



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 101 OF 2010

GEORGE KARIMI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by M. WACHIRA Chief Magistrate Embu in Criminal Case No. 1352 of 2010 on 30th June 2010)

J U D G M E N T

GEORGE KARIMI MACHARIA was charged with the offence of **Rape of a person with mental disability** contrary to **Section 7 of the Sexual Offences Act No. 3 of 2006**. The particulars as stated in the charge sheet were as follows:-

On the 28th day of June 2010 in Embu District within the Eastern province, intentionally caused his penis to penetrate the vagina of PWM without her consent within the view of JW a person with mental disabilities.

ALTERNATIVE COUNT

The particulars are:-

Committing an indecent act with an adult contrary to Section 11 (A) of the Sexual offences Act No. 3 of 2006.

On the 28th day of June 2010 in Embu District unlawfully and indecently assaulted PWM by touching her private parts.

The appellant pleaded guilty to the main charge when he first appeared in Court. He was sentenced to 10 years imprisonment. He filed this appeal against the conviction and sentence and cited 3 grounds. However, when the appeal came for hearing he filed amended grounds which he asked the Court to adopt. They are as follows:-

1. *He pleaded guilty to the charges leveled against him of rape of a disability contrary to Section 7 of the Sexual Offences Act 3 of 2006.*
2. *Following that verdict on the trial Magistrate, he net not to hamper with the same but only to seek the mercy of the court to reduce for him the sentence imposed against him at its won convenient one.*

3. *He is a pauper.*
4. *It was his first time to appear in court over any offence (1st offender).*
5. *For now he is reformed and will be a law abiding citizen.*
6. *He is self dependant as a mechanic by profession.*
7. *Since his arrest his family became desperate due to his absence as he was the bread winner to his family.*
8. *His wife passed away early in 2011 and that his children are now taken care of by his grandmother.*
9. *He has fully reformed due to the difficult circumstances of the prison.*
10. *That the honourable court find his arguments valid and meritorious to secure for leniency.*

From his written submissions which have been presented as grounds, the appellant appears to have abandoned his appeal against conviction. All he is asking for is review of the sentence. The appeal was opposed by the State.

The record shows that the appellant appeared before the Chief Magistrate on 30/6/2010 when his plea was taken. The charge was then read and translated to the appellant in kiambu language and he admitted it. The prosecution then narrated the facts. These are the facts that were presented to the Court.

“On the 28/6/2010 at about 2.00 p.m. the complainant, one PW was on her way home for Karorina market and she met accused. Accused then followed her from behind. He started pestering the complainant with view of having sex with her. She refused and went towards home. Before arrival, she entered into a bush to answer a call of nature. She did so and as she dressed, the accused jumped on her knocked her down and raped her. She cried out loudly and she was rescued by among others JW and others. With help of members of public accused was arrested, taken to Itabua police Station where he was charged. Complainant was taken to Embu Provincial General Hospital where she was treated. This is the medical form to show extent of injuries and treatment PEX1. A P3 form was filed. This is it PEX2.

Accused was also treated and this is P3 form PEX3. The petticoat and pants of complainant were recovered at scene. This is petticoat PEX4(a) and pant – PEX4(b).

The appellant was charged with the offence of raping a person with a mental disability. It is nowhere stated in the facts above that the complainant had a mental disability. Facts should always establish the ingredients of any given offence. No certificate was produced to show that the complainant had a mental disability.

My finding therefore is that the ingredient of rape was proved by the facts, but there was no proof that the complainant was incapable of giving consent for the act. It was also nowhere stated in the facts that the appellant pleaded the fact to that the complainant was a person with a mental disability.

I therefore find that the facts did not establish the offence that the appellant was charged with. The plea cannot therefore be said to have been unequivocal.

I allow the appeal and quash the conviction. The sentence is set aside.

The appellant to be released unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13TH DAY OF

FEBRUARY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Ingahizu for State

Appellant

Njue CC