



REPUBLIC OF KENYA



**Miumu v Republic (Criminal Appeal E004 of 2021)
[2023] KEHC 27443 (KLR) (29 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 27443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E004 OF 2021
GL NZIOKA, J
AUGUST 29, 2023**

BETWEEN

PETER CHIRA MIUMU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against decision of Hon. Rawlings Liluma, Resident Magistrate delivered on 23rd February 2021 vide Criminal Case Sexual Offence No. 3 of 2019 at the Senior Principal Magistrate’s Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case S/O No. 3 of 2019, with the offence of rape contrary to section 3(1) (a) (b) (3) of *Sexual Offences Act* (herein “the Act”) and an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Act*. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case was fully heard with the prosecution calling a total of five (5) witnesses. The prosecution case in brief is that, on the evening of January 26, 2021, (PW1) WW (herein “the complainant”) was sent by (PW2) LWK to collect firewood for boiling water.
3. That, the appellant, found her looking for firewood and grabbed her by the hand, led her to place where he removed her clothes and inner wear and then removed his trouser, inserted his “*kanyunyū*” the organ used to urinate, in her private part and raped her.
4. The complainant testified that when the appellant removed his clothes she noticed he had a *panga* and knife. That as he raped her, some boys who were coming from the river saw them and started throwing stones and the appellant fled. However, the boys and other members of the public followed him and beat him with stones and arrested him.



5. The complainant was taken to hospital immediately after the event and found to have been raped. The investigation was carried out and the appellant was charged accordingly.
6. At the close of the prosecution case, the court ruled that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied committing the offence. He stated that on the morning of January 29, 2019, he went to his place at Malewa Ranch at Kipipiri sub-County.
7. That at around 3:00pm he left Kipipiri to visit his sister at her home and as he returned home near the river, he met a group of five (5) boys including Maina whom he greeted. However, Maina refused to greet him as they had their issues at Malewa Ranch and previously had an altercation with Maina.
8. That, one of the other boys cut him on the head with a *panga* and he ran away to a nearby homestead of JWN. However, the boys found him and took him to the police station.
9. That he was charged with assault resulting from the incident at Malewa Ranch, however, the charge was changed and he was accused of raping a girl.
10. Further, the girl was later brought to the police station by her grandmother and her uncle. The police asked for the complainant's clothes or evidence but were informed that the clothes were washed. The police called for a vehicle from Kipipiri and they were taken with the complainant to the hospital at about 10:15am where the complainant was examined.
11. He testified that the results of the tests came back negative as an indication that the complainant had not been raped. However, people from Malewa Ranch insisted that he should be jailed. That it was a political case and thus he was charged.
12. At the conclusion of the hearing of the case, the trial court delivered a judgment on February 23, 2021, where the court held that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on the main count. He was then sentenced to serve fifteen (15) years imprisonment.
13. However, the appellant being aggrieved by the conviction and sentence has appealed against it on the grounds as here below reproduced:
 - a. That, the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution case where age of the appellant was not proved.
 - b. That, the learned trial magistrate erred in law and fact by holding that penetration of the complainant's genitals (vagina) was penetrated by the appellant while there was no evidence tendered to prove the same.
 - c. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the prosecution case was not proved beyond reasonable doubt to the required standard.
 - d. That, the appellant's defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence.
14. Subsequently, the appellant filed amended grounds allegedly pursuant to section 350(2) (v) of the [Criminal Procedure Code](#) which states:
 - a. That the learned trial magistrate erred in law and fact by failing to appreciate that the witnesses claim that PW1 was mentally disturbed and lacked medical evidence to corroborate mental disability.



- b. That the learned trial magistrate erred in both law and fact by failing to find that the prosecution did not discharge its duty of proving its case beyond reasonable doubt pursuant to the provisions of section 107 of the Evidence Act.
- c. That the sentenced imposed is both harsh and excessive and not informed by the unique facts and circumstances of the offence nor by the consideration of the appellant's mitigation.
15. The respondent was accorded an opportunity to file a response to the appeal and there was none at the time of writing this decision.
16. The appeal was disposed of by filing of submissions. The appellant submitted that there was no medical evidence that the complainant was mentally disturbed. That PW2, PW4 and PW5 all stated in their evidence that the complainant was mentally challenged.
17. However, the trial court failed to order for a mental assessment to be carried out which would indicate whether she was mentally challenged or not.
18. That if she was, the trial court would have declared her a vulnerable witness under section 31 of the Act. That the issue of the complainant's mental status should have been determined before hearing expert evidence and failure to do so prejudiced the appellant thus the hearing was not conducted in a fair manner.
19. The appellant argued that the prosecution failed to prove its case to the required standard as provided for under section 107 of the Evidence Act (Cap 80) as its case was full of contradictions and inconsistencies. That PW2 stated that she had washed the complainant's clothes which was at variance with the evidence of PW1 that she went to the police station with her clothes, and the PRC form that indicated the complainant's clothes were handed over to the police in a plastic bag.
20. Further, that the PRC form did not have a name of the victim and that it is at variance with the P3 form. That, PW3 contradicted himself on whether he was among the people who arrested the appellant. Furthermore, the issue of whether the appellant was armed with a maasai rungu only came up during cross-examination of the witnesses and the same was not produced in court despite evidence that it had been handed over to the police.
21. That, the contradictions and inconsistencies went to the root of the prosecution's case and created doubt in the prosecution's case that should be determined in his favour. He relied on the case of Twehangane Alfred vs Uganda Cr. App No. 139 of 2001 [2003] where it was stated that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence been ignored.
22. The appellant stated he was alive to the provision of section 143 of the Evidence Act on the number of witnesses needed to prove the case.
23. However, he submitted that the prosecution failed to call the boys who arrested him and who were crucial witnesses and therefore an adverse inference can be made against the prosecution. Reliance was placed on the case of Bukenya and others vs Uganda 1972 EA 549 where it was stated that where evidence is barely adequate, the court may infer that the evidence of uncalled witnesses was adverse inference to the prosecution case.
24. That the sentence of fifteen (15) years imprisonment imposed by the trial court was harsh and excessive as it was above the mandatory minimum sentence of ten (10) years provided for under section 3(1)(a) (b) (3) of the subject Act.



25. He cited the case of *S vs Malgas* 2001 (2) SA 1222 SCA 1235 where the Court of Appeal in South Africa stated that judges are free to depart from the prescribed sentences as they determine whether the circumstances in a particular case justify the departure.
26. Further he relied on the Canadian cases of; *Republic vs CA* (1996) 1 SC Republic 500; *Republic vs Manybears* 2009 ABCA 82; and *Republic vs Johnson* 2012 ONCA 339 where it was held that in considering the sentence to impose the court should consider the age of the offender and should refrain from imposing a sentence greater than the offender's expected lifespan; that the possibility of reform should not be overlooked; and sentences should not be too long as to crush the optimism of eventually re-integration.
27. He also placed reliance on the case(s) of *Peter Mungai Njoroge vs Republic* (2020) eKLR and *Mohammed Iddi Omar vs Republic* (2019) eKLR where it was held that everyone deserves a second chance and that the court should consider the appellant's plea that he is not a danger to society. The appellant relied on the case of *Sammy Wanderi Kugotha v Republic* [2021] eKLR where the court substituted a sentence of life imprisonment with a sentence of twenty (20) years imprisonment.
28. The appellant submitted that the trial court failed to consider his mitigation in line with the provisions of section 216 and 329 of the *Criminal Procedure Code*. That, the sentence imposed the trial court did not adhere to the principles of sentencing as outlined in Paragraph 3 of the Judiciary Sentencing policy guidelines that include proportionality, equality, uniformity, parity, consistency, impartiality, accountability, transparency, inclusiveness.
29. Further, the sentence imposed is not in tandem with the principles of rehabilitation. That, there is no prescribed period for a person to be reformed as one can take a day while another can take a hundred (100) years. He cited the case of *Douglas Muthaura Ntoribi vs Republic* [2014] eKLR where it was stated that a good working prison should reform convicts, that there is no research to suggest that capital offenders cannot be reformed.
30. However, the respondent in submissions dated October 24, 2022 submitted that the complainant had proper mental capacity and was competent to testify. That she gave rational and clear answers to questions put to her. Further section 125 of the *Evidence Act* provides that, all persons are competent to testify unless the court considers otherwise and that a mental disordered person or lunatic is not incompetent unless prevented by his condition from understanding the questions put to him and giving rational answers.
31. Furthermore, it was conceded that it had the burden to prove its case to the required standard and cited the case of; *Stephen Nguli Mulili v Republic* [2014] eKLR. That, in this case it was required to prove penetration, lack of consent and identity of the perpetrator.
32. That, the complainant positively identified the appellant as their preacher for several years and knew his name as Chira. Further the prosecution relied on the evidence of the complainant as supported by the medical evidence by PW4 Dr. Ntwiga to prove penetration.
33. Furthermore, the complainant testified that the appellant was armed with a knife and *panga* which was confirmed by PW3 Maina being evidence of rape by force.
34. The respondent submitted that the sentence imposed by the trial court was correct in the circumstances of the case that the appellant was armed and the complainant felt threatened. In addition, the appellant had a previous record that the trial court considered.
35. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972)



EA 32, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

36. In that matter, the court stated as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v. R* [1957] EA 570. 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 findings and conclusions; 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”

37. Be that as it were, the appellant was convicted of the offence of rape contrary to section 3 (1) of the Act which provides that:

“(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.”

38. Thus the elements of the offence of rape that must be proved are: penetration, that the penetration was unlawful and without consent, and the accused committed the offence.

39. Penetration, is defined under section 2 of the Act, as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

40. On whether penetration is intention and unlawful, section 43 of the Act, states 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.

(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.”

41. Further, the Court of Appeal in the case of *Republic v Francis Otiemo Oyier* [1985] eKLR set out the *mens rea* for rape outlining what the prosecution is required to prove and pronounced itself thus: -

“The learned magistrate had the correct appreciation of the mens rea in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: *DPP v Morgan* (1975) 61 Cr Appl. R 136 HL The prosecution must prove either 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; Archbold *Criminal Pleading Evidence and Practice* 40th Edn pp 1411 – 1412 paragraph 2881 and *R v Harwood K* (1966) 50 Cr App R 56.”

42. To revert back to the matter herein, the prosecution in proof of penetration and rape adduced medical evidence by calling PW4 Doctor Julius Ntwiga In-charge Engineer Hospital who produced the P3 form on behalf of Dr. Rotich which indicated that, the complainant was examined two (2) days after the incident. Upon examination it was noted normal genitalia, moist introitus, hypermic hymen broken at 3, 6 and 9 o'clock with fresh remnants of the breakage. He also produced the PRC form which indicated similar injuries save that the complainant had whitish cream discharge. The medical reports indicated it is a case of penile vaginal penetration.

43. PW2 LWK the complainant's mother testified that, she found the complainant's clothes soiled at the back and according to her, it was soiled with sperms. That her private parts were filled with sperms to thigh high. PW3 DMM testified that he found the appellant had removed the complainant's clothes and was doing the act, bad manners.

44. The afore evidence corroborates the complainant's evidence that she was raped and/or penetration was adequately proved.

45. The next question to consider is whether, the complainant consented to the sexual intercourse. The answer is in the negative. PW1 vehemently stated in her evidence in chief that:

“The accused is a bad person. He should be locked up. I was taken to hospital at Miharati after the incident. I went with his dirt just the way I was at the hospital.”

46. In cross-examination she stated: -

“The accused told me that if I say or scream he will kill me with the weapons he had. Remember he had a knife. We did not have friendship the accused showed me money with his hand.”

47. The afore evidence does not support a victim who consented to the sexual activity. Similarly, there is corroborative evidence of PW2 W and PW3 Maina that, the appellant was armed with a *panga*, *masai rungu* and a knife. The subject weapons were used to intimidate or threaten the complainant not to resist the sexual intercourse thus coercing her and/or subjecting her to duress and threats.



48. It is noteworthy that although the weapons were not produced I agree with the trial court, all the witnesses testified the weapons were recovered from him. He has not denied it. In fact PW3 Maina testified that he had seen the appellant with those weapons previously as he hanged around and did not confront him as he knew he was usually armed.
49. The last issue to consider is whether the appellant committed the offence. The complainant testified that it was the appellant who raped her. That she knew the appellant well as he used to be their preacher and led singing in church.
50. That, (PW3) DMM, testified that he was on the road heading home at around 6pm when he saw the appellant grab the complainant's hand and lead her to a bush. He ran home and informed PW2 LWK the complainant's mother.
51. That when he returned to the scene he found the appellant raping the complainant and he screamed and the appellant run away, however, he and other people gave chase and managed to apprehend the appellant, and disarmed him of a *maasai rungu* and a *panga* that he had on his hip and escorted him to the Police station.
52. PW2 LWK the complainant's mother, testified that, when she found the complainant at the scene she looked scared and upon inquiry she learned the appellant had raped her. That while at the Chief's Centre, the appellant offered to pay her whatever she wanted but she declined.
53. Pursuant to the afore evidence I find that the appellant was caught in the act of raping the complainant and therefore positively identified as the perpetrator. The incident took place day time.
54. The appellant argued in his submission that the boys who alleged found him in the act, chased him and arrested him should have been called as witnesses. However, section 143 of the Evidence Act (Cap 80) Law of Kenya states that: -

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
55. The failure to call the subject witness did not weaken the prosecution case.
56. The appellant also alleged that the complainant had a mental problem but PW2 W, the complainant's grandmother refuted the same indicating she has slow speech and one hand capped but carries on her normal chores.
57. The trial court record PW1's version of what transpired does not indicate that she is mentally incapacitated not to recall the events of the day. Her testimony as can be deduced from the record is flowing and consistent. The trial court made a finding that the court understood her testimony very well which is inconsistent with a person suffering from mental incapacity. The trial court further noted that, the medical examination as per the P3 form revealed PW1 suffered from cerebral palsy and not mental illness. The trial court had the benefit of the witness's demeanour.
58. The defence by the appellant zeros on the date of his arrest which he states to have been on January 29, 2019 and the charge sheet states the offence was January 26, 2019. He blames his arrest on PW3 Maina whom he had disagreed with over Malewa ranch. He further argues that when the complainant was examined for rape the results were negative. He maintained that the charges are framed. He further argued that the prosecution case was tainted with contradictions and inconsistencies.
59. The appellant's case was supported by the evidence of his wife to the effect that, they have two houses, one at Ol Kalou and the other at Kipipiri. That, the appellant came home from Ol Kalou and at around



3:00pm, the appellant's brother informed him that a child was in hospital. That the appellant milked the cows and left.

60. That after twenty (20) minutes she tried to call him in vain and after about three times someone named Mugo picked the phone and informed her that she would not see her husband again due to a land issue and beating of Maina. Later, the appellant called and informed her that he had been arrested for beating Maina, a Director of Malewa ranch and was also accused of rape.
61. The next day she visited the police station where the police officers informed her that the test done had shown that nothing was done and was told to return on Monday. On Monday, the complainant's grandmother was told to take out a P3 form which she did by evening and the appellant was charged.
62. From the defence advanced it may be possible there were issues of a disagreement but throughout the cross examination of PW3 Maina the appellant did not cross examine him on the issue thus rendering his defence to be an afterthought. As regards the wife's evidence it is full of reported events and does not address where the appellant was at the alleged time of offence. The rape having been clinically established and appellant positively connected, I dismiss the defence.
63. All in all, I find the conviction in the subject matter is safe confirm and/or uphold it. As regard sentence, section 3(3) of the subject Act, provides that: -

“(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.”

64. I note that the appellant was sentenced to fifteen (15) years. The sentence is lawful and indeed he did not show remorse. Consequently, the appeal on conviction and sentence are dismissed in its entirety.
65. Right of appeal within 14 days. It is so ordered

DATED, DELIVERED AND SIGNED THIS 29TH DAY OF AUGUST, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

The Appellant present, virtually

Mr. Ndiema for the Respondent

Ms Ogutu: Court Assistant

