



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kanampiu v Republic (Criminal Appeal E005 of 2022)  
[2023] KEHC 18036 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL APPEAL E005 OF 2022**

**LW GITARI, J**

**MAY 25, 2023**

**BETWEEN**

**JOSEPH MWANDIKI KANAMPIU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein was charged at the Chief Magistrate's Court at Chuka with the offence of rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on 20<sup>th</sup> day of December, 2019 in Tharaka Nithi County within the Republic of Kenya, the Appellant unlawfully and intentionally caused penetration of his genital organ, namely penis, into the genital organ, namely anus, of J.M., a male adult aged 23 years.
3. The Appellant also faced an alternative charge of committing an indecent act with an adult contrary to Section 11 of the *Sexual Offence Act* No. 3 of 2006.
4. The Appellant denied committing the offence and after a full trial, the learned trial magistrate found the Appellant guilty, convicted him, and sentenced him serve a term of ten (10) years' imprisonment.
5. Aggrieved by his conviction, the Appellant instituted this appeal *vide* the Petition of Appeal dated 25<sup>th</sup> January, 2022 which raises the following main grounds of appeal:
  - a. That the learned trial magistrate erred in both matters of law and facts by convicting the Appellant without considering that the adduced prosecution evidence was inadequate to stand conviction.
  - b. That the learned trial magistrate still erred in both matters of law and facts by disregarding the Appellant's defense which contained plausible and that would impeach the prosecution case.



- c. That the learned trial magistrate misdirected itself on facts by finding the offence of attempted rape was proved on assumption.
  - d. That the learned trial magistrate still erred in both matters of law and facts by failing to find that the ingredients of attempted rape were not proved.
6. The Appeal was canvassed by way of written submissions which I have summarized here below.

### **The Appellant's Submissions**

The appellant argued all the five grounds together. It is his submission that the legal burden of proof in criminal cases is on the prosecution and the standard of proof is proof beyond any reasonable doubts.

7. It is the Appellant's submission that the prosecution evidence was not sufficient to warrant a conviction. That the fact that the complainant woke up suddenly at night and found himself wet on his anus did not prove that there had been penetration. He contends that the trial magistrate failed to record the reasons for believing a single witness.
8. The appellant further submitted that the complainant did not adduce evidence to prove that there was contact between him and any part of the appellants body or the genital organ of the complainant which caused penetration. It is the appellant's contention that the record of the trial court does not show that the anus of the complainant was penetrated or what was used to cause the penetration.
9. It is further the Appellant's submission that the clinical officer who gave his evidence gave a contradictory and incomplete report which was unreliable to the extent that it captured the complainant's age as 17 years yet the complainant testified that he was 23 years old. The Appellant thus contended that the evidence of the clinical officer is a fabrication and ought to have been disregarded.
10. He further submitted that the case against him was purely premised on speculation and suspicion. That no evidence was adduced to prove that the complainant was sedated. That the ingredients of the offence of rape were not proved.
11. Finally, the Appellant submitted on the sentence imposed on him although this never came up in his grounds of appeal. On this, it was his submission that the sentence of 10 years imprisonment was harsh and excessive. The Appellant thus urged this Court to tilt the wheels of justice in his favour and set him at liberty. In the alternative, that this Court substitutes the sentence imposed upon him with a lesser sentence. He relied on the Court of Appeal decision in the case of *Joshua Mwangi Gichuki v Republic* Criminal Appeal No.84/2015, Nyeri.

### **The Respondent's Submissions**

12. It is submitted that the State supports the conviction and sentence on its part, the Respondent started by submitting that the Appellant was not facing the offence of Attempted Rape contrary to Section 4 of the *Sexual Offence Act* as indicated on his Petition of Appeal. On the contrary, that he was facing the offence of Rape under Section 3(1)(a)(b)(3) of the *Sexual Offence Act*. That the ingredients of the offence were proved to the required standard of beyond any reasonable doubts.
13. The Respondent went on to submit that all the ingredients of the offence that the Appellant was facing were proved to the required standard. Further, that the trial court did consider the Appellant's defence and found it wanting.
14. On the issue of the Appellant's sentence, the Respondent submitted that the same had not been challenged but went on to address the issue. In this regard, it was the Respondent's submission that



the sentence meted out was legal and proper in the circumstances. That the Appellant cannot benefit from any other sentence as 10 years imprisonment is the proper sentence going by the provisions of Section 3(3) of the *Sexual Offence Act*. Finally, the Respondent submitted that the Appellant's right to a fair hearing was safeguarded as he was given a chance to mitigate and the trial court considered the mitigation before meting out the sentence and that the principles of the celebrated Muruatetu case are not applicable in sexual offences.

15. The Respondent thus submitted that it fully supported the conviction and sentence meted by the honourable trial magistrate in this matter and thus urged this Court to dismiss the present appeal in its entirety.

### **Issues for determination**

16. From the grounds of appeal raised by the Appellant and the respective submissions by the parties, which I have considered, the main issue that arises for determination in this appeal is whether the case against the Appellant was proved to the required standard of beyond any reasonable doubt. While the issue of sentencing was not raised in his grounds of appeals, I will equally address the same hereunder considering that both parties have made their submissions on the same.

### **Analysis**

17. Being a first appeal, the duty of this Court as a first appellate is now well settled in law. For avoidance of doubt, it is the duty of this Court to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to access their demeanour. [See: *Okeno v. Republic* [1972] E.A. 32]. In *S Robi Wangui v Republic* (2019) eKLR the Court of Appeal held inter alia, that the first appellate court must make its own findings on the evidence laid before the trial court before deciding whether the magistrate's finding should be supported.
18. Based on the above authority, I shall now re-evaluate the evidence that was presented before the trial court.

#### **a. The Prosecution's Case**

19. PW }1 was HM. She stated that the complainant (PW2) was her younger brother and that she knew the Appellant as they studied in the same secondary school. She recalled that on the material day, she met with the Appellant at Kathwana market and he offered to give her a ride home on his motor cycle. They reached her home at around 7.30 p.m. The Appellant's motor cycle had a problem as its lights were not working and he asked PW2 to help him light the path using a torch. According to PW1, the Appellant was to take PW2 back home the following day. The Appellant then left with PW2. The following day, PW2 returned home alone.
20. It is PW1's testimony that on 24<sup>th</sup> December, 2019 at around 8.00 p.m., her brother, one SN, told her what PW2 had told him. That the Appellant sodomized him on the material day and that he now had difficulty and felt pain when going for a long call in the toilet. PW1 then called PW2 who confirmed the incident. S went to the Appellant's home on 25<sup>th</sup> December, 2019 but did not find him. That they only found the Appellant's parents. He then reported the matter to Kathwana Police Station on 26<sup>th</sup> December, 2019
21. PW2 was the complainant. He corroborated PW1's testimony about his sister arriving at their home with a motor cycle and that he went with the Appellant to his home. He explained that when they reached the Appellant's house, where he lives alone, the Appellant started showing him pornographic



movies from the Appellant's mobile phone. That PW2 asked the Appellant to show him where he would sleep and the Appellant told him to sleep in the Appellant's bed. That at midnight, he found himself naked and noticed that he had some wetness in his anus. The Appellant was naked too. PW2 testified that he asked the Appellant what had happened and that the Appellant threatened to do worse things to him if he ever told anyone what had happened.

22. PW2 further testified that the following morning the Appellant carried him on his motor cycle and left him a distance near PW2's home. He confirmed that he later told his brother S when the pain became too much and that his brother is the one who told PW1. PW2 produced in evidence his birth certificate as P. Exhibit 1. He further stated that he was treated at Chuka District Hospital. That he then went back to school but the pain became too much and he was admitted at Orsola Mater Hospital for two weeks.
23. PW3 was Nicasio Mbundi, the investigating officer in this case. He confirmed that a report of a case of defilement was made at Kathwana Police Station on 26<sup>th</sup> December, 2019. He booked the incident in the occurrence book and sent the victim to hospital for treatment. He then investigated the incident by visiting the Appellant's house which was the scene of the alleged offence. He found that the Appellant had a decoder and TV which he stated that the Appellant used to show the victim phonographic videos. On cross examination, he stated that he never recovered the CDs containing phonographic videos.
24. PW4 was Joseph Mwenda Mirebu, a registered clinical officer at Chuka District Hospital. According to him, he filled the P3 form for PW2 and stated that PW2 was a male aged 17 years. He further testified that on anal genital examination, he had noted healing bruises around the anal opening of PW2. Hepatitis, VDRI, and HIV test all came out negative. An anal swab revealed no presence of spermatozoa. PW4 produced, PW2's treatment notes from Kajuki Health Centre, treatment notes from Chuka District Hospital, PRC from Kajuki and P3 Form as P. Exhibits 2, 2(b), 3, and 4 respectively.

#### **b. The Defence Case**

25. On his part, when found to have a case to answer after the close of the prosecution case, the Appellant gave sworn defence and informed the trial court that on the material day, he was at the garage repairing a motorcycle. That he met PW1 who he alleged was his lover/girlfriend but they separated. That they sat down waiting for the motorcycle to be prepared and afterwards, PW1 requested that the Appellant drops her at her home. The Appellant alleges that the lights of the motorcycle were not working and so PW1 used her phone torch to light the way up to her home. That when they got to PW1's home, they found her mother, 2 boys and 1 girl. It is the Appellant's statement that PW1 asked the complainant to accompany the Appellant to his home so that he could assist him light the road with a torch.
26. The Appellant confirmed that the complainant spent the night at his home. According to him, the complainant woke up the following day and took the Appellant's motorcycle. That the Appellant followed him and found that he had fallen down and got injured on the stomach. The Appellant then disagreed with the complainant for taking his motorcycle without permission but still carried him to his home. It was the Appellant's case that on 25<sup>th</sup> December, 2019 the complainant and PW1 went to his house asking him for a compensation of KShs. 50,000/= as damages for the injuries that the complainant had sustained while on the Appellant's motorcycle. He then stated that on 26<sup>th</sup> December, 2019 he was arrested on allegations that he had raped the complainant.



## Determination

27. The offence of rape is defined under Section 3(1) of the [Sexual Offence Act](#) No. 3 of 2006 as follows:

“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.”

28. Section 3(2) of the [Sexual Offence Act](#) provides that “the term “intentionally and unlawfully” has the meaning assigned to it in Section 43 of this [Act](#)”. The said Section 43(1) of the [Act](#) stipulates that:

“(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.”

Section 43 of the [Sexual Offences Act](#) provides:

1. “An act is intentional and unlawful if it is committed
  - (a) in any coercive circumstance;
  - (b) under false pretences or by fraudulent means;
  - (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 (c) 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 or 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.

(5) This section shall not apply in respect of persons who are lawfully married to each other.

29. Penetration is a critical ingredient for the offence of rape. On penetration, Section 2 of the *Sexual Offences Act* defines “penetration” as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

30. In the present case, the complainant stated that when he woke up, he found that he was naked. That the Appellant was also naked and the complainant felt wetness in his anus. The trial court, while relying on the evidence of the clinical officer, found that there had been penetration.

The evidence of penetration is usually given by the victim. In this case the fact that the complainant was with the appellant on that material night is not in dispute. The appellant confirmed in his defence that he went with the complainant to his house and they slept on his bed until the next morning. The complainant testified that at night he woke up and found himself naked. The complainant also realized that his anus was wet and he was feeling a lot of pain. The appellant was there stark naked and cautioned the complainant not to tell anyone as to what had transpired. The appellant also told him that if he told anyone what happened, he would do even worse things to him. The complainant did not tell anyone until when the pain became unbearable and he informed his brother SN who in turn informed her sister PW1. It was then that the matter was reported to the police and the complainant was escorted to hospital.

31. The clinical officer who filed the P3 form (PW4) testified that the complainant had healing bruises around the anal opening. He told the court that the complainant had alleged that he was sexually assaulted by a person who was well known to him. The evidence given by the complainant clearly shows that the appellant had an ill intention. He showed the appellant phonographic movies and as they slept he stripped naked. The fact that the complainant was wet on his anus and was in pain shows that the appellant penetrated him with his penis. The complainant sustained bruises. This is a fact which shows that force was used. The complainant was asleep when this happened and had therefore not consented to the act. The appellant therefore committed this offence unlawfully and intentionally against the complainant. The trial magistrate found that the appellant penetrated the complainant’s anus using his penis which action was illegal, unlawful and uncalled for. The trial magistrate stated as follows: “ I find no reason to doubt the complainant’s evidence of what happened that night.” See page 34 line 31 to page 35 line -5. The trial magistrate had the chance to see the complainant and observe his demeanor. As such when she held that she had no reason to doubt the complainant, it means that she believed that the complainant was telling the truth.

32. In Sexual offences, the court can rely on the sole evidence of the victim to convict if the court is satisfied that the victim is telling the truth.



Section 124 of the *Evidence Act* provides:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. 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.”

I find that the appellant merely denied that he sodomised the complainant but all the other facts were not in dispute. I find that the evidence of the complainant which was corroborated by the medical evidence proved that the appellant sodomised the complainant. The ingredients of the offence of rape as set out under Section 3(1) of the *Sexual Offences Act* (supra) were proved beyond any reasonable doubts. The defence of the appellant was not plausible because the complainant was treated in hospital and there was no evidence that he had sustained injuries from a motor bike accident. The complainant on the other hand told the court that he could not steal the motor bike as he does not even know how to ride one. I find that the trial magistrate did consider the defence of the appellant and properly rejected it. The clinical officer who examined the complainant was candid despite the fact that some days had passed after the rape that the only visible injuries which he noted on the complainant were bruises on the anus of the victim which were evidence of penetration into the complainant’s anus. The medical evidence therefore corroborated the fact of rape but not of the victim having been involved in an accident. I find that the defence of the appellant was properly considered and rejected. The appellant in his submissions had raised the issue that there was contradiction on the age of the complainant. The prosecution produced the birth certificate of the complainant as exhibit 1. It shows that he was born on 5/6/1997. It follows that in 2019 he was twenty two (22) years old. It is on the treatment notes that the age is given as 17 years. The charge sheet also stated that the victim was a juvenile aged seventeen years. It is true that the age of the victim of a sexual offence is a critical component. Section 3 of the *Sexual Offences Act* (supra) on the definition of the term rape, age is not provided as a mandatory ingredient requiring proof before conviction. The respondent was alive to this fact and amended the charge sheet on 21/7/2020 and quoted the age of the victim as twenty three (23) years. The fact that there was contradiction on the victim’s age did not prejudice the appellant in any way. This flow in the prosecution case is cured under Section 382 of the *Criminal Procedure Code* which provides:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this *Code*, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In this case age was not a mandatory ingredient of the offence. The appellant did not therefore suffer any prejudice. The evidence adduced by the prosecution was not speculation as alleged by the appellant. The evidence was well corroborated and confirmed by the appellant. This heinous act could



not have been committed in the open for there to be witnesses. The complainant tendered credible and reliable evidence which was corroborated by medical evidence. The nature and the circumstances of this offence is such that the court could convict on the evidence of the complainant if the court believed him.

On the sentence Section 3(3) of the *Sexual Offences Act* (Supra) provides for a minimum sentence of ten years which may be enhanced to life imprisonment. The appellant was sentenced to the bare minimum sentence provided for the offence of rape. The principles in the Supreme Court decision in *Muruatetu case* are not applicable in Sexual offence. In *Hassan Kabindi Katana alias Kinungi & Another v Republic* Court of Appeal Malindi Criminal Appeal No.8/2019 cited by the respondent, it was held that the holding in Muruatetu's case is not applicable to Sexual Offences. The accused was ordered to serve the minimum sentence provided for the offence. The trial magistrate did not error in anyway by imposing the minimum sentence provided for.

**Conclusion:**

After evaluating the evidence and for the reasons stated above I find that the respondent adduced evidence which proved the charge against the appellant beyond any reasonable doubts. The conviction of the appellant was proper.

I order as follows:

This appeal is dismissed.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**L.W. GITARI**

**JUDGE.**

