



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT MOMBASA
CRIMINAL APPEAL NO.36 OF 1997**

BETWEEN

MICHAEL MBINDYO APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from an order of the High Court of Kenya at
Mombasa (Lady Justice Ang'awa) dated 3rd December,
1996,**

in

H.C.CR.A. NO.452 OF 1996

JUDGMENT OF THE COURT

The appellant was convicted by the Principal Magistrate at Malindi of rape and sentenced to 7 years' imprisonment with hard labour and 5 strokes of the cane. The particulars of the charge were that on 7th May, 1996 at or about 8.45 p.m. near [particulars withheld] Hotel, Watamu in Kilifi District of the Coast Province, he had carnal knowledge of F.W.W(1) without her consent.

The evidence which the trial court accepted was that the complainant after having dinner with two friends at a local restaurant was left at a bus stop to catch transport to the place where she lived with her sister F.W(2) (p.W.1). The appellant whom the complainant knew before as a customer in a supermarket where she worked came along in his car and agreed to give her a lift to her house. The complainant got into the car. Instead of taking the complainant to her residence he drove into a bush and then stopped the car. He began making advances to the complainant which she rebuffed. He got out of the vehicle and pulled her out. He held her against the door and pushed her back inside again. He forcefully laid her on the back seat, removed her trouser and knickers and had sex with her without her consent. She screamed for help but none came. She was bleeding heavily. The appellant then drove her to a point near her sister's house.

According to F.W(2) (P.W.1) the complainant's sister, when she arrived home at around 10 p.m., she was in a state of shock. She was bleeding and could not walk properly. Her hair was shaggy. She was distressed and she told her she had been raped by the appellant. F.W(2) took the complainant for medical treatment the following morning. The injury sustained by the complainant was stated in the P.3 form as elliptical tear on the posterior fornix of the vagina with bleeding. The vaginal tear was repaired by surgical operation. The medical evidence was admitted without any objection along with the report of the Government Analyst. In his sworn evidence, the appellant admitted giving the complainant a lift but denied having raped her. He suggested that he was targetted because of a grudge the complainant's sister

had against him arising from disagreements in business. He claimed this lady owed him Shs.11,000/=.

The appellant appealed to the superior court against both conviction and sentence but his appeal was summarily rejected by Ang'awa, J. under section 352(2) of the Criminal Procedure Code. It is against that dismissal that the appellant now appeals to this Court.

The main ground of appeal urged by Mr. Mwadilo on behalf of the appellant was that the learned Judge erred in law, in rejecting his appeal summarily. He submitted that the memorandum of appeal raised issues of law which the superior court should have dealt with. He submitted that the complainant's evidence lacked corroboration and also that there were a number of discrepancies in the prosecution evidence the benefit of which should have gone to the appellant. And finally, he submitted that the sentence imposed on the appellant was excessive in the circumstances.

We think that the complainant's evidence was amply corroborated by the medical evidence which, as we have already pointed out, was admitted without challenge and in this regard we cannot lose sight of the fact that the appellant was represented by an advocate. The state in which the complainant was when she arrived at her sister's house on the fateful night also corroborated her account of what had happened. She was bleeding, distressed and could hardly walk.

The appellant's conduct in trying unsuccessfully to buy the silence of the complainant by paying her sister Shs.11,000/= also corroborated the complainant's evidence.

As regards sentence, we do not think seven years and 5 strokes of the cane is severe taking into account that the maximum sentence for rape is life. In the circumstances we are satisfied that the learned Judge acted properly when she rejected the appellant's appeal summarily and this appeal must fail, and is dismissed.

We would however, for future guidance draw the attention of the subordinate courts to the importance in such cases of ensuring that the admissibility of medical evidence is dealt with strictly in accordance with the provisions of section 77 of the Evidence Act by calling the maker of such a report to produce it. This was not done in the present case but in view of what we have said about the totality of the evidence, we are satisfied the omission did not occasion any prejudice to the appellant.

Dated and delivered at Mombasa this 22nd day of July, 1997.

A.M. COCKAR

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CHIEF JUSTICE

R.O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR