



**Nyakundi v Republic (Criminal Appeal 30 of 2024)
[2024] KEHC 13438 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 30 OF 2024
DR KAVEDZA, J
OCTOBER 29, 2024**

BETWEEN

DUKE OMARI NYAKUNDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence as per the judgement delivered on 11th April 2024 by
Hon. Murage (PM) at Kibera Chief Magistrate's Court Sexual Offences Case no. E055 of 2023)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of rape contrary to section 3(1)(a)(b) as read with section 3 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence as per the charge sheet were that on "the 15th day of April 2023 at an unknown time at Lang'ata Sub-County in Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.K without her consent.
2. In the petition of appeal and amended grounds of appeal, he raised the following main ground: The appellant challenged the totality of the prosecution's evidence against which he was convicted, stating that the learned trial magistrate erred by failing to find the key ingredients of the offence were not established against him, that the appellant's rights to fair trial were violated, and that the burden of proof was not established.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. To succeed in a prosecution for rape, it must be proven that the accused committed an act that caused penetration without the other person's consent. "Penetration" under section 2 of the Act means, "the



partial or complete insertion of the genital organs of a person into the genital organs of another person.”

5. Further, section 3 of the *Sexual Offences Act* No. 3 of 2006 provides thus;

3. Rape

(1) A person commits the offence termed rape if—

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
- (b) the other person does not consent to the penetration; or
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.

6. The prosecution in an offence of rape must therefore prove the other ingredients of the offence. The prosecution called three (3) witnesses in support of their case. S.K(name withheld) the complainant herein gave sworn testimony, stating that the night before the incident, she was taken to work by a man named Protus in the company of the appellant. They both left, but the appellant came back a while later together with a friend, where they both drank alcohol the whole night. In the morning at around 5a.m, the appellant told PW1 that Protus whom she was calling to pick her up had told him to take her home.
7. She complied with him, but when they had approached her place of residence, the appellant refused to let her disembark the motorcycle, and instead took her to Gorofani Bar. She testified that the appellant lied to her that Protus was in one of the rooms, and when she entered the said room and found that he was in fact not in, the appellant forcefully took her clothes off and raped her.
8. When he was done and left, she proceeded to a chemist, where she was advised to proceed to Coptic Hospital. The hospital gave her various documents including a continual sheet and a post-rape care form, after which she went to Langata Police Station to record her statement and present the documents. The appellant was later arrested and PW1 was able to identify him. She maintained her testimony throughout her cross-examination, further stating that the appellant had threatened her, which is why she desisted from screaming.
9. PW2, Inspector Linda Medza recalled that on 15th April, 2023, she was on duty and had gone to Highrise where there was a fire. She found the complainant, who recounted to her the incident, and after she read the complainants’ documents, she went ahead to arrest the appellant. She corroborated the testimony of PW1 in court, and further narrated that she visited the scene and interviewed the receptionist of the lodging who acknowledged that the appellant had visited the place in the company of the complainant.
10. PW3, Loreen Mwendu Mailo a clinical officer at Coptic Centre Hospital, produced the post-rape care form dated 15th April 2023 for PW1. Upon examination, it was observed that she had a scar on her right upper limb, and one scar on her left thigh which she termed as old scars, in addition to whitish discharge on her labia majora and redness along the vaginal wall. Moreover, she noted that the complainant had given birth to a child. After the examination, she was referred back to the police station.
11. Having considered the evidence adduced by the prosecution, the trial court ruled that a prima facie case had been established. The accused was then placed on his defence.



12. DW1, the appellant herein, stated that on 14th April 2023, he went to have some drinks at Nairobi West Club where the complainant worked. He did not seem to recall what happened that particular night since he was drunk. The following morning, he found himself in his house, and discovered that his phone and money were missing. Thereafter, he went out to take a shower, when he was met by his landlord, who warned him to stop his heavy drinking. After showering, he began looking for his motorcycle, and upon inquiry, his landlord told him of its whereabouts.
13. Later that day, PW1 came to him and asked him to transport her to Nairobi West. However, Protus ended up doing so, and after sometime the police arrested him and took him to a police post. In the evening, he was transferred to Langata Police Station, where he was charged and his charges read to him.
14. DW2 corroborated the testimony of DW1, stating that on 15th April 2023, he found the appellant drunk at a stage, where he was sleeping with his motorcycle next to him. He decided to push the motorcycle to Nyayo Highrise, and take the appellant to his house. After three days, the appellant called him and informed him that he had been arrested and charged with rape. He was then told that he was late and that they were taking him to Langata, and after that they proceeded to court.
15. The trial court found him guilty of the offence charged and convicted him accordingly.
16. I have considered the grounds of appeal and the submissions by parties and I find that the main issues for consideration are whether the prosecution proved its case beyond reasonable doubt and whether the sentence was harsh and excessive in the circumstances.
17. The main ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent in the case of *Republic vs. Oyier* [1985] KLR 353 the Court of Appeal held that;
 - “ 1. 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.
 2. 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.
 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
18. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
19. With regard to penetration, PW1 gave a detailed account of how the appellant took her to a lodging place, under the guise that the man she had asked for, Protus, was in one of the rooms. Immediately she got in, the appellant stripped her of her clothes and proceeded to rape her.



20. PW1's evidence was also corroborated by the medical evidence tendered by PW3. She indicated that from the medical documents, it had been observed that there was a whitish discharge on her labia majora, coupled with redness along her vaginal wall. These findings proved that there was penetration.
21. As regards the issue of consent, the following key issues are of importance. As narrated by PW1, the complainant became acquainted with the appellant through Protus, her regular motorcycle rider. On the material night, the appellant visited the club where the complainant worked and drank throughout the night. The following morning, when the complainant was unable to contact Protus, the appellant and a friend offered to take her home. However, instead of going home, they proceeded to a lodging.
22. The complainant testified that she spent over 12 hours with the appellant, making his identification free from any possibility of mistake. She claimed to have followed the appellant to Gorofani, believing that Protus was there. At Gorofani, they checked into a room through the reception area and were given keys. The complainant further testified that the appellant was too intoxicated to ride a motorbike. Given this state of inebriation, it raises the question why she did not attempt to run or call for help at 6 a.m.
23. The evidence suggests that the appellant was heavily intoxicated, and the complainant could have overpowered him during the alleged ordeal. In my view, it appears she voluntarily entered the room. After the encounter, the complainant went to a chemist, where she was advised to report the incident. However, the purpose of her visit to the chemist remains unexplained, as the prosecution did not clarify this aspect.
24. PW2, IP Menza, corroborated the complainant's testimony, confirming that the appellant had been drinking all night. However, if the appellant was indeed so intoxicated, the complainant could have easily sought help from the receptionist when they were given the room key. This also contradicts the investigating officer's testimony that the appellant had covered her mouth, a detail not mentioned by the complainant.
25. The receptionist, who would have been a crucial witness, was not called to testify, despite having interacted with the parties. Additionally, although the complainant had not changed clothes or showered, no DNA samples were collected to determine whether semen matching the appellant's DNA profile was present. This omission further undermines the strength of the prosecution's case.
26. 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 vs 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.



27. 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.”

28. 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.

29. 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.

30. 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 AND DELIVERED VIRTUALLY THIS 29TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

Appellant Present

Ms. Omurokha for the Respondent

Achode Court Assistant

