



**IN THE COURT OF APPEAL  
AT NYERI**

**CORAM: TUNOI, AGANYANYA & NYAMU, J.J.A.**

**CRIMINAL APPEAL NO. 553 OF 2010**

**BETWEEN**

**ROBERT NJOGU MBURU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(An appeal from the judgment of the High Court of Kenya at Nyeri (Okwengu, J) dated 10<sup>th</sup> May, 2005**

**in**

**HCCRA NO. 341 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

***ROBERT NJOGU MBURU***, the appellant, was after a brief trial convicted by the Resident Magistrate, Muranga, of rape contrary to ***Section 140 of the Penal Code*** and of unnatural offence contrary to ***Section 162 (a) of the Penal Code***.

The particulars of the charges were firstly; that on 16<sup>th</sup> August, 2003, in Maragua District of the Central Province, the appellant had carnal knowledge of ***P.W.M.***, without her consent and secondly that on the same day, at the same time in Maragua District, he had carnal knowledge of the same prosecutrix against the order of nature.

A full trial was held in which the prosecution called five witnesses. The appellant was subsequently convicted. In sentencing the appellant, the learned trial magistrate stated:

**“COURT**

***I have carefully considered the plea by the accused and also that he is a first offender. I order that he serves:***

***Count 1 – 7 (seven) years***

***Count 2 – 7 (seven) years***

**14**

***Sentence to run consecutively.***

***Right of appeal 14 days.***

**G. P. Ngare, RM**

**26.6.04”**

Being aggrieved by the convictions and sentences, the appellant preferred his first appeal before the High Court of Kenya at Nyeri. On 9<sup>th</sup> May, 2007, Okwengu J summarily rejected the appeal under **Section 352 (2) of the Criminal Procedure Code**. Hence this second appeal.

The appellant submitted before us that the learned trial judge ought not to have summarily rejected his appeal in that the said appeal did not fall among those laid down in **Section 352 (2)** aforesaid. He averred that he was only asking this Court to correct the sentences so that they run concurrently. The learned Principal State Counsel, Mr Kaigai, agrees and asks us to correct the patently wrong sentence.

In our view, the learned Judge acted wrongly in summarily rejecting the appeal before her. A mistake was plainly obvious on the record as far as sentencing is concerned.

The two charges had arisen out of the same offence and the same facts and the proper way to have sentenced the appellant would have been to make the sentences concurrent. It is trite that where a person commits more than one offence at the same time and in the same transaction, the practice is, save in very exceptional circumstances, to impose concurrent sentences. See **R VS SAWEDI MUKASA S/O ABDULLA ALIGWAISA 13 EACA 97**. This was not done by the two courts below and yet there were no exceptional circumstances.

As the appellant is about to serve out the sentences, we will apply **Section 3 (2) of the Appellate Jurisdiction Act** and deal with the appeal in order to save time and avert a miscarriage of justice. The section states as follows:

“3 (1) .....

(2) ***For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.***

(3) .....

On the basis of the above section, we will deal conclusively with this appeal. The convictions are upheld, but, the sentences of imprisonment are ordered to be served **concurrently** with the result that the appellant shall serve a total of seven (7) years only **with effect from 22<sup>nd</sup> June, 2004**, the date on which he was sentenced by the trial court.

To that limited extent does this appeal succeed. It is so ordered.

Dated and delivered at Nyeri this 19<sup>th</sup> day of May, 2011.

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**