



REPUBLIC OF KENYA



**Mwangale v Republic (Criminal Appeal E009 of 2021)
[2023] KEHC 3486 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E009 OF 2021**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

SULEIMAN MWANGALE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment of Hon. E. Malesi, Senior Resident Magistrate,
in Kakamega CMCCRC No. 109 of 2018 (SO), of 19th February 2021)*

JUDGMENT

1. I note from the record that no formal order was made for admission of this appeal, neither were directions given by the Judge, for having the appeal canvassed by way of written submissions, although I do note that the Deputy Registrar, Hon. JN Maragia, directed the appellant, on 27th September 2022, to file written submissions. Anyhow, I shall overlook that, in the interests of substantive justice, given that the original trial court records have been availed and a record of appeal filed. I shall deal with the appeal on the merits as if it had been admitted, and directions given by the Judge for disposal by way of written submissions.
2. The appellant, Suleiman Mwangale, had been charged before the trial court of the offence of rape, contrary to section 3(1)(a)(c), as read with section 3(3) of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya. The particulars were that on 11th and 12th days of September 2018, at [particulars withheld] area, in Kakamega Central District of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of MV, the complainant, without her consent. There was an alternative charge of committing an indecent act with an adult, contrary to section 11(a) of the *Sexual Offences Act*.
3. The facts of the matter are fairly straightforward. According to both the appellant and the complainant, PW1, the 2 met along the way, somewhere, and discussed about the appellant contracting PW1 as house help. They approached PW1's parents, who were agreeable. The 2 then went to the home of the



appellant, so that PW1 could start her job. All this was happening on 10th September 2018. The next morning, 11th September 2018, after the appellant's children after left for school, the appellant called PW1 into his house, and forced her into sexual intercourse. He made advances, which she resisted, and wanted to scream, but the appellant warned her against it. He removed his clothes, and then removed hers. The next day, the appellant asked PW1 to mop his house, after which he had sexual intercourse with her. After that he began to quarrel PW1, called her mother. She picked her bag ready to go, and he took her to Kakamega town, and dumped her there. She eventually got home, where she heard that the appellant was accusing her of stealing his Kshs. 30, 000.00. She later reported the matter at the police station, was taken to hospital, and the appellant arrested and charged. The appellant had also reported to the police that PW1 had stolen Kshs. 30, 000.00 from him.

4. After taking evidence from both sides, the trial court found that the offence of rape had been established against the appellant. Whereupon the appellant was aggrieved, hence the instant appeal. The grounds are that the case was not proved beyond reasonable doubt; the trial court cited balance of power between the appellant and PW1, an issue which had not arisen at the trial; the evidence of PW1 was not corroborated; and the appellant would not have had sex with someone who was HIV+.
5. The respondent's written submissions are dated 6th October 2022. It is submitted that the facts were fairly simple and straightforward. The appellants filed 2 sets of written submissions. One set is by himself, and it is undated. The other is by his Advocates, it is dated 11th October 2022, and was filed in court on even date. The principal argument is that the offence of rape was not proved. Sections 42 and 43(1) of the [Sexual Offences Act](#) are cited, for the purpose of establishing whether or not a sexual act was intentional and unlawful.
6. The offence of rape is defined in section 3 of the [Sexual Offences Act](#), in the following term:

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.
 - (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.
- (2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this [Act](#).



- (3) 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.”
7. Going strictly by section 3 of the *Sexual Offences Act*, rape happens where there has been penetration, which is intentional and unlawful. Unlawfulness has something to do with lack of consent or where consent is present but was obtained through force or threats or intimidation. PW1 testified that there was penetration, which happened without her consent.
8. Section 3 refers to “consent” and “intentionally and unlawfully,” which are defined in sections 42 and 43, in the following terms:

“42. Consent

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43. Intentional and unlawful acts

- (1) An act is intentional and unlawful if it is committed-
- a. In any coercive circumstance;
 - b. Under false pretences 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
 - d. 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.
- (3) False pretences of fraudulent means, referred to in subsection (1) (b), include circumstances where a person-
- (a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;



- (b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or
 - (c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.
 - (4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act-
 - a. asleep;
 - b. unconscious;
 - c. in an altered state of consciousness;
 - d. under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;
 - e. mentally impaired; or
 - f. a child
9. Consent is about a person agreeing by choice to be penetrated, and having the freedom and capacity to make that choice. In this instance, PW1, from her own mouth, says that she did not consent or she did not agree to be penetrated by the appellant. The issue as to whether she had the freedom or capacity does not arise, for that arises only where there is a consent, which is being challenged.
 10. The intentional and unlawfulness of the penetration is defined in the various circumstances set out in section 43. It could happen under coercive circumstances, or under false pretences or fraud, or with respect to a person who does not understand the nature of the act. Coercive circumstances denote use of force; false pretences and fraud denote trickery; while the last instance would be where a victim is taken advantage of, on account of their disability, on account of either mental infirmity or the effect of drink or drugs or age or any of the others set out above.
 11. The instant case appears to fall under coercive circumstances, for PW1 did not allege use of trickery or incapacity or disability of one sort or other. No brute force was apparently used, but there was use of soft force. She said that appellant told her that he loved her, and she resisted, pointing out that the relationship between them was work-related. He then went on to undress himself, and to undress her. The trial court concluded that there was abuse of power or authority, to the extent that one was a worker and the other the employer. The appellant submits that that issue did not arise at trial, and the trial court considered matters that were not before it. Both PW1 and the appellant were clear that they had agreed that the appellant would hire PW1 as a domestic worker. She had reported to work the previous day, only for the appellant to force himself on her the next morning. This was a circumstance that the could draw inferences from for the purpose of determining the intentional and unlawfulness of the act. The appellant was an employer and PW1 was an employee. There was an imbalance in the power relations, and the person with power over the other could abuse that power to get the person in



the weaker position to do things that she may, in different circumstances, may not have done. I am not persuaded that the trial court considered extraneous circumstances.

12. Perhaps the appellant expected some form of physical resistance. There is no rulebook on how a person in the circumstances that PW1 found herself in ought to react. Some could offer physical or verbal resistance. Others could yield to the act unwillingly, considering the imbalance in power relations. Most sexual offences happen in secrecy or under cover of darkness. PW1 stated that there was no one else at the home. So, even if she resisted or screamed, no one would have come to her aid. In such cases, the trial court relies on the strength of the testimony of the victim and corroborative evidence. Regarding the testimony, the trial court relies on demeanour, among other factors. The court need not expressly state what it made of the demeanour of the victim, or whether it believed her to be honest and truthful, so long as the judgement is clearly based on what she said in her testimony.
13. On corroboration, it is no longer the law that corroboration is a mandatory requirement for all rape cases. The court need not look for the same, and can quite properly convict based on the testimony of the victim. In this case, the trial court, after hearing from PW1, believed her, and proceeded to convict. The appellant has argued that PW1 did not try to report, which would have provided corroboration. She explained that the appellant used to lock up everywhere at his home before he left, and she had nowhere to go and report. He argued that she did not mention to PW2 about the rape ordeal. I cannot tell whether or not PW1 told PW2 about it. But I do note that the 2 are siblings, and I take judicial notice of the fact that it may be awkward, in Africa, for an adult sister to openly tell her adult brother about her sexual encounters, regardless of the circumstances. The fact that he took her to the police station stands for something.
14. The appellant attempted to challenge the medical evidence, that PW1 went to the clinician after a lapse of several days. The suggestion was that the evidence that came out, that there had been sexual contact, did not point to the appellant, for PW1 could have had contact with other men in the interim. I agree. PW1 did not go to hospital immediately after the sexual encounter, but after 4 or 7 days, according to PW3. However, the medical evidence is not the only evidence upon which a conviction for sexual offences can be founded. The trial court acted on the basis of the testimony of PW1, and less on the medical evidence.
15. There is also the submission that the appellant could not have engaged in sexual intercourse with a person that he knew was HIV+. From the testimony of PW1, she did not tell the appellant that she was HIV+. She said that she wanted to tell him that she “was sick,” but he forced himself on her, before she could do that. The argument then, that he could not have had sexual relations with a person who he knew was HIV+, would have no basis.
16. I am not persuaded that the appellant has placed before me material that demonstrates that the trial court fell into error, and came to the wrong conclusions. I am persuaded that the evidence presented by the prosecution reached the threshold to sustain a conviction for offence charged. Consequently, I do hereby affirm the conviction, and confirm the sentence. The appeal is accordingly dismissed.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF APRIL 2023

W MUSYOKA

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JUDGE

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. WO K'Ombwayo, instructed by M. Kiveu, Advocate for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

