



No.359/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 132 OF 2013

RICHARD KIMANZI NGULU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Sexual Offence No. 10 of 2013 by

Hon. S.A. Ogot – R.M. on 7/6/2013)

J U D G M E N T

1. The appellant was charged with the offence of **rape** contrary to **Section 3(1)(9) (c)** of the Sexual Offences Act. Particulars being that on the **13th day of March 2013** at about 11.00am, at **[particulars withheld] village, Ikanga location of Mutomo District** within **Kitui County**, intentionally and unlawfully caused his penis to penetrate the vagina of **K M**, by use of force.
2. In the alternative he is charged with **committing an act of indecency** with an adult contrary to **Section 11(6) of the Sexual Offences Act No. 3 of 2006**. Particulars being that on the **13th day of March 2013** at about 11.00am, at **[particulars withheld] village, Ikanga location of Mutomo District** within **Kitui County**, committed an act of indecency with **K M** by touching her private parts namely vagina.
3. He was tried, convicted on the main charge and sentenced to **ten (10) years** imprisonment. Being aggrieved by the conviction and sentence thereof he now appeals on grounds that:
 - i. The charge sheet was defective.
 - ii. Evidence adduced did not support the charge.
 - iii. Accepting evidence adduced by the Clinical Officer was erroneous.
 - iv. The defence put up was disregarded.
4. According to the prosecution's case, PW1, **K M** was sent to collect maize from the appellant's home by PW2 **C K**. She used a donkey as means of transport. After offloading the first load she returned to carry the second load. While picking maize that had been stored in the kitchen the appellant knocked her down, felled her and had carnal knowledge of her. She went home. The following day she notified PW2. She sought treatment. PW3 **Michael Kalunga**, the Clinical Officer who examined her found her having sustained multiple lacerations on the labia minora. She had a foul smelling whitish vaginal discharge. She had gram positive cocci which is a sexual transmitted organism and there was a presence of pus cells. He formed an opinion that there had

- been forcible vaginal penetration. PW4 **No.50928 Corporal Steve Matasyo** arrested him.
5. In his defence the appellant gave a sequence of events that transpired on the **26th March 2013** when he was arrested. He denied having committed the offence.
 6. The trial magistrate evaluated evidence adduced and found that the appellant was positively identified as the person who had raped the complainant.
 7. In his submissions the appellant reiterated what is stated in the grounds of appeal. The learned state counsel, **Ms. Amojong**, opposing the appeal submitted that there was proof that the complaint was raped. The identification of the appellant was positive and the defence put up was wanting. She called upon the court to dismiss the appeal.
 8. This being the first appeal I do remind myself of the need to consider evidence adduced afresh and in the process come up with my own independent findings bearing in mind the fact that I neither heard nor saw witnesses who testified. (See **Okeno versus Republic 1972 EA 32**).
 9. It has been alleged by the appellant that the charge is defective. A defective charge would not disclose essential ingredients of the offence charged. The appellant herein is charged with rape which is a charge known in law. Proper Sections of the law have been cited. The charge as framed is unambiguous. Any person reading it would understand it. The appellant did understand the charge, he pleaded to it and prepared his defence hence the charge was not defective. (See **Fappyton Mutuku Ngui versus Republic 2012 eKL 480**).
 10. Evidence adduced proving the fact that the complainant was known carnally. Medical evidence adduced proved that the penetration in question was forcibly done such that the complainant sustained lacerations. She was even infected. The Clinical Officer who filled the P3 form was qualified and he stated his findings following a physical examination carried out. The learned trial magistrate hence directed herself properly by relying on his evidence in reaching her verdict.
 11. The trial court which had the opportunity of observing the complainant found her evidence sufficient. It found the witness absolutely trustworthy. A re-evaluation of her evidence shows that she had nothing against the appellant that would prompt her to come up with such an allegation. No suggestion was given why she would have come up with such an allegation. I have absolutely no reason to interfere with the findings of the trial magistrate since the evidence adduced did measure the requisite standard of proof.
 12. I therefore uphold the conviction of the trial court and the minimum prescribed sentence imposed. Accordingly the appeal is dismissed.

DATED, SIGNED and DELIVERED at KITUI this 17TH day of JULY, 2014.

L.N. MUTENDE

JUDGE