



**Araka v Republic (Criminal Appeal 104 of 2023)
[2024] KEHC 11335 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 104 OF 2023
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

FRANK MASANTI ARAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence delivered by Hon. E. Boko (SPM) on 17th November 2022 at Kibera Chief Magistrate's Court Sexual Offences Case No. 113 of 2020 Republic vs Frank Masanti Araka)

JUDGMENT

1. The Appellant, Frank Masanti Araka was charged and after a full trial convicted for the offence of rape contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act* No 3 of 2006. Consequently, he was sentenced to serve eight and a half years imprisonment. Being aggrieved by his conviction and sentence, the Appellant filed the instant appeal.
2. The Appellant raised six (6) grounds in his Petition of Appeal to which he expounded in his written submissions. The said grounds have been coalized as follows: The appellant challenged the totality of the prosecution's evidence against which he was convicted; the appellant complained that the time spent in remand custody was not considered. He urged the court to quash his conviction and set aside the sentence imposed.
3. First appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. See *Okeno v Republic* [1972] EA 32.
4. I have considered the evidence and the submissions by both parties. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.



5. Rape is defined under section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.
6. The elements for rape are well settled in *Simon Kimiti David v Republic* [2017] eKLR where it was stated thus;

“Without corroboration, the essential elements of rape consist of the following:

- (1) The act of intentional and unlawful penetration.
- (2) The act of sexual intercourse was done and against the complainant's will.
- (3) The consent is obtained by force or by means of threats or intimidation.”

7. The prosecution was therefore required to establish the following ingredients; penetration, absence of consent, and that the Appellant was the unlawful perpetrator of the act.
8. The prosecution case was as follows. The complainant, a student at [Particulars Withheld] Technical Institute, testified that on August 17, 2020, she received a message from a stranger named Frank on Facebook, who claimed he could help her find a job at a company called Darling in Nairobi. They arranged for her to travel to Nairobi on August 23, where he promised her accommodation at his sister's place. Upon arrival, Frank sent two boys to pick her up, leading her to his residence. Once there, he started pulling her dress up, but she resisted. He continued and overpowered her, removed her pant and had sex with her at night and in the morning. The next day, he beat her with a belt and slapped her for refusing to have sex with him. At night on Monday, he beat her up because she was refusing to have sex with him and raped her again.
9. The complainant reported to PW2 whom the appellant had introduced as a friend. PW2 advised her to leave and stay with a friend. However, the appellant had taken her phone to charge, preventing her from leaving. After a brief stroll, she met some boys who helped her retrieve her phone from the appellant, who insisted she collect her clothes before leaving. When her phone rang, the appellant became aggressive, pulling her hair and scratching her.
10. PW2 intervened, leading to a fight with the appellant, during which bystanders helped subdue him. They then went to report the incident to the 'nyumba kumi' and were directed to the Mukuru police post, where the complainant recorded her statement and was taken to MSF hospital for treatment. Later, she identified the appellant at the police post, leading to his arrest. In court, she clarified she did not recall specific dates and denied the appellant's claim of a consensual interaction, insisting he raped her. She also stated her unfamiliarity with the area and confirmed the phone number used to contact her.
11. Was there an absence of consent? A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice. In the case of *Republic v Oyier* [1985] eKLR, the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.”



12. In the present case, during the ordeal, the complainant resisted but the appellant overpowered her. In addition, he also beat her for refusing to have sex with him. It is clear to this court that PW1 was not in a position to consent to the sexual act since she was subjected to forceful sexual intercourse. I hold that these actions are consistent with the testimony of PW1 that she did not consent to the sexual intercourse.
13. Further, Dickson Okari Okinda (PW2) testified that he lived in Imara Daima and worked for a painting company. He knew the appellant who lived nearby. On August 23, 2020, the appellant called him to check on his "wife," the complainant. When PW2 met them, the complainant revealed she was not really the appellant's wife and had been beaten and raped by him. PW2 advised the appellant to treat her kindly and let her go home.
14. On 25th August 2020 Dickson found the complainant at the appellant's house, where she reported more abuse. He confronted the appellant, but a fight broke out, and neighbours intervened. They took the complainant to the local chairman, who referred them to the police. She was later taken to SHOFCO for care
15. PW 1's testimony did not require corroboration in accordance with the proviso to section 124 of the [Evidence Act](#) (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the victim was telling the truth. The trial magistrate found PW1 to be a truthful witness and found no evidence as to any grudge between the appellant and the complainant that would make her give a false narration of the events. Further, I have thoroughly looked at the record and I note that PW1 was consistent in her narration of the series of events. Despite being subjected to rigorous cross-examination by the appellant, her evidence was not shaken on cross-examination.
16. Even so, to corroborate PW1's evidence on penetration, the prosecution called Dorine Kerubo (PW4) who testified that the complainant was examined at MSF Hospital in Mathare on 26th August, 2020, at 2:00 AM, after experiencing sexual violence between August 23 and 25. Upon examination, the complainant appeared sad and had mild swelling in her left eye. The genital examination showed normal external genitalia, no discharge, and a torn hymen with old tears. The vagina was pink and moist, with whitish discharge but no injuries, and the anal examination was normal. A high vaginal swab revealed the presence of spermatozoa. PW4 the medical reports into evidence. These findings were consistent with the testimony of PW1.
17. In this case, PW1 gave clear and graphic testimony of the ordeal. PW1 identified the appellant who he had met through Facebook and stayed with him for two days. There was therefore no error or mistake in his identification as the assailant. I hold that PW1 positively identified the Appellant as the one who committed the act of rape.
18. In his defense, the appellant, a plumber from Mukuru Kwa Njenga, claimed he was at work on 25th August, 2020, after his wife, S, prepared breakfast. She called him during the day, reminding him to return early because she was traveling to Kisii. He returned home around 6:30 PM, withdrew money for her fare, and later encountered PW2 who asked for money. The appellant declined, stating it was for his wife's fare.
19. Later that evening, PW2 and others arrived at his home, demanding entry. When he refused, they forced their way in and assaulted him, leading to a hospital visit and a report to the Mukuru police. He claimed to have seen PW2 at the police station, where he was arrested but remained unaware of the charges. The appellant denied knowing the complainant before the court and asserted that PW2 had attacked him over a money dispute.



20. S, as a defence witness, supported the appellant's account of events, asserting that he was attacked by PW2 and his associates after she left for her funeral. However, during cross-examination, she contradicted his claims about his occupation, stating he was a tout, not a plumber.
21. I have weighed the appellant's defence against the prosecution case and find that it amounts to a mere denial and it does not in any way raise doubts on the prosecution's witness testimonies. I therefore affirm the appellant's conviction.
22. As regards the sentence, the appellant has submitted that the same was harsh and excessive.
23. A cursory reading of the sentencing notes reveals that the trial magistrate in imposing the sentence the trial court considered the following: the pre-sentence report; the two and a half years spent in remand custody during the trial; the appellant was a first offender. She then sentenced the appellant to eight and a half years. In the circumstances the sentence imposed was proper and is affirmed.
24. The upshot of the above analysis is that the appeal against conviction and sentence is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2024.

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Maroro present for the Respondent

Achode Court Assistant

