



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Gonjobe v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 18079 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E015 OF 2022**

JN NJAGI, J

MAY 25, 2023

BETWEEN

ABDI MOHAMED GONJOBE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by
Hon. E.K.To, Principal Magistrate, in Moyale PM's Court
Criminal Case No. MSO E002 of 2021 delivered on 23/11/2021)*

JUDGMENT

1. The Appellant herein was convicted for the offence of attempted rape contrary to section 4 of the [Sexual Offences Act](#) No. 3 of 2006 and was sentenced to serve 5 years imprisonment. The particulars of the offence were that on the 9th day of August in 2019 in [particulars withheld] Sub- County within Marsabit County he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of KDG (herein referred to as the complainant) without her consent. The Appellant was aggrieved by the conviction and the sentence and filed the instant appeal.
2. The grounds of appeal are:
 1. That the learned trial magistrate erred in law and fact in relying on evidence whose investigations were shoddily done.
 2. That the offence of attempting rape was not proved to the required standard of beyond reasonable doubt.
 3. That the learned magistrate erred in law and fact in dismissing the Appellant's defence without giving cogent reasons.



Case for Prosecution

3. The evidence of the complainant was that the Appellant was her neighbour in [particulars withheld] Sub county. That on the material day at around 10 am she had left her home to cut some grass. The Appellant found her where she was cutting grass and held her from behind. He was holding a condom. He removed his trousers and underpants and pressed her to the ground while holding his penis. He removed the complainant's clothes and she remained in her underpants. He tried to insert his penis into her vagina. The complainant screamed and a certain woman went to her rescue. On seeing the woman, the Appellant ran away.
4. The complainant went home and reported to her husband PW2. It was the evidence of PW2 that the Appellant had passed by his home. That shortly after his wife returned home while crying. She had blood on the face. She reported that the Appellant had attempted to rape her. He took her to [particulars withheld] police station and reported. She was issued with a P3 form. She was taken to hospital and attended to by a doctor. The Appellant went underground away from [particulars withheld]. After more than one year he went back to [particulars withheld] and he was arrested on 4/1/2021. The investigating officer PW3 charged him with the offence. During the hearing the complainant identified a piece of clothe that she was wearing at the time of the assault. The investigating officer produced it as exhibit, Pexh.1. The same officer produced the treatment notes and the P3 form as exhibits, Pex.2.

Defence case

5. When placed to his defence the Appellant stated in a sworn statement that his family goats and those of the complainant were grazing in the same field. That he had agreed that the complainant's family was to make some payments. They did not pay. He told them to take their goats. The complainant's husband threatened to kill him. They later framed up the offence of rape against him.
6. The accused called one witness, his mother DW2. It was her evidence that she was taking care of the complainant's goats at a place called [particulars withheld]. She did so for a period of one year. The complainant's family was to pay her Ksh.3,300/=. She sent her daughter to collect the money. They said that she, DW2, owed them Ksh.1,000/=. They offered to pay her Ksh.3,000/= but she declined. She asked them to go for their goats. She later sent her son to ask for the money. He reported to her that he had been abused and chased away. The complainant told her that the appellant had held her and did not do anything to her. She called the elders to talk over the issue but the complainant's husband declined.

Submissions

7. The Appellant made written submissions in which he stated that the husband to the complainant alleged that his wife had injuries on the face yet the prosecution failed to call the clinical officer who attended to the complainant to support the evidence of assault. That failure to call the clinical officer was fatal to the case.
8. The Appellant submitted that the woman who was said to have witnessed the incident was not called to testify in the case. Further that the Appellant's defence that there was a grudge between him and the complainant raised reasonable doubt on whether the offence was committed. That the benefit of doubt ought to have been resolved in favour of the Appellant.
9. It was submitted that in an offence of rape the evidence of the victim ought to be corroborated in material particulars. The Appellant relied on the case of *Maina v Republic* (1970) EACA 370 where it



was held that before the court convicts on an offence of rape the trial court ought to warn itself of the danger of doing so where there is no corroboration and only convict where it is satisfied that the victim is telling the truth. The Appellant submitted that his conviction was not safe. He urged this court to find that the offence was not proved and acquit him of the offence.

10. The state through the Prosecution Counsel, Mr. Otieno, conceded to the appeal on the ground that the independent witness who is said to have witnessed the incident did not testify in the case. That the trial court did not state why he believed that the complainant in this case was a truthful witness. Therefore, that the conviction was not safe.

Analysis and Determination –

11. This being a first appeal, the duty of the court is to analyze and evaluate afresh the evidence adduced before the lower court and drawn its own conclusions while bearing in mind that it neither saw nor heard the witnesses testify. The Court of Appeal in *Okeno v Republic* [1972] EA 32 set out the duty of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

12. The standard of proof in a criminal case is that of beyond reasonable doubt. This burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. The burden is discharged by availing by the prosecution of evidence that will prove an accused person guilty of the commission of the offence beyond any reasonable doubt – See *Sawe v Republic* (2003) KLR 364. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 stated this degree to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as 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.”

13. The issues for determination in the appeal are:
 - (1) Whether it was fatal for the prosecution to fail to call material witnesses.
 - (2) Whether it was procedural for the investigating officer to produce the medical documents as exhibits.
 - (3) Whether the charge against the Appellant was proved beyond reasonable doubt.
14. The woman who was alleged to have witnessed the incident was not called to testify in the case. It is the duty of the prosecution in a criminal case to call witnesses who are necessary to prove the case. Where such evidence is not produced without any explanation being offered, it may be open for the court



to draw an inference that were the evidence produced it would have been adverse to the prosecution evidence. In *Bukenya & Others v Uganda* (1972) EA 549, the Court of Appeal for East Africa stated as follows:-

“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”

15. In *Nguku v Republic* [1985] KLR 412, it was held that:

“Where a party fails to produce certain evidence, a presumption arises that the evidence, if produced, would be unfavourable to that party..”

16. In this case, it is clear that the woman who was not called to testify was a very crucial witness in the case. There was no explanation from the prosecution as to why the woman was not availed as a witness in the case. Without the evidence of the said witness it may as well mean that there was no such a witness or that the evidence of the witness was adverse to the prosecution case.

17. It is trite law that the evidence of a victim in a rape case must be corroborated in material particulars. What amounts to corroboration was stated by the Court of Appeal in *Mukungu v Republic* [2002] 2 EA 482 where citing *Mutonyi v Republic* [1982] KLR 2003 it held that:

“An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See *Republic v Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61.”

18. The law of corroboration in rape cases is that the court must warn itself of the danger of convicting on the uncorroborated evidence of the victim but the court can convict in the absence of corroboration upon warning itself of the danger of doing so and upon satisfying itself that the victim was truthful. In *Benjamin Mugo Mwangi & Another v Republic* [1984] eKLR, the Court of Appeal considered the law in regard to corroboration in rape cases and stated as follows:

“There was no corroboration of C’s evidence that she had been raped. This was a sexual offence and so it was incumbent upon the trial magistrate to warn himself that it was not safe to convict the appellants on the uncorroborated evidence of C but that having warned himself, he could convict in the absence of corroboration. The trial magistrate was here faced with a case of an oath against an oath. The relevant law in Kenya is succinctly set out in *Chila v The Republic* [1967] EA 722 at page 723:

“The law of East Africa on corroboration in sexual cases is as follows. The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may



convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.”

The decision was applied in *Margaret v the Republic* [1967] KLR 267 ... In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that [particulars withheld] evidence is true. We are not so satisfied and so the convictions cannot stand: *R v Cherap arap Kinei & Another* (1936), 3 EACA 124.”

19. That is the law to be applied in this case as will be discussed later in the judgment.
20. The complainant in this case stated in her evidence that she went to hospital though she did not indicate to the court whether she had received any injuries. Her husband PW2 however stated that she had blood stains on the face. The P3 form indicated that the complainant had sustained bruises on the chin and cheek.
18. The P3 form and the treatment notes in this case were produced in court by the investigating officer, PW3. According to the treatment notes the complainant was seen at Ramata Health Centre but it is not clear at which medical facility the P3 form was completed. The question is whether it was procedural for the investigating officer to produce the said documents in court as exhibits.
19. Section 77 of the *Evidence Act* allows a document made by an expert such as a medical practitioner to be admitted in court as evidence. However, before the document is produced the conditions set in section 33(b) of the *Evidence Act* have to be met. The section provides as follows:

“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;”

20. The clear meaning of the above section is that before the P3 form and the treatment notes were produced in the case as exhibits, it was incumbent upon the prosecution to lay a foundation on why the makers of the documents could not be availed in court. More so that the person called to produce the documents was one who was familiar with the handwriting and signatures of the makers of the documents. I am guided in this respect by the Court of Appeal decision in the case of *Sibo Makovo v Republic* [1997] eKLR where the P3 form in a rape case was produced in court by a police constable and the Court pronounced itself as follows:

“The P3 form which was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a



person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in Courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.”

21. In *Republic v Julius Karisa Charo* (2005) eKLR, as cited in *Musee Joseph Musyoka v Republic* [2014] eKLR, the court stated the following in respect to production of expert evidence under section 77 of the *Evidence Act*:

“Decided cases in this point are unanimously that with regard to the production of expert evidence in court, police officers must not be the people to play that role. The ordinary consideration being the chance for the accused person and his counsel to cross-examine the person called to produce the document. Since, medical (or scientific) evidence normally tends to be conclusive, great care has to be taken to ensure that where the person who conducted the examination is not available the person called in his place is technically qualified in the field in question to provide opinion.”

21. From the foregoing, it is clear that the Investigating Officer was not qualified to produce the P3 form and the treatment notes in court as exhibits. He did not know the makers of the documents and he certainly never worked with them. In having the document produced by the wrong person, the Appellant was denied an opportunity to cross-examine the makers of the documents and was in the premises denied his right to fair trial. The documents therefore ought to be expunged from the record. In their absence there is no evidence that the complainant suffered any injuries during the purported attack.
22. The totality of the evidence adduced before the trial court is that there was no corroboration of the complainant’s evidence that the Appellant attempted to rape her. Corroboration in this case would have emanated from the evidence of the woman who is said to have gone to the complainant’s rescue and from medical evidence. However, this evidence was bungled by failure to call the woman and the makers of the medical documents.
23. In convicting the Appellant of the offence, the trial magistrate stated as follows:
- “From the evidence on record, I find the prosecution evidence on record to be clear, consistent and corroborative. The complainant clearly narrated to the court what transpired to her on the material day. The accused was clearly identified as the aggressor...the defence of a disagreement does not oust the clear prosecution evidence. I therefore ... dismiss it.”
24. It is clear from the judgment of the learned magistrate that he did not consider that a crucial witness was not called to testify in the case. He did not consider that the medical documents were un procedurally produced in court as exhibits. He convicted the Appellant on the ground that the evidence was corroborative but he did not state what that evidence was. Had he analyzed the evidence in detail he would have realized that there was no corroboration to the complainant’s evidence.
25. I have keenly examined the evidence of the complainant in detail. I do not find sufficient evidence on which to form a basis that it is sufficient to sustain a conviction in the absence of corroboration of the complainant’s evidence. The state rightly conceded to the appeal.



26. In view of the foregoing, I hold that the charge of attempted rape was not proved beyond reasonable doubt. The conviction entered against the Appellant was unsafe and therefore the appeal is merited. In the premises I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 25TH DAY OF MAY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Accused – present in person

Court Assistant - Abdow

14 days R/A.

