



**Ezar v Republic (Criminal Appeal E099 of 2022)  
[2023] KEHC 17788 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17788 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E099 OF 2022**

**LW GITARI, J  
APRIL 27, 2023**

**BETWEEN**

**LUCAS EZAR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant was tried and convicted of the offence of rape contrary to Section 3(1) (a)(b)(3) of the *Sexual offences Act* No. 3 of 2016 and sentenced to serve ten (10) years imprisonment. He was tried before the Principal Magistrate's Court at Tigania Criminal Case No. E002 of 2022.
2. The appellant was dissatisfied with both the conviction and sentence and filed his appeal raising six grounds and prayed that the appeal be allowed, sentence be set aside, conviction be quashed and he be set at liberty.
3. The appeal was based on six grounds in the petition of Appeal filed in court on 26/07/2022. The appellant however filed amended grounds of appeal together with his written submissions.

The amended supplementary grounds of appeal as follows:-

1. That, the learned trial magistrate erred in law and fact by failing to Note that the Medical Report disproves the evidence of the complainant since there was no evidence of penetration.
2. That, the learned trial magistrate erred by law and fact by failing to Note that the offence is attempted rape not rape according to the testimony of the complainant (PW1).



3. That, the learned trial magistrate erred in both law and fact by failing to note that the names appearing in the P3 Form are different from the name given by the complainant.
4. That, the learned trial magistrate erred in both law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts.
5. That, it is my humble beg to you Honourable Judge to consider Section 333(2) of the *Criminal Procedure Code* Pre-trial detention period.
6. That the learned trial magistrate erred in both law and fact by failing to note that the investigation was shoddy.

The appeal was canvassed by way of written submissions.

### **Brief Facts**

4. The appellant was charged with rape. It was alleged in the particulars of the charge that on 25/1/2022 at Ngaremara Location Tigania East Sub-County within Meru County he willfully and intentionally caused his penis to penetrate the vagina of MK without her consent. In support of the case, the prosecution called five witnesses. The facts of the case are that on 25/1/22 at 3:00 am the complainant (PW1) was in her house asleep when she heard someone break and enter into her house. At that time the complainant was with her two year old grandson. The complainant saw the appellant and she struggled with him. The appellant then raped the complainant who in turn screamed for help.
5. The complainant's son JE (PW3) went to the scene and the complainant told him that the accused had raped her. The complainant's son went inside the house and found the appellant sleeping next to the child. The complainant's son went and called the youth leader (PW2), and they locked the accused and the complainant inside the house. The Investigating Officer PW4 and the OCS visited scene after receiving a report through a phone call. That someone had been locked in a house. PW4 – found that it was the appellant who had been locked inside the house on allegation that he had raped the complainant. The appellant was rescued by the OCS from the members of the public who wanted to lynch him. The same day the complainant was examined by a Clinical Officer, Lucy Kananu PW5 at Muthara Sub-County Hospital. The clinical officer found that the clitoris and labia minora had bruises. The clinical officer found that the injuries were as a result of forced penetration and concluded that the complainant was raped. The appellant was then charged.

### **Defence Case**

6. The appellant upon being put on his defence, he opted to give unsworn statutory statement in his defence. His defence is that he did not commit the offence and that the real culprit was allowed to escape.

### **Summary of evidence**

7. PW1 MK who is the complainant, testified that on 25/1/22 at 3:00am while asleep in her house with her two year old grandson she heard someone had knocked the door loudly and entered. The person struggled with her and raped her. She screamed and her son went to her rescue and locked the house. He locked both the appellant and the complainant inside the house.
8. On cross-examination she clarified that she had indeed rushed to her son's house to seek help and the appellant followed her. He then followed her, entered her house and covered himself with a blanket.



9. PW2 EE testified that on the material night he heard screams and went outside. He went inside and shortly thereafter JE PW3 who is the complainant's son went to his house and informed him that Majani which is the nickname of the appellant had been found in his mother's house. PW2 went to the scene and found that the appellant had been locked inside the house. He took an alarm padlock and locked the house as some youth wanted to lynch him. Later in the morning he opened the padlock after the OCS came.
10. PW3 JE was the complainant's son. On the material day, she was woken up by her mother who was crying. The complainant told her that she was being harassed. He found the appellant had covered himself with a blanket. The complainant told her she had been raped. PW3 locked the appellant inside the house in the morning the police went and opened the house appellant came out. PW3 testified that he had known the appellant for a long time.
11. PW4 Moses Kusimba who is the Investigating Officer testified that he was informed by the OCS Livangila Police Station that a person had been locked inside a house at [Particulars Withheld] Village. He proceeded there and found the appellant had been locked inside the complainant's house and members of the public had gathered to lynch him. They took the appellant to the police station. The complainant was treated. PW5 was the Clinical Officer, Lucy Kananu. She testified that she examined the complainant who alleged that the perpetrator forcefully penetrated her vagina. On examination she found that the complainant had bruises on the clitoris and labia minora which led her to make a conclusion of rape. She then filled a P3 Form, exhibit 2 and other treatment notes.

#### **Analysis and Determination:**

**The issue which arises for determination is whether the prosecution proved the charge against the appellant beyond any reasonable doubts.**

12. This is a first appeal. The court has a duty to analyse the evidence and come up with its own independent finding. The High Court as the first appellate Court may hear appeals on both matters of fact and law. On the matters of fact it is the duty of the High Court as the first appellate court to re-evaluate the evidence adduced at the trial and come up with its own independent finding while bearing in mind that it had no opportunity to hear the witnesses when they testified and assess their demeanor then leave room for that.

See *Okemo Versus Republic* (19720) EA 32.

13. The Appellant is charged with the offence of rape contrary to Section 3(3) of the *Sexual Offences Act* Section – 3- of the *Sexual Offences act* provides;

3.

- (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. (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.

14. From this provision, the ingredients of the offence of rape may be summarized as follows:-  
Penetration  
Consent  
Whether the penetration was by the appellant



15. I will proceed to consider whether the prosecution proved each of these ingredients:-

### **1. Proof of Penetration.**

16. This is a matter of fact supposed to be proved by the testimony of the complainant. In this case the complainant testified that the appellant entered her house in the wee hours of the night. She struggled with him but unfortunately he managed to rape her. The complainant testified that the appellant was well known to her and when he entered the house she realized he was the one. That the appellant was well known to the complainant is not in dispute. The complainant could therefore not have failed to recognize him as the perpetrator. The evidence of the complainant that she was raped on the material night was corroborated by the medical evidence tendered by PW5, the Clinical Officer who examined her and found bruises on her clitoris and labia majora which was indicative of forced penetration. She concluded that the complainant was raped.

17. I find that the prosecution adduced credible evidence which proved the fact of penetration in the complainant's genital organ namely vagina beyond any reasonable doubts.

### **2. Consent**

18. In case of rape the proof of lack of consent is mandatory and must be proved beyond any reasonable doubts.

19. In the case of *Republic – Versus – Oyier* (1985) KLR 333, the Court of Appeal held:-

- “ 1. The lack of consent is an essential element of the Crime of rape. The mensura 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”.

20. The complainant in her evidence stated that she struggled with the accused but she was overcome and the accused went ahead and raped her. The accused merely denied this fact and claimed that the culprit was allowed to escape. The evidence of PW2 & 3 is that it is the appellant who was inside the house when the complainant raised an alarm that somebody was harassing her. It is the appellant who was rescued from the house by the police. The fact that PW2 & 3 heard that complainant screaming and crying is sufficient proof that what was happening was against her will. I find that the complainant did not consent to the Sexual Act. The prosecution proved that the Sexual Act was unlawful as the complainant had not consented. The appellant had Sexual intercourse with the complainant without her consent.



### 3. The Identity of the Perpetrator.

21. The complainant testified that the appellant is the one who raped her. PW2 and 3 testified that they locked the house from outside when they heard the complainant screaming and saying that somebody was harassing her. Later at 8:00am when the OCS came to the scene with the Investigating Officer, the house was opened and the person who emerged from the house was the appellant.
22. The complainant informed the OCS that it is the appellant who raped her. The defence of the appellant that the culprit escaped is not true. I find that the appellant was identified by PW1, 2 & 3, as the perpetrator. The complainant confirmed that the appellant raped her when he forcefully entered her house.
23. I find that the evidence on record was well corroborated and properly identified the appellant as the perpetrator.

### Grounds of Appeal

24. On the first ground of appeal, the appellant contends that the medical report disapproves the evidence of the complainant as there was no evidence of penetration. Section 2 of the *Sexual Offences Act* defines Penetration to mean – “Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person”
25. The complainant in her evidence in chief stated that the appellant struggled with her trying to rape her. In re-examination at page 5(printed number) line 12, the complainant stated, “He entered the house and raped me”. The allegation was rape and not attempted rape. The clinical officer (PW5) confirmed that the complainant had bruises on her genitalia which was evidence of forced penetration. PW4 confirmed that there was penetration. This ground must therefore fail as the medical evidence did confirm that there was penetration. This also answers ground No. 2. I find that ground No. 2 must fail.
26. On ground No.3, the P3 Form is in respect of the complainant MK. The Outpatient Card is for MN. The General Outpatient Card has names A (Surname), L (First name) K (last name). The Post Rape Care Form has the names MKLA. There is no dispute that these names belong to the complainant. The clinical officer identified the complainant. She confirmed her name when she testified and it is the name on the charge sheet. In my view there is no discrepancy on the names of the applicant which raises doubts. There is no prejudice on the appellant such discrepancies must be ignored.
27. The appellant under, ground number seven stated that his defence was not considered. The learned trial magistrate at page 4 (printed) of the judgment considered the defence of the appellant at length from the line 31 – 37 to page 5 line 1 – 14. The ground is therefore without merits.
28. As for grounds No. 5, the appellant has urged the court to consider Section 333(2) of the Criminal Procedure Code on pre-trial detention period. The record shows that the appellant was charged in court on 27/1/22 though he was granted bail it seems he did not post bail and remained in custody throughout the trial which lasted for about seven months. The learned trial magistrate had a duty to consider the period spent in custody and reduce the sentence proportionately to the time spent in custody awaiting trial. The exact period of incarceration from date of arrest to the date of sentence is six months and twenty four days.

### Conclusion

29. For the reasons stated, I find that the prosecution did adduce sufficient evidence which proved the charge against the appellant beyond any reasonable doubts. The appeal is without merits.



**I order that:-**

1. This appeal is dismissed.
2. The sentence shall be reduced by six months and twenty four days to take into account the period spent in custody awaiting the trial.
3. The Deputy Registrar to serve the order on the Officer in-charge of the prison where the appellant is serving the sentence for compliance.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**In the presence of:-**

Ms. Kitoto for ODPP – present

Lucas Ezar the appellant in person.

**HON. LADY JUSTICE L. GITARI**

**HIGH COURT – JUDGE**

