



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCRA NO 4 OF 2015
(FORMERLY MERU HCCRA NO. 30 OF 2015)

SAMUEL MWITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of L. N. MESA – Ag PM made on 5th February, 2015 in Marimanti Principal Magistrate’s Criminal Case No.274 of 2013).

JUDGMENT

1. On 12th June, 2013, Samuel Mwiti Muturi, the Appellant herein was arraigned before the Principal Magistrate’s Court, Marimanti with the offence of rape contrary to section 3 (1) (a) of the sexual offences Act No. 3 of 2006. It was alleged that on 9th June, 2013 at *[particulars withheld]* village, Kanjoro Location, Tharaka North district within Tharaka Nithi County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of C M without her consent. The Appellant also faced an alternative charge of indecent act contrary to section 6 (d) of the sexual offences Act on the allegation of committing an indecent act with the same woman. The Appellant denied the charge, was tried and convicted of the charge of rape and convicted to serve ten (10) years imprisonment.
2. Aggrieved by the said decision, the Appellant has challenged the same on six grounds which can be summarized into two:-
 - a. **that the medical evidence produced did not prove the offence to the required standards;**
 - b. **that the trial court erred in convicting the Appellant on inconsistent and contradictory evidence.**
3. This being a first appeal it behoves this court to review and re-evaluate the facts afresh in order to draw its own conclusions. See the case of **Ekeno –vs- Republic [1972] EA 352**. However, in doing so, this court must at all times be aware that it did not have the advantage of seeing the witnesses testify.`
4. That prosecution case was that on 9th June, 2013 at about 6pm, the Appellant went to the complainant’s home with a panga. She gave him water to drink which he poured down. The complainant’s husband then called her to Kamacabi market and when she was going there, passing through a bush, the Appellant attacked her, and demanded for money. He then wrestled her to the ground and removed her pant. He began having sex with her. She screamed and her children

- came. She told one of them to go and call her husband who was in Kamacabi market about 2 kilometres away. Another neighbour (PW3) responded to the screams, came to the scene and attempted to hit the Appellant with a stone. The complainant's husband came and the Appellant ran away when he saw him leaving the panga behind. The complainant and her husband then followed the Appellant to his sister's home and arrested him. The matter was reported to the officers at Kamacabi AP Camp who came and re-arrested the Appellant. The complainant later reported the matter to Makutano Police Station who referred her to Tharaka Nithi district hospital for examination and treatment.
5. PW1, a clinical officer from Tharaka District hospital told the court that the complainant visited the hospital in the morning of 10th June, 2013 with a history of rape. Upon examination, her hymen was found to have been broken and the vaginal walls had abrasions. The conclusion was that there was peno-vaginal penetration. In his defence, the Appellant told the court that on the material day he was at the market between 1pm and 6pm when a police officer came and arrested him on the allegation that he had raped the complainant. According to him, he was charged because of a long protracted land dispute between his family and the complainant's husband.
 6. At the hearing of the Appeal, the Appellant relied on his written submissions. He submitted that there was material contradiction in the testimonies of the complainant, PW3 and PW4. That the evidence of PW1 was not credible; that she alleged that she had sent her child aged seven (7) years to run to Kamacabi 2 kilometres away to go call her husband (PW4). To him, this was improbable. On his part, Mr Ongige Learned counsel for the state conceded the appeal. He submitted that the medical evidence produced did not connect the Appellant to the peno vaginal penetration of the complainant having in mind that the complainant, a married woman slept overnight before being examined. He further submitted that there were glaring contradictions in the evidence of the complainant, PW3 and PW4. That their evidence was improbable in that if PW3 came and found the Appellant about to start having sexual intercourse with the complainant, the Appellant could not have continued to have sex with the complainant until her husband to have come and found him in the act. He urged that the appeal be allowed.
 7. The court has carefully considered the evidence produced before the trial court. The first ground is that the medical evidence did not connect the Appellant to the offence. PW1 the clinical officer from Tharaka Nithi District hospital told the court that the complainant visited the hospital at 9.00am on 10th June, 2013. That on examination, it was confirmed that the complainant had had peno vaginal external penetration without a condom. The question that arises is whether it was the Appellant who had committed that act. It is alleged that the rape occurred on 9th June, 2013 at 6 pm. The complainant reported the incident to Kamacabi A.P Camp on that evening. She did not seek medical attention that day. She went home and spent the night with her husband until the following morning. She was examined at 9.00am the morning after the alleged incident. There was no evidence that the complainant did not spend the night with her husband. It was not alleged that they did not have any sexual contact that night. In any event, the P3 form PExh 1 which was filled approximately 15 hours after the alleged act confirmed the approximate age of the injuries to have been days. Further, the stains found on the complainant's pant were not shown to be connected to the Appellant. At the end of the day, can it be said that in the circumstances the medical evidence pointed at the Appellant beyond any reasonable doubt? This court entertains doubts.
 8. The second ground of appeal was that the prosecution evidence was inconsistent, contradictory and improbable. According to the complainant, the people who responded to her screams were her children and PW3. She stated that she told her 10 year old child to go and inform her husband who was about two (2) kilometres away of what had befallen her. That the Appellant released her when he saw her husband. That PW3 tried to scare the Appellant with a stone. On her part PW3 told the court that when she responded to the complainant's screams, she found that the Appellant had removed the complainant's pant and wanted to have sexual intercourse with her. That she hit the Appellant with a torch and the Appellant ran away. That it was about 4 pm and there was no one around. On his part, PW4, the complainant's husband told the court that he was at Kamacabi market when his youngest child came crying. She told him that his wife had been beaten. He

rushed to the scene and found the Appellant lying on top of the complainant. That upon his arrival, the Appellant stood up and run away holding his trouser. That he found several people at the scene including the Appellant's brother.

9. From the evidence of the complainant, PW3 and PW4, various questions arise. If the complainant's children and PW3 responded to the screams, how would a 10 year child run two (2) kilometres to call the father (PW4) for him to come and still find the Appellant still on top of the complainant? If PW 3 responded to the screams, why didn't she find the complainant's children at the scene who were said to have remained behind after the 10 year old was sent to fetch the father? PW3 told the court that when she reached the scene, she found the accused had removed the complainant's pant and wanted to have sexual intercourse with the complainant. PW3 hit the complainant with a torch and he stood and run away. That means that the Appellant had not committed the act. According to her, the incident occurred at 4 pm while the complainant and PW4 testified that the incident occurred at 6 pm. According to PW4, the person who came to call him was his youngest child. His three (3) children were then aged 5 years, 7 years and 10 years, respectively. Is it plausible that a five (5) year old child would run two (2) kilometres to look for a father who would then cover the same distance back and find a rapist still going on with rape in the presence of many people? It should be remembered that PW4 told the court that when he arrived at the scene, he found several people including the Appellant's brother and the Appellant only ran away after seeing him.

10.To this court's mind, the story of rape was completely cooked up and does not add up. The trial court was in very serious error when it relied on such inconsistent, contradictory and improbable evidence to convict the Appellant on such a serious offence of rape. This court finds that the prosecution case was not proved to the standard required in law and Mr Ongige quite rightly conceded the appeal.

11.Accordingly, the Appeal is hereby allowed. The conviction is quashed and the sentence set aside. The Appellant is to be released forthwith unless otherwise lawfully held.

DATED and DELIVERED at Chuka this 12th day of May, 2016

A. MABEYA

JUDGE.

Judgment read and delivered in open court in the presence of all the parties

A.MABEYA

JUDGE

12/5/2016