



**Nyakambi v Republic (Criminal Appeal 18 ( E015) of 2022)  
[2023] KEHC 18450 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL 18 ( E015) OF 2022  
PN GICHOHI, J  
MAY 31, 2023**

**BETWEEN**

**ENOCK NYAKAMBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon. S. N. Abuya (CM)  
delivered on 22nd September, 2022 in Kisii Magistrate's Court S.O Case No. 34 of 2019)*

**JUDGMENT**

1. The background of this appeal in that the Appellant herein was charged with the offence of Rape contrary to section 3 (1) (a) (b) (3) of the Sexual Offences Act No 3 of 2006 . The particulars were that on the 25<sup>th</sup> day of February 2019 at about 0400 hrs in Kisii Central District within Kisii County, he intentionally and unlawfully caused his penis to penetrate the vagina of LBO without her consent.
2. He was also charged with the alternative count of committing indecent act with an adult contrary to section 11 (a) of the Sexual fences Act No 3 of 2006 . The particulars were that on the 25<sup>th</sup> day of February 2019 at about 0400 hrs in Kisii Central District within Kisii County, he intentionally touched the buttocks and vagina of LBO with his penis without her consent.
3. He was tried and ultimately convicted and sentenced on the main count and sentenced to serve 10 years imprisonment vide judgment delivered on September 22, 2022.
4. Dissatisfied, he preferred this appeal. He listed following grounds in his Petition of Appeal;
  1. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the P3 form admitted as exhibit, had no probative value since it lacked medical content in support of the charge medication/treatment have been



sought and conducted 5 days after alleged incidence thus unsafe and not capable of being relied upon a conviction and sentence.

2. The Learned Trial Magistrate erred in law and in fact by putting much reliance and speculative assumptions and in particular the alleged “blood-stained pant” to hold that this was conclusive proof of rape considering that the doctor had only opined that may/might not conclusively have been caused by injury to her genitalia or genital trauma without proof as to whether this was human blood or not and the age of the said blood stain.
3. The Learned Trial Magistrate erred in law and in fact by laying emphasis on the evidence adduced by PW3, Daniel Nyameino with reference to the state of the cloths presented and injuries sustained considering that PW1 had acknowledged falling from a moving motorbike and no other evidence/ witness in support of the allegations that indeed the complainant wore the very cloths on that particular day thereby arriving at an erroneous conclusion.
4. The learned trial Magistrate erred in law and in fact by holding that the incident occurred in particular time whereas there was no indication whatsoever of the crime scene having been visited upon to ascertain the existence of the alleged features if at all there were any (bushy area), presence of any evidence of struggle and call data/GPRS to ascertain the location of both the complainant and accused at the time of the alleged incidence and thus arriving at a erroneous conclusion.
5. The learned Trial magistrate failed to properly, and/or at all evaluate the entire evidence on record , that is, oral evidence vis-à-vis the documentary evidence and consequently failed to notice the material discrepancies apparent in the evidence of the prosecution witnesses thereby arriving at an erroneous decision.
6. The learned trial Magistrate erred in law and in fact in convicting and sentencing the appellant of assault whereas there was no sufficient evidence or at all to warrant such decision and/ or verdict .
7. The Learned Trial Magistrate meted out a sentence which was illegal; null and void hence the sentence ought to be set aside *Ex-Debito Justitiae*

5. He therefore prayed that;

- a) The Appeal be allowed and the conviction and sentence dated September 22, 2022 be quashed varied and /or set aside.
- b) Consequent to prayer (a) above being granted, the appellant be set at liberty forthwith.
- c) Such other further and/or relief the Court may deem necessary to grant.

6. It is now settled law that as a first Appellate Court, this Court should analyse and re-evaluate the evidence before the trial court and come up with its own conclusions on that evidence (See *Okeno v R* [1972] EA 32.



7. The prosecution called three witnesses in support of their case while the Defence had two witnesses inclusive of the Appellant.
8. The complainant (PW2) testified that after selling ground nuts at Kisii Bus Stage on February 25, 2019 he called the Appellant at around 4.00 p.m. to take her home. He was a boda boda rider. Instead of the Appellant taking her to her home at [Particulars Withheld], he drove towards Milimani Area prompting her to ask him why he was not taking her to her home . He told her that he was going to fuel his motor cycle.
9. Suddenly he increased the speed and drove her into a bushy area. She fell from the motor cycle and he held her. He then told her that he had admired her for a long time and that on that day it was a must for them to have sex or else he was going to stab her.
10. He removed her trousers and raped her. She tried to scream but he ended up assaulting her and told her that if she dared scream again, he would stab her. After the incident, the Appellant left her at the scene of crime. She reported the matter to police and she was later taken to hospital for treatment. She produced the copy the medical card and P3 Form that were marked for Identification as exhibits. She told the court that she had known the Appellant for a very long time he normally carried her.
11. PC Juma (PW2), of Kisii Central Police Station took over investigations from PC Oliver who had been transferred to Migori County. While referring to PC Oliver’s statement dated January 25, 2019, he told the court a Rape Case was reported at Kisii Central Police Station by PW1 that at 4.00 pm after she was done with her business in Kisii town, she boarded a motorcycle being ridden by the Appellant to take her to her home in Jogoo.
12. That instead of the Appellant taking her to Jogoo, he changed direction and drove her towards Milimani Area. Along the way the Appellant pulled her to the bush and forcefully had sex with her. She later reported the matter to Kisii Central Police station. She was directed to go to hospital where she was treated and her P3 Form filled by the doctor. After investigations, the Appellant was arrested on March 15, 2019 and charged with this offence.
13. In cross-examination he stated that no other person saw the Appellant rape her. That the complainant used to call him to take her home after work. He could not tell the cloths that the Appellant wore on the fateful day as he was not there at the time of the alleged offense .
14. Daniel Omanyony Nyameino, (PW3) a clinical officer at Kisii Teaching and Referral Hospital treated the complainant on January 30, 2019. He testified that the complainant visited the hospital with a torn soiled black t-shirt. When he examined her, he noted that she had a torn blood-stained light blue underwear. The black trouser that she had put on was dirty from behind. She complained as having been raped on January 25, 2019 by a person who was well known to her. She had bruises on the back of her ear.
15. The injury was 4-6 days old and caused by a blunt object. On examination of her private parts, he noted that there were discharges emanating from her genitalia. Samples were taken to Kisii Teaching and Referral Hospital lab on January 30, 2019 but nothing was found. On February 1, 2019 she reported that she received regular periods.
16. According to PW3 delays in seeking medical attention may have led to loss of crucial evidence since the offense occurred 5 days earlier. He explained further that the blood on her underpants may have resulted from injury to her genitalia or genital trauma.
17. When cross examined by the appellant PW3 stated that the Appellant was never presented before him for any examination.



18. In his unsworn statement, the Appellant testified that the complainant was a person well known to him because he used to buy from her Chang'aa. He recalled that he had her debt amounting to Ksh 2,000 and because he had been unable to settle the same, the lady had sworn to punish him. That one day while at the stage waiting to carry customers, he was arrested and taken to Kisii police. Later he was presented to court and charged with the offense. He denied committing the offense and insisted that he was framed by the complainant.
19. Leoninda Bosibori (DW2) testified that the complainant and the Appellant were not just friends but were married to each other and the two could disagree in shifts. She explained that between the months of December, and November, 2018 as they were selling the illicit alcohol, police officers raided their premises and took the alcohol away without arresting the complainant. Later the complainant accused the Appellant of setting her up so that she could be arrested. The complainant and the Appellant later on proceeded with their alcohol business and were living well. She later heard that the complainant had accused the Appellant but she did not know why.
20. In cross examination, she told the court that the complainant and the Appellant were her neighbours and lived as husband and wife since June 2018 but had no children. The two used to sell alcohol and in the plot . The complainant then took alcohol money and fled on December 30, 2018 and went to live alone. That three months later , the complainant claimed that the Appellant had raped her.
21. From that evidence the trial magistrate had two issues for determination that is;
  1. Whether or not on the date in question the complaint was raped.
  2. If so whether the Accused person was the rapist.
22. She then held ;

### **Issue 1.**

“I find there is no doubt that on the date in question the complainant (PW1) was raped as stated that on the date in question a bodaboda rider who was taking her home diverted from the route to her home in Jogoo, he took her to a bushy area in Milimani, he removed her trouser, she screamed, he threatened to stab her if she screamed again, he assaulted her and he raped her.

Further her evidence was corroborated by the CO(PW3) who examined her 5 days after the rape who stated that her pant was blood stained and the blood stains may have been caused by injury to her genitalia or genital trauma. Further the clinical officer (PW3) produced the complainants p3 form and appointment card as exhibits.

### **Issues 2**

I find there is no doubt that the Accused person was the rapist. Even though the rape occurred at 4 am the complainant and Accused had known each other for a long time before the incident as the Accused used to carry the complainant as a bodaboda, the complainant is the one who called the Accused to come take her home on the said date and they even talked to each other during the incident. Therefore, no issues of mistaken identity could arise herein.

On the other hand, I find the Accused person's defense that he did not commit the offence but the complainant who was his customer just framed him because he failed to pay her debt for Kshs 2000/= which he acquired as he used to buy chang'aa for the complainant is not a believable defense and is an afterthought as he never raised this issue when cross examining the complainant. Further when



the Accused was cross examining the complainant, he never alleged that he was the complainant's customer but instead alleged she was his girlfriend and they had gone to a lodging.

Further still the Accused's witness alleged that the complainant and Accused were married and they used to sell alcohol together but the complainant fled with the money they had made from the said business which contradicts the Accused's defence.”

### Submissions

23. Parties chose to prosecute the appeal by way of written submissions. The appellant filed his written submissions on January 16, 2023 while those of the respondent were filed on January 18, 2023.
24. On behalf of the Appellant, counsel submitted that the trial court failed to take into consideration the fact that the complainant only sought for medication after 5 days after the incident had occurred. According to him, the delay in seeking medical attention ought to have raised doubt in the mind of the trial Magistrate whether the incident ever occurred.
25. Further, he submitted that the P3 Form had no evidence sexual intercourse, no spermatozoa or bruises and thus to him the same lacked any probative value to support the charge. He further submitted that the blood-stained pant was never presented before the court as exhibit to support the case. He contended that the doctor's opinion that the blood on the pant may have been caused by an injury to her genitalia or genital trauma was merely speculative since the said blood could also have been caused by any other cause such a monthly period, and besides, the said clothes were not presented as evidence in court.
26. While raising doubt as the incidence really occurred, he argued that the Investigating Officer did not visit the scene of crime to establish any form struggle. The learned counsel argued to that the trial court relied only on the evidence of one witness to sustain the conviction given the gravity of the offense. He further sates that the complainant acknowledged falling for the motor cycle thereby sustaining injuries yet she did not report to police , never sought treatment or filed a case for compensation by the Appellant.
27. On his part , counsel for the Respondent opposed the Appeal and submitted that during trial, the elements of the offense of Rape as set out under section 3 (1) of *Sexual Offenses Act* were brought to the fore. That the elements include intentional and unlawful penetration of the genital organ of the person, coupled with the absence of consent as was set out by the Court of Appeal in the case of *Republic vs Oyier* [1985] KLR and that from the complainants account before the trial court, all the elements were met.
28. He contended that the findings of the doctor just added quantum to the Complainant's account buttressing the case against the Appellant. He argued that the Appellant's argument that treatment having been sought 5 days after incident was unsafe and not capable of being relied upon was incorrect since the medical report confirmed and accentuated the complaint's account relating to the incident.
29. While expounding on the medical report, he submitted that the credibility of the report was not challenged by the Appellant during the cross-examination during trial. Lastly , he submitted that the Appellant did not expatiate any discrepancies in the evidence that could have vitiated the successful prosecution of the case and accordingly the Appeal is unassailable and ought to be dismissed.



## Determination

30. From the material before court , the issue of determination is whether the prosecution established the offence of rape contrary to Section 3(1) as read with Section 3(3) of the Sexual Offences Act beyond any reasonable doubt. Section 3 (1) of the Sexual Offences Act states that;

“a person commits the offence of rape if;

He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;

- a) The other person does not consent to the penetration; or
- b) The consent is obtained by force or by means of threats or intimidation of any kind.”

Section 3 (3) thereof 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.”

31. What is clear in this case is that both the complainant and the Appellant were known to each other , to the level that he used to be called even at 10.00 pm to take her home after work. During her cross-examination by the Appellant, the complainant denied ever being his girlfriend. She also denied that they had gone to a lodging. From that line of cross examination, then if the relationship between the two was not of a husband and wife. That evidence that was only raised by DW2.

32. In his statement in defence, he changed his line of thought. His relationship with her, according to him was that he used to buy chang'aa from her and that he owed her a debt of Ksh 2,000/- and that she swore to punish him for it. That was contradicted by his witness who said that the complainant fled with the Appellant's money from chang'aa business. Even if they knew each other, it would not be a licence to force himself into her and it is an offence under the Act. The court however relies in the strength of the prosecution case and not the weakness of the defence. The burden of proof never shifts to the accused person at this stage.

33. Under Section 124 of the Evidence Act has a proviso to requirement for corroboration that “Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

34. The complainant testified that the Appellant increased speed as he headed to a bushy area and she fell from a motorcycle. According to PW2 who was not even the investigating officer, the report from the initial investigating officer that along the way, the rider stopped the motor cycle pulled the complainant to a nearby bush and had sex with her forcefully. On his part, PW3 told the court that he examined the complainant and the back of her back of her ear was bruised and tender.

35. The complainant did not seek treatment immediately and does not account for that failure. The incident is said to have occurred on February 25, 2019 but she saw the doctor on 31<sup>st</sup> February 2019 and that is the day the doctor saw torn black T- shirt , dusty white /light blue under-pant, bloody genitalia , black silk trouser – dusty .



36. The doctor opined that the bloody genitalia could have been due to trauma in the genitalia. Of course, the history was that she was raped on January 25, 2019. What is intriguing is that she reported to the doctor that she received regular periods on 1/1/2019. It is therefore speculative that the blood-stained clothes, including the under-pant, that the doctor saw on January 30, 2019 were the clothes the complainant wore on the alleged night she was raped and that the blood therein was as a result of trauma to genitalia caused by rape on January 25, 2019. These are evidential gaps in the prosecution case raising material doubts and they be resolved in favour of the accused person.
37. In the circumstances, the conviction based on the weak defence rather than the strength of the prosecution case is not safe. It was tantamount to shifting the burden on the accused person based on inconclusive and unreliable evidence in the prosecution case.
38. I therefore allow this appeal. The conviction is quashed and sentence of 10 years set aside. The appellant is set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 31ST DAY OF MAY, 2023**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

The Appellant

Mr. Ochengo for Respondent

**Kevin Isindu, Court Assistant**

