



REPUBLIC OF KENYA



KENYA LAW
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**Muia v Republic (Criminal Appeal 33 of 2023)
[2024] KEHC 15935 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 33 OF 2023
DR KAVEDZA, J
DECEMBER 19, 2024**

BETWEEN

JAMES MUTUNGA MUIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 30th October 2018 by Hon. E. Boke (S.P.M) at Kibera Chief Magistrate's Court Sexual Offence Case No.6 of 2017 Republic v James Mutunga Muia)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of rape contrary to section 3(1)(c) as read with 3 of the [Sexual Offences Act](#), No. 3 of 2006. He was sentenced to serve ten (10) years imprisonment.
2. Being aggrieved, the appellant filed an appeal challenging his conviction and sentence.
3. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.
4. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of [Mark Oruri Mose v R](#) [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.



5. The prosecution called three (3) witnesses in support of their case. The complainant, CM (name withheld), testified that on 6th December 2016, the appellant, whom she knew, contacted her. They arranged to meet at a stage in [particulars withheld]. Upon meeting, the appellant did not have the money he had promised to repay. Disheartened, she began walking home. As she passed a bushy area, she was suddenly attacked, and a bandage was placed over her mouth to silence her. At the time of the attack, she had a two-month-old baby strapped to her back. During the struggle, the baby fell to the ground. She attempted to scream, but her cries were muffled due to her mouth being covered.
6. When she fell, the assailant tore her underwear. She tried to struggle but had undergone a caesarean operation 2 months prior and was still in pain. The assailant then forcefully had sex with her. He then told her that he had now repaid her debt '*nimekulipa deni yako*'. The complainant maintained that it was the appellant who covered her mouth and raped her.
7. Following the incident, the complainant called her husband, who accompanied her to Nairobi Women's Hospital for a medical examination. She was admitted for three days. Upon discharge, she reported the incident to the police. The complainant further testified that on 30th December 2016, the appellant began calling her to seek forgiveness. However, she expressed no interest in reconciling with him.
8. During cross-examination, she affirmed that she went to the hospital on the night of the incident and underwent surgery due to complications with her cesarean wound, which had not yet healed. She denied knowing the appellant prior to July 2016, stating that he had been in remand until his release in July 2016.
9. It was the evidence of PW2 that the complainant is his wife. He recalled that on 6/12/2016, she called him at around 8 pm and said she had been raped. They met at their house and proceeded to Mbagathi Hospital, where they found a doctor's strike and so went to Nairobi Women's Hospital. His wife told him that a customer had raped her some minutes past 8 pm at the stage 2 area in [particulars withheld]. It was his evidence that he did not know the appellant. Further,

Upon cross-examination, he said that he did not know the appellant. He said that the gender violence people at the hospital were not present at the time they arrived, which could have occasioned the discrepancy of dates on medical documents.
10. PW3, Simon Nzambu of Nairobi Women's Hospital gave evidence on behalf of Dr. Edwin Ochieng who was not available to testify. He gave evidence that the complainant was examined on 6th December 2016 at around 6.30 pm. He noted that she had no injuries on her physical body. Her external genitalia was normal and her hymen had old tears.
11. He noted that she had changed clothing and had taken a shower before examination. She was on pills as contraceptives, her last menstruation was on 16/11/16, and the last day of consensual sexual intercourse was on 5/12/16. Pregnancy, STI, and HIV tests were negative. He concluded that there was penetration. He produced the PRC form and the GVRC form. Upon cross-examination, he said that the report was on 6/12/16 at 2 pm and the incident was reported to have taken place on 4/12/16.
12. Upon closure of the prosecution case, the defendant was found to have a case to answer and he was put in his defence.
13. The appellant testified that he works in construction and lives with his wife and child. He stated that he first met the complainant in 2015 while he was in remand. After his acquittal, he contacted her, and she expressed happiness and a desire to meet. They met in October 2016 at Uhuru Park, where the complainant asked if he was married. He confirmed he was married with a child. The complainant



claimed she was unmarried but had a child, adding that she was unhappy with her current partner and wished to marry the appellant. He requested two months to consider.

14. On 20th November 2016, the complainant invited him to her home. He visited on 23rd November 2016. While at her place, she left for two hours to braid a client's hair, leaving him to watch TV. Upon her return, a man entered, and they went to the kitchen together. The complainant explained the man was her brother and that her sister's children called her "mum." When the children returned, one boy addressed the appellant as "uncle" and showed him that his photo was the complainant's phone wallpaper. The appellant also saw a photo of the complainant with the man, whom the boy identified as his father.
15. The appellant confronted her. She denied being married, but he ended the relationship unless they remained friends. She then admitted she was married but feared losing him if she told the truth.
16. After the breakup, the complainant threatened him and regretted supporting him while he was in custody. The appellant suggested she calculate her expenses, but she declined. On 18th January 2017, while at home with his wife, the complainant called his wife's phone. The appellant, with his wife's knowledge, decided to "catfish" the complainant through SMS. He alleged she plotted to kill him with a friend's pistol. He confronted her the next day, and they agreed to meet.
17. At [particulars withheld], the complainant shouted "thief," but locals recognised the appellant, preventing harm. He reported the incident at Muthangari Police Station (OB No. [particulars withheld]). The complainant later caused a disturbance at his home and his mother's house. His mother allowed her to take back clothes she had bought. The appellant was arrested and presented messages and photos deleted by the complainant, citing OB No. [particulars withheld] as evidence.
18. The appellant's mother, DW2, corroborated his account, confirming the complainant's demand for clothes and disturbance at her home.
19. The trial court found him guilty of the offence charged and convicted him accordingly.
20. 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.
21. 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 v. 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.”



22. 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.
23. Regarding penetration, the complainant (PW1) provided a detailed account of the incident. She testified that the appellant approached her from behind, covered her mouth with a bandage, and, exploiting her vulnerability due to recent caesarean section (CS) injuries, tore her underwear and sexually assaulted her. She identified the appellant by his voice, manner of speech, and prior interaction, also stating that she saw him during the attack.
24. The complainant's testimony was corroborated by medical evidence presented by PW3, confirming a history of penile-vaginal penetration. On the issue of consent, it is established law that where a woman submits due to fear of death or duress, such submission constitutes rape.
25. In this case, no evidence indicates consent. The complainant testified that the appellant restrained her, forced her to the ground, tore her underwear, and had intercourse with her against her will.
26. The complainant's testimony did not require corroboration within the proviso of section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are to believe that the minor was telling the truth. I have also thoroughly gone through the testimony of the complainant and found that she was consistent throughout her narration, despite being subjected to rigorous cross-examination by the appellant.
27. As for identification, the complainant stated the appellant, known to her previously, lured her under the guise of repaying a debt. They arranged to meet in [particulars withheld] two hours after a 6:30 pm phone call.
28. The appellant's denial is inconsistent with the complainant's credible and consistent testimony. The evidence as a whole supports a clear identification of the appellant, ruling out any claim of mistaken identity.

Accordingly, the prosecution proved all elements of rape beyond reasonable doubt. The appeal against conviction is therefore dismissed.
29. The appellant was sentenced to serve 10 years imprisonment. The primary objective of sentencing is not solely to punish but also to rehabilitate and reintegrate offenders back into society as responsible citizens. I do not doubt that the sentence imposed by the trial court for the offence in this case, was lawful.
30. For the above reasons, I hereby affirm the sentence of ten (10) years imprisonment imposed to run from January 24, 2017 the date of the appellant's arrest pursuant to section 333(2) of the *Criminal Procedure Code*. Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024.

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant

