



**Gitari v Republic (Criminal Appeal E107 of 2021)
[2023] KEHC 357 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E107 OF 2021
TW CHERERE, J
JANUARY 26, 2023**

BETWEEN

PATRICK MUTWIRI GITARI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence in Nkubu Criminal
SO No. E034 of 2021 by Hon.E.Ayuka (SRM) on 17th August, 2022)*

JUDGMENT

Background

1. Patrick Mutwiri Gitari (appellant) has filed this appeal against conviction and sentence on a charge of rape of an imbecile contrary to section 146 of the Penal Code. Appellant also faced an alternative charge of committing an indecent act with an adult contrary to section 11 (1) of the Sexual Offences Act No 3 of 2006. The offences were allegedly committed on August 19, 2021 against RK.
2. DM aged 13 years and KM aged 15 years who are complainant's brothers stated that on August 19, 2021, they returned home from school at 04.00 pm to find appellant popularly known as Kirito in their house raping his sister RK PM upon receiving PW2's complaint rushed to their home to find complainant naked but appellant who was alleged to have raped RK was nowhere to be seen. The matter was reported to police and complainant was examined and found with broken hymen and tenderness on the thighs.
3. Upon being called to offer his defence, appellant opted to remain silent. in a judgment dated August 17, 2022, appellant was convicted and sentenced to serve 14 years' imprisonment.
4. Dissatisfied with the sentence, the appellant lodged the instant appeal lodged the instant appeal mainly challenging the conviction and sentence on two main grounds that:



- i. Complainant did not testify
- ii. Prosecution case was not proved

Analysis and determination

5. I have considered the appeal in the light of the evidence on record and submissions filed by the appellant the state not having filed any.
6. This is a first appeal. The duty of the first appellate court as explained in *Okeno v Republic* [1972] EA 32 and in *David Njuguna Wairimu v Republic* [2010] eKLR is to re-evaluate the evidence on record, analyze it and make its own findings while bearing in mind that it was not present at trial to see and assess the demeanour of the witnesses. This court should therefore not interfere with the facts as presented and recorded by the trial court, but instead, should rely on them as they are recorded.
7. I will first address the issue of whether the failure to call the ‘complainant’ as a witness was fatal to prosecution’s case
8. From the onset, the meaning and application of the word complainant as used by our courts in criminal proceedings seems to sometimes cause confusion. The definition of the word complainant is not provided for in the *Criminal Procedure Code* (Cap 75 of the Laws of Kenya). On the one hand, the word complainant has been used to refer to a person who lodges a complaint with the police or any other lawful authority that some offence or criminal act has been committed. The nearest our *Criminal Procedure Code* has made an appreciation of the meaning of the word complainant is under section 208(1) of the *Code* which reads as follows:“(1)If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).”Section 202 of the *Criminal Procedure Code* also makes reference to a complainant and specifically states that if the complainant fails to turn up in court on the date fixed for hearing the accused is entitled to an acquittal. Section 204 of the *Criminal Procedure Code* also makes reference to a complainant who for good reasons may be allowed to withdraw a complaint.
9. In this case, it is alleged that the complainant is an imbecile. The clinical officer confirmed that the complainant was able to explain herself during examination. It was therefore not open to the prosecution not to call the complainant to testify even if only for the purpose of identifying the perpetrator. Had she been called, the court would have had an opportunity to hear whatever she had to say and collate it together with the evidence of the other witnesses.
10. By failing to avail the complainant, appellant’s right to a fair trial which includes the right to “challenge evidence” by cross-examination guaranteed under article 50 (2) (k) was denied.
11. Accordingly, I allow the appellant’s appeal, quash the conviction and set aside the 14 years imprisonment term and further order that appellant shall be retried before another magistrate other than Hon E Ayuka (SRM).
12. The appellant shall be presented to the Nkubu principal magistrate’s court on February 1, 2023 for plea taking and such other and/or further orders that the trial court might deem fit to grant.

DELIVERED AT MERU THIS 26TH DAY OF JANUARY 2023

WAMAE. T. W. CHERERE

JUDGE

Appearance



Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)

