



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 91 OF 2010

JAMES MUSYOKI KITHUKU.....APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. F.M. Nyakundi Principal Magistrate delivered on 3/08/2009 in Makueni Principal Magistrate Criminal Case No. 267 of 2009)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **James Musyoki Kithuku** was charged with the offence of **rape** contrary to **section 3 (1) (a)** of the **Sexual Offences Act**.

The particulars of the offence are that on 11th July 2009, at *[particulars withheld]* village, **Mukimwani Sub-location, Kisau Location** in **Mbooni East District** within **Eastern Province**, the Appellant intentionally and unlawfully caused the penetration with his genital organs namely penis to the genital organ of **M N** without her consent.

2. In the alternative the Appellant was charged with the offence of **indecent assault** contrary to **section 11 (6)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the charge were that on the 11th day of July 2009 at *[particulars withheld]* village, **Mukimwani Sub-location, Kisau Location** in **Mbooni East District** within **Eastern Province** unlawfully and indecently assaulted **M N** by touching her private parts.

3. The Appellant was convicted on his own plea of guilt after the charges were read to him and he pleaded guilty. The Appellant was sentenced to 30 years imprisonment.

4. The prosecution read the facts out in court and which the Appellant stated, **“the facts as read to me are correct.”** The facts read out to the court revealed that the complainant, a 75 year old grandmother was pushed down by the Appellant who removed her pants and proceeded to have sexual intercourse with her.

5. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the grounds that he did not understand the language used in court during plea; that the sentence was too harsh since he was a first time offender and that if the case was heard the court would have given him the benefit of doubt.

6. The State opposed the appeal. The learned State Counsel **Ms. Maingi** submitted that the Appellant was asked whether he understood the language of the court which he affirmed and that the plea was unequivocal and the sentence of 30 years was within the law.

7. The legal principles to be applied in plea taking in all Criminal Cases were well enunciated in the case of **Adan vs Republic [1973] EA 445** where the Court held:-

i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

iv. If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

v. If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

8. This procedure was duly followed by the learned trial magistrate in convicting and sentencing the Appellant. The record of the lower court clearly reflects that there was **English/Kikamba** interpretation. The charge was read out and explained to the Appellant in **Kikamba language** and the Appellant replied to the same in **Kikamba language**. The plea was unequivocal.

9. Section 348 of the **Criminal Procedure Code** provides as follows:-

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

However, as stated by the Court of Appeal in **John Muendo Musau –vs- Republic – Nairobi Criminal Appeal 365/11**, an appeal against a conviction based on a plea of guilty is not absolute. The court is not bound to accept the plea of guilty and the conviction as there may be an unusual circumstances such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused in court from the date of arrest.

However, there are no unusual circumstances in the appeal herein. The ground of appeal that if the case had proceeded to a full hearing the Appellant could had been given the benefit of doubt is immaterial.

10. Section 3 (3) of the **Sexual Offence Act** provides for a sentence of not less than ten (10) years but which can be enhanced to imprisonment for life. In my view the sentence of 30 years is excessive. Consequently I substitute the sentence of 30 years imprisonment to 20 years. Orders accordingly.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of June 2014.

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B. THURANIRA JADEN

JUDGE