REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL NO. 2 OF 2013

BETWEEN

JOHN MWANIKI MUSUNZA ……. APPELLANT

AND

REPUBLIC …….…….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 484 at Principal Magistrate Court at Siakago, Hon. A.N. Makau, Ag SRM delivered on 14th January 2013)

JUDGMENT

1. The appellant faced three charges as follows;

a. *Rape contrary to section 3(1)(a) and (b) and (3) of the Sexual offences Act (Act No. 3 of 2006). The particulars were that on 26th August 2011 at* ***[Particulars Withheld]*** *of Mbeere North County, he intentionally and lawfully caused penetration of his penis into the anus of G T N without her consent.*
b. *An alternative charge of committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act. It was alleged that on the same day and time, he intentionally touched the anus of the said G T N with his penis against her will.*
c. *An additional charge of causing actual bodily harm contrary to section 251 of the Penal Code (Chapter 63 of the Laws of Kenya) was also preferred.*

2. The appellant was tried and convicted for the offences of rape and assault and sentenced to serve 10 years and 3 years in prison respectively with both sentences to run concurrently. The appellant now appeals against conviction and sentence.

3. The prosecution called five witnesses to prove the case against the appellant. The complainant, PW 1 testified that on 25th August 2011 at about 9.00 pm she was at her sister's house at ***[Particulars Withheld]*** when one W requested to be escorted to her husband's house to collect her child's clothes. She reluctantly agreed and they proceeded to the house. While there, the appellant came in and Wawira stood up to leave and as PW 1 also stood up, Wawira slapped her and pushed her back to the seat and told her not to pretend because she knew everything. As Wawira was leaving, PW 1 tried to leave with her but the appellant held her, pushed her back into the house and forced her to lie on the seat.

4. PW 1 testified how the appellant threatened to kill her if he tried to go away. She was pushed to his bed while struggling causing her to fall on the ground. She crawled under the bed but he

pulled her out. He put the radio on high volume. The appellant held PW 1 by the neck inserted his hand in her mouth and slapped her. He took a knife and slashed her biker and tore her panties. She kept on struggling. The appellant also hit her with a blow on the mouth and her teeth until she started bleeding. The beating continued all the time. Her attempts to scream were muted when he put a cloth in her mouth. He pushed her on the bed. As she was lying on her stomach, PW 1 stated that he inserted his penis into her anal region. He told her to refund the Kshs.500 he had given Wawira as he did not get satisfied. He threatened to kill her but she pleaded with him. He gave her the torn biker and panties and told her to leave at about 2.00am.

5. PW 1 testified that she had injuries on her left limb joint, right shoulder, neck and teeth. After the ordeal she went straight to her sisters who took her to Kiambere Dam police Station. She states that she gave the Police the pair of panties. The following morning she reported to Kiambere Dam Dispensary where the P3 form was filled.

6. PW 2 recalled that on 26th August 2011 at about 2 am he was at home sleeping. He was awoken by a lady crying and when he went out he found PW 1 who narrated to her how she had been assaulted by the appellant. He stated that she had swollen marks on the face and body. She mentioned the name *Mboi* which he knew was the appellant. He escorted her to Kiambere Police Station and later to the Dispensary. He met the appellant after taking PW 1 to the dispensary. In cross examination, he stated that the appellant gave him Ksh 200/= bus fare to go and look for the complainant's mother to settle the matter amicably.

7. PW 3, the sister to PW 1 confirmed that on the material night, PW 1 had come to stay with her when Wawira came and requested her to go to the appellant's house to pick her child's clothes. PW 1 did not come back until about 1.00 am crying. She narrated the events of that night to her. She proceeded to Kiambere Police Station accompanied by PW 2. She testified that she knew the appellant.

8. PW 4 the clinical officer at Kiambere Dam Dispensary testified that he examined PW 1 referred by Kiambere Dam Police. He examined her on 26th August 2011. According to the P 3 form signed and filled on 30th August 2011, PW 1 sustained the following injuries, bruises on the mouth, bleeding from the lower gum with loose lower incisors, bruises on the back of the neck with tenderness on pain on touch. The thorax and abdomen had bruises on the front part. She also had bruises and swelling on left shoulder and elbow joint. The lower legs had bruises and the right hip joint was swollen and bruised. She was treated with analgesics and antibiotics and put on a PEP. He examined her vagina and noted a swelling on the right labia minora with the upper cervix as normal. There was discharge of blood. On her anal region there were bruises but it was intact with no tears. The surroundings of the arms had bruises but he noted no penetration. The vaginal swab did not show any bacterial infection.

9. PW 5, the investigating officer, confirmed that PW 1 reported a Kiambere Police Station on 26th August 2011 at about 3 am. She stated that she had been raped by *Mboi*. PW 4 testified that in the company of other officers arrested the appellant on 26th August 2011 at Ngiiri Market bus stage.

10. When the appellant was put on his defence, he elected to give sworn testimony. He stated that on 24th August 2011 he was at his grandmother's home in Mwingi attending a family function. He stayed here until the next day. As the function ended at 4 pm, he decided to travel to Kiambere town on 26th August 2011. When he arrived at Kiambere at about 6 pm, he was met by two officers who arrested him. He also stated that he and PW3 were living together as husband and wife and that he had given her some money to start business. He stated that on 14th August 2011, he asked PW 2 to collect the money but he instead became a prosecution witness.

11. The Learned Magistrate analysed the evidence and concluded that the appellant was properly identified as the person who committed the offence against PW 1. He dismissed the appellant's

defence and convicted the appellant.

12. As this is the first appeal, the Court is obliged to conduct an independent review of the evidence and to come to its own conclusion bearing in mind that it did not see or hear the witnesses (***Okeno v Republic*** **[1972] EA 32**). The appellant has challenged the conviction on the several grounds. He submits that he was convicted on inconsistent and uncorroborated evidence. That the person called Wawira was not called as a witness and that the prosecution failed to prove its case beyond reasonable doubt.

13. The State, represented by Ms Ing'ahidzu, opposed the appeal on the ground that there was clear and cogent evidence implicating the appellant. She however conceded that the conviction of rape should be reduced to that of committing an indecent act as the medical evidence was clear that there was no penetration.

14. The principal issue raised by the appellant is that he was not identified. It is true that the offence occurred at night as confirmed by PW 1, PW 2 and PW 3. Although PW 1 did not directly testify to the conditions of the lighting, the evidence leaves no doubt as to the appellant's identity. PW 1 was taken to the appellant's house by Wawira and the three of them interacted before Wawira left. PW 1 was with the appellant from about 9 pm to about 1.00 am which was more than sufficient time for PW 1 to be familiar with the appellant. Furthermore, the issue was not merely one of identification but recognition. Although PW 1 testified that she did not know him by full names, she knew him as *Mboi* since he worked as a conductor at [Particulars Withheld] Ngiiri Market. I am therefore satisfied that on the evidence that appellant was properly identified.

15. The evidence also corroborates PW 1's testimony that she was assaulted sexually. Her testimony of her struggle and injuries was clear and concise. PW 2 and PW 3 who saw her immediately after the assault confirmed the injuries. PW 4 who examined her a day later gave evidence of her injuries which were consistent with the fact of her assault and the injuries described by PW 2 and PW 3. The prosecution evidence pointing to the appellant is strengthened by the fact that PW 1 reported the incident almost immediately to PW 2 and PW 3 and then made a report to Kiambere Police Station.

16. The appellant has complained that Wawira was not called as a witness. Wawira was the woman who lured PW 1 to the appellant's house. Although she was not called as a witness or charged, her evidence was not necessary to establish the offence for which the appellant was charged. The appellant submits that the prosecution did not exhibit the panties that were torn. In fact the evidence does not show that the complaint took the panties to the police or that the police made an effort to secure them as exhibits. In my view, the failure to produce the appellant's clothes in evidence was not fatal to the charge when the evidence is examined as a whole.

17. As regards the appellant's defence, the same was rightly dismissed by the learned magistrate. The clear evidence of the prosecution established the presence of the appellant at the scene of crime and not at any other place.

18. In order to establish the offence of rape, the prosecution must prove the act of penetration with the genital organs. The medical officer, PW 4 testified that upon examination of PW 1's anus, he concluded that there was no penetration but there were bruises but no tear which would be indicative of penetration. I agree with leaned counsel for the State, that in the circumstances, the conviction of rape was not supported by the evidence.

19. However, the evidence of PW 1 narrating the struggle, the injuries she sustained and the fact that the anal area had bruises points to an attempt by the appellant to rape her. In ***Abraham Otieno v Republic*** **Kisii Cr. Appeal No. 53 of 2009 [2011]eKLR,** "*For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks*

and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of actus interveniens, that would be good evidence of attempted rape." The prosecution proved the appellant's intention to have intercourse with PW 1.

20. Under the powers granted to the High Court under **section 354** of the ***Criminal Procedure Code***, I allow the appeal only to the extent that I set aside the conviction for rape and substitute it with a conviction or attempted rape contrary to **section 4** of the ***Sexual Offences Act***.

21. Although the minimum sentence is 5 years, the appellant's act here was accompanied by violence which is confirmed by the injuries sustained by PW 1. I therefore decline to interfere with the sentence of 10 years imprisonment. Save to the extent, the appeal is dismissed.

SIGNED at NAIROBI.

D.S.MAJANJA

JUDGE

DATED and **DELIVERED** at **EMBU** this **9th day of May 2014.**

H. ONG'UDI

JUDGE