



**Mahenzere v Republic (Criminal Appeal 28 of 2024)
[2024] KEHC 11531 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 28 OF 2024
DR KAVEDZA, J
SEPTEMBER 30, 2024**

BETWEEN

VINCENT KISAKA MAHENZERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Kabuya I.M (S.P.M) on 15th February 2024 at Kibera Chief Magistrate’s Court Sexual Offences Case No. E076 of 2023 Republic vs Vincent Kisaka Mahenzere)

JUDGMENT

1. The appellant was charged and, after a full trial, convicted for the offence of rape, contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 16th June 2023 in Kibra Sub-County within Nairobi County he intentionally and unlawfully caused his penis to penetrate the vagina of DAA without her consent.
2. The appellant was sentenced to serve 10 years’ imprisonment. He appeals against conviction and sentence in line with his undated petition of appeal. The appellant has filed six grounds of appeal in support of his case. He also filed written submissions which have been duly considered.
3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. In his appeal, the appellant challenged the totality of the prosecution’s evidence against which he was convicted. He argued that the ingredients of the offence were not adequately proved and the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.



5. I have considered the evidence and the submissions on record. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.
6. 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.
7. 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.”
8. 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.
9. PW2, DAA, the complainant, testified that she resides with her sister. She recalled that on the day of the incident, at approximately 8 a.m., she was preparing porridge when her friends arrived. She stated that she regularly performs laundry work for payment and was invited to the appellant's house, accompanied by her two friends, to carry out laundry duties. However, after some time, her friends left, leaving her alone with the appellant. At that moment, the appellant locked the door, picked up a knife, and threatened to harm her. She averred that the appellant forced her to his bed, undressed her naked, and tied her hands up before inserting his fingers into her vagina while touching her body.
10. The complainant testified that she left the appellant's house at around 3 p.m., went home, took a bath, and changed her clothes. She further stated that their neighbour learned about the incident from Wicky, a member of the Nyumba Kumi initiative, who later informed her sister about the events a week later. Her sister then took her to Nairobi Women's Hospital. The complainant affirmed that the appellant mistreated her on the day in question.
11. During cross-examination, the complainant testified that she did not wash the appellant's clothes on the material day. The appellant had asked her to wait outside for Kshs. 500, but he never returned, so she went home. She also mentioned that Wicky was present during the incident and informed Irene three days later. The complainant further explained that she did not report the incident initially because the appellant had threatened her. She denied fabricating the case over unpaid laundry services.
12. PW3, the complainant's sister testified that on June 19, 2023, she learned from her neighbour Wilken that the complainant had been raped. The complainant told her that while doing laundry at a man's house, her friends left her, and the appellant mistreated her. PW3 reported the incident to Kibera Police Station the next day and took PW2 to Nairobi Women's Hospital, where no unusual findings were detected.
13. During cross-examination, PW3 stated that it was Wilken who informed her of the incident, but he did not record a statement. PW3 denied that PW2 willingly engaged in the sexual encounter involving the complainant and her two friends. She asserted that her sister's mental challenges were exploited by the two women involved. She asserted that there was no fabrication involved.



14. PW5, Margaret Akinyi, testified that she is a housewife and neighbours PW3, while the appellant is from her locality. On June 16, 2023, around 4 p.m., she saw the victim leaving the appellant's house. The next day, the complainant told her that she had gone to do laundry there but was raped and thrown out. PW5 later informed the victim's sister, PW3, and recorded her statement.
15. PW1, John Njuguna, a clinician at Nairobi Women's Hospital, was called to provide medical evidence on behalf of Calvin Oluoch who examined the complainant but was away for further studies. The complainant was brought to the hospital on 16th June 2023 on allegations of rape. Upon examination, there were no visible injuries. Genital examination revealed that the hymen was absent with an old tear which was healed.
16. The witnesses presented by the prosecution did not witness the alleged acts of rape. This is not peculiar to this matter, as such acts of intimacy rarely get witnessed by third parties. Circumstantial and collaborative evidence would normally be used in such situations. The proviso to Section 124 of the *Evidence Act* (Cap 80) Laws of Kenya also allows the court to convict based on the evidence of the victim if the court is satisfied that the victim is truthful and proceeds to give reasons for such a belief.
17. In rape, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* [2015] e-KLR citing *Kassim Ali v Republic* Criminal Appeal No. 84 of 2005 (Mombasa) where the appellate court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”
18. This court has noted from the medical report that the medic noted no lacerations or any signs of lacerations or any other physical injury which in my view is material because for the offence of rape to be sustained, the prosecution must prove the element of force, intimidation, threats or any other undue influence by the perpetrator to engage in sex.
19. The provision of Section 42 of the Sexual Offence Act describes consent as;

For the purpose of this Act, a person consents if he or she agrees by choice and has freedom and capacity to make that choice.
20. It is also important to get to the bottom of the elements of intent and an unlawful act of the rape itself to find out if the evidence tendered at the trial brought out the said elements to the required standard.
21. Section 43(1) of the Sexual Offence Act provides as follows: -
 - (1) An act is intentional and unlawful if it is committed—
 - a) in any coercive circumstance;
 - b) under false pretenses or by fraudulent means; or
 - c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
 - (2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—



- (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
- (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or....
- (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

22. In *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”

- 23. The complainant testified that she accompanied two friends to the appellant’s residence to do laundry for remuneration. However, once her friends departed, the appellant forcefully inserted his fingers into her vagina and engaged in inappropriate touching. The complainant stated that she did not resist his advances due to threats made by the appellant. Following the incident, the appellant failed to pay the agreed sum of Kshs. 500. The complainant informed PW5 about the incident three days later.
- 24. In her evidence, the complainant’s sister testified that she was made aware of the incident by PW5. Furthermore, she indicated that the complainant is mentally challenged and thus vulnerable to manipulation, suggesting that the complainant’s friends might have influenced her to visit the appellant’s house. Notably, no medical report was presented to the court to substantiate the claim of mental impairment.
- 25. Nevertheless, the critical element of rape is not solely penetration, as evidenced by the broken hymen noted in the P3 form, but the absence of consent. A charge of rape can only be upheld if this element is established beyond reasonable doubt. The prosecution must demonstrate that consent was lacking or that any consent given was procured through threats, coercion, or other means as delineated under Section 43(1) of the *Sexual Offences Act*. This fundamental fact must be evident from the evidence presented.
- 26. Significantly, the two friends who accompanied the complainant to the appellant’s residence were not called as witnesses, despite their pivotal role in the proceedings. Allegations suggest that they escorted the complainant to the appellant’s house for paid laundry services; however, the complainant asserted that she did not wash any clothes. The question arises as to the purpose of the payment if no laundry was performed. It is not within the court’s purview to fill in the gaps left by the prosecution’s case.
- 27. Furthermore, the timeline concerning the alleged defilement remains ambiguous. The complainant stated that she arrived at the appellant’s premises at approximately 8 a.m. and left at 3 p.m. She claimed she did not engage in laundry but was in the company of her friends throughout the day. The prosecution has made no attempts to clarify what the complainant was doing during those hours, leaving significant gaps in the narrative.
- 28. The issue that this court has to grapple with is whether the contradictions and inconsistencies outlined in the foregoing analysis are so trivial as to be ignored, or whether they are substantial and fundamental



to the issues for determination. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated as follows about contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies, and inconsistencies in the evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies, and inconsistencies are proved, they must be resolved in favor of the accused.

It is a settled principle of law, however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

29. The test as to whether the contradictions are minor or substantial was laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):

“In assessing the impact of contradictory statements or discrepancies on the prosecution’s case, our understanding is that firstly, for contradictions to be fatal, they must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case.”

30. From the above authorities, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.

31. Having analyzed and re-evaluated the evidence on record, it is my finding that the Complainant was an untruthful witnesses as evidenced by the contradictions and inconsistencies in her evidence. The said contradictions are so substantial as they relate to material facts. I, therefore, disagree with the trial magistrate that they were minor and trivial and did not affect the credibility of the witness.

32. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Mongare for the Respondent

Achode Court Assistant

