate was satisfied that the appellant had committed the act of rape. Under **section 3(1)** of the *Act*, the offence of rape is established if:

1. The accused intentionally and unlawfully commits an act which causes penetration of the victim's genital organs,
2. The other person does not consent or,

3. The consent is obtained by force or by means of threats or intimidation of any kind.

8. Having evaluated the evidence, I am satisfied that the prosecution established that PW 2 was raped. PW 2's narration of her ordeal leaves no doubt that she was raped. Her mother, PW 3, saw her in a state of distress. Her clothes were torn and she took her hospital. PW 1 also confirmed that she had been subjected to penetration of her vagina. That she was dragged into a maize plantation with threats and infliction of violence leaves no doubt that PW 2 did not give consent to an act of penetration.

9. The key issue in this case is whether the appellant is the person who committed the felonious act. The incident took place at 5.00pm and the assailant was seen by both PW 2 and PW 4. The trial magistrate concluded that the identification of the appellant was not in doubt. The circumstances of identification are important in any case and the trial court must examine the facts carefully in order to avoid a case of mistaken identity.

10. In this case, the suggestion by the prosecution witnesses was that the assailant was a known person. PW 2 referred to him as the accused. She did not state his name or explain how she knew him, if he indeed was familiar to her. PW 4, who was with her when they were chased, identified him as Joseph Amunga but did not state how he knew him. The testimony of PW 3 was that PW 2 told her that she had been raped by, "a certain man." She also added that since PW 2 knew where she was raped, "we went to the home of RM but in the farm. PW 2 identified the appellant as the one who raped her by face." It is noteworthy that PW 3 did not state whether she herself knew the appellant or not from past antecedents or interactions.

11. It is apparent therefore that this was not a case of identification of a stranger but recognition of a person well known to PW 2 and PW 4. It has been held that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger but even in such cases honest mistakes may be made (see *Anjononi & Others v Republic [1980] KLR 59*). But even in a case of recognition, the prosecution must lead evidence to provide a basis for finding that the assailant was recognised as recognition depends on personal knowledge of the assailant in some form or other. In this case there was no evidence of past interaction or knowledge of the appellant by the witnesses hence the court cannot infer that he was a person known to them.

12. It is for the aforesaid reason, that the issue of failure to call the investigating officer becomes acute. He would, for example have given the circumstances under which the appellant was arrested which would shed light or buttress the issue of identification. The owner or proprietor of the farm where the appellant was identified was also not called.

13. The trial magistrate did not test the evidence of identification and for the reasons I have set out, I find and hold that the appellant's conviction was not safe. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KISII on this 12<sup>th</sup> day of NOVEMBER 2018**

**D.S MAJANJA**

**JUDGE**

Mr Obure, Advocates for the Appellant.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.