



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CRIMINAL APPEAL NO 103 OF 2014**

**BERNARD CHARLES.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from Judgment of the Principal Magistrate Court at Makindu*

*Criminal Case No 937 of 2013 by E.M. Muiro Resident Magistrate*

*on 12<sup>th</sup> March, 2014)*

**JUDGMENT OF THE COURT**

1. The appeal arose from the judgment delivered on the 12<sup>th</sup> March, 2014 by the Resident Magistrate Hon. E.M. Muiro at Makindu Law Courts. The accused was charged with the offence of rape contrary to **section 3(1)(a)(b) as read with section 3(3) of the Sexual Offences Act No. 3 of 2006** and with an alternative offence of **Indecent Act** with an adult contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**. He was found guilty, convicted and sentenced to serve ten (10) years imprisonment.

2. Not being satisfied with the conviction and sentence, the appellant filed this Appeal raising the following grounds of appeal:

a. That the learned trial magistrate made an error in both law and facts and misdirected himself by holding that the case for the prosecution was proved beyond reasonable doubt whereas medical evidence brought forward by the prosecution created a reasonable doubt, which was fatal to the prosecution case.

b. That the judgment of the trial magistrate was un-satisfactory due to the omission to consider the medical status on HIV testing to both parties and any link possible.

c. That the provisions of **Section 124 of the Evidence Act** was not applicable in a situation where, there was an omission to consider the medical status of HIV testing on both parties and in a situation where a reasonable doubt is created by the evidence brought forward by the prosecution.

3. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

4. The appeal is opposed by the State through the submissions filed herein on **12<sup>th</sup> July, 2015**. The

prosecution's case is that the trial court did not error in convicting and sentencing the appellant. The prosecution submitted that the case was proved beyond any reasonable doubt and that the appellant must fail.

5. It is the duty of this court as the first appellate court to re-evaluate and to re-examine the evidence tendered at trial, and so that this court may reach its own conclusion on the matter. To this end this court will critically look at the evidence tendered at the trial court.

6. In proving his case the trial prosecutor called a total of four (4) witnesses and when the appellant was put on his defence he gave unsworn evidence and did not call any witness.

#### **7. Summary of the prosecution evidence**

PW-1 testified that on 4<sup>th</sup> August, 2013 around 3.00p.m while at her sister's house the appellant who was their employee and a person well known to her got hold of her by force and raped her for about 30 minutes while inside the bedroom. After the incident the appellant reported the matter at Masonaleni Police Station leading to the arrest of the appellant. The complainant were taken to hospital for examination and treatment, where she was examined by PW-4 who testified that on genital examination PW1 felt pain on her genitalia and on urine examination she had an infection and she tested positive on HIV thus witness concluded the PW-1 had been raped.

8. PW-2 a police officer confirmed that he is the one who arrested the appellant after a complainant had been lodge at the police station, and on the next day she escorted the appellant and complainant to hospital.

9. PW-3 investigates the case and record the complainant statement.

#### **10. Appellants defence**

In his defence the appellant opted to give unsworn evidence where he denied committing the offence and stated that he never knew why he was arrested. The respondent opposes the appeal and submit as hereinafter.

#### **Submissions**

11. Parties filed submissions which I have considered. The only issue I raise for determination is whether the case was proved beyond any reasonable doubt?

12. According to the evidence on record the offence occurred during the day when there was sufficient light hence the complainant was able to see the appellant who had sex with her without her consent, and he was a person who was well known to her, thus this is a case of recognition as opposed to that of identification of a stranger. For the offence of rape to be established the following elements must be demonstrated; intentional and unlawful penetration of the genital organ of a person by another and that such penetration was done in absence of consent. From the evidence on record it is apparent that the appellant forced the complainant into unlawful sex by strangling her on the neck.

13. On the question of penetration, PW-4 the medical officer, who examined the complainant formed an opinion that the complainant had been defiled after examining her genitals.

According to **section 124** of the **Evidence Act** the proviso reads:-

***“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”.***

14. The trial court warned itself on the dangers of convicting the appellant on uncorroborated evidence, and it further proceeded to give reasons to wit that the complainant evidence was consistent. (*Refer to page 5 of the trial court judgment*).

15. This court finds that the medical evidence on record is sufficient and it supports the prosecution's case since it was proved that the complainant had pain in her genitals which the doctor ascertained were as a result of rape. The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.

16. Having carefully considered the appeal herein and evidence together with submissions, it is the finding of this court that the appeal lacks merit. The appeal is dismissed. The conviction and sentence by the trial court is upheld.

**That** is the judgment of the court.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF MARCH, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Benard Charles – Applicant

Saoli – for State

Court Assistant - Muoti