



**Kayana v Republic (Criminal Appeal E064 of 2021)
[2023] KEHC 359 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E064 OF 2021
TW CHERERE, J
JANUARY 26, 2023**

BETWEEN

ELIJAH KAYANA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence in Maua Criminal
SO No. E006 of 2021 by Hon.A.G. Munene (PM) on 12th April, 2022)*

JUDGMENT

Background

1. Elijah Kayana (Appellant) has filed this appeal against conviction and sentence on a charge of rape contrary to section 3(1) (a) and (c) as read with section 3(3) of the [Sexual Offences Act](#) No 3 of 2006 (the Act). 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 February 1, 2021 against MM.
2. Complainant stated that Appellant gained access to her house at night and raped her. That she locked him in the house and went to call for help. KS and SK stated that Appellant was arrested sleeping on complainant's bed and complainant informed them that she had been raped. Complainant was examined a day after the incident and was found with a bleeding 1 cm tear on her vagina with blood stains on her pants. The investigating officer visited the scene and collected bloodstained bedsheet and lessso which she tendered as exhibits.
3. In his sworn defence, the Appellant stated he was arrested while working on his shamba and thus denied that he was arrested in complainant's house.



4. In a judgment dated April 12, 2022, Appellant was convicted and sentenced to serve 30 years' imprisonment.
5. 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. Prosecution case was not proved
 - ii. Sentence was harsh

Analysis and Determination

6. I have considered the appeal in the light of the evidence on record and submission filed by the Appellant the state not having filed any.
7. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of the Constitution which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.
8. English case law is also replete with decisions which elucidated this standard of proof in a criminal case. Lord Denning in the case of Miller vs Minister of Pensions (1942) AC stated as follows: -

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”
9. The degree of proof in criminal cases was properly established in the classicus English case of Woolmington vs DPP 1935 AC 462. Similarly, in Bakare vs State 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
10. Complainant stated that she was raped in her house from where she managed to escape and lock Appellant in the house. PW2 and PW3 stated that it was from complainant's house that Appellant was arrested immediately after complainant raised an alarm. From the foregoing therefore, Appellant's defence that he was arrested from his shamba was well considered and rightly rejected by the trial court.
11. Medical evidence revealed that complainant had a bleeding 1 cm tear on her vagina with blood stains on her pants, bedsheet and lessso. The trial court's finding that forceful penetration had been proved was therefore well founded.
12. Section 3 (3) of the Sexual Offences Act provides that:



A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

13. Having been a first offender, I find that Appellant was entitled to the least form of sentence which in this case is 10 years.
14. In the end, the appeal fails except on sentence. The 30 years' imprisonment term is set aside and substituted with a 10-year imprisonment term which shall commence from February 1, 2021 when Appellant was arrested.

DELIVERED AT MERU THIS 26th DAY OF *January* 2023

WAMAE. T. W. CHERERE

JUDGE

In the presence of

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)

