



**Republic & 2 others v Njeru & 2 others (Criminal Appeal E005 of 2023)
[2023] KEHC 26925 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E005 OF 2023
LM NJUGUNA, J
DECEMBER 18, 2023**

BETWEEN

**REPUBLIC 1ST APPELLANT
REPUBLIC 2ND APPELLANT
REPUBLIC 3RD APPELLANT**

AND

**JERVASIO MWANIKI NJERU 1ST RESPONDENT
JERVASIO MWANIKI NJERU 2ND RESPONDENT
JERVASIO MWANIKI NJERU 3RD RESPONDENT**

(Appeal arising from the decision of Hon. H. Nyakweba in Chief Magistrate’s Court at Embu Sexual Offence No. 28 of 2020 delivered on 20th March 2023)

JUDGMENT

1. The appellant has brought this appeal, being dissatisfied with the above-cited decision of the trial court, seeking orders that the appeal be allowed, the order of acquittal of the respondent be quashed and/or set aside. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact by:
 - a. Failing to appreciate that the Prosecution proved the offence to the required standard;
 - b. Dismissing the evidence of the medical officer who produced medical documents in support of the evidence and the charge on record;
 - c. Failing to consider the report of the government’s analyst who produced a report in support of the evidence and the charge on record;



- d. Disregarding the evidence adduced by PW1-PW19 regarding the circumstances of commission of the offence;
 - e. Failing to note that the evidence adduced by the prosecution witnesses was well corroborated;
 - f. Failing to consider the prosecution evidence in totality;
 - g. Considering irrelevant and extraneous factors in arriving at the decision to acquit the accused person; and
 - h. Finding that the prosecution failed to prove the charges preferred against the accused person beyond reasonable doubt.
2. The respondent was charged with 3 counts. The first count was the charge of rape contrary to section 3(1)(a)(b) as read together with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 31st May 2020 at around 5PM at Manyatta Police Station in Embu North Sub-County in Embu county, the respondent intentionally and unlawfully caused his penis to penetrate the vagina of J.W.N without her consent. The alternative charge was: committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2006, whose particulars are that on 31st May 2020 at Manyatta Police Station in Embu North Sub-County Embu County, the respondent intentionally touched the breast, buttocks and vagina of J.W.N aged 42 years old with his hands and penis.
 3. The second count was the charge of rape contrary to section 3(1)(a)(b) as read together with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 31st May 2020 at around 5PM at Manyatta Police Station in Embu North Sub-County in Embu county, the respondent intentionally and unlawfully caused his penis to penetrate the anus of J.W.N without her consent. The alternative charge was: committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act No. 3 of 2006, whose particulars are that on 31st May 2020 at Manyatta Police Station in Embu North Sub-County Embu County, the respondent intentionally touched the breast, buttocks and anus of J.W.N aged 42 years old with his hands and penis.
 4. The third count was the charge of abuse of position of authority contrary to section 24(2)(a) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 31st May 2020 at Manyatta Police Station in Embu North Sub-County Embu County, the respondent took advantage of his position as police officer to have unconsented sexual intercourse with J.W.N at Embu North Directorate of Criminal Investigations office within the limits of the station to which he is appointed as sub-county criminal investigations officer.
 5. The respondent pleaded not guilty to all the charges and a plea of not guilty was entered for each count. The prosecution called 19 witnesses.
 6. PW1 was J.W.N who is the complainant who stated that she received a phone call from a police officer named Simon, requesting her to go to Manyatta Police Station regarding some Kshs. 200,000/= which she had received from her husband S.K and which she used to open a business at Ugweri. That her husband's sister had fueled a disagreement between her and her husband and the police arrested her for the money that was owing. That she was kept in custody at the station for several days before the police officers released her on free bond.
 7. That when she was sent to a separate building for bond processing, the respondent took her to the inner office and raped her before letting her go. That when she left, she reported the matter to a police officer who took her to the OCS where she narrated the ordeal in the presence of the respondent and



- senior officers. That the respondent apologized and even offered to pay for her treatment so long as she lied that she had been assaulted by a stranger. That she was escorted to Embu Level 5 Hospital for treatment and thereafter she recorded a statement with police.
8. It was her further evidence that S.K was ready to settle the differences he had with her but his sister made the situation worse, leading to the ordeal. On cross-examination, she stated that after the respondent had sucked her breast, he made her to suck his penis and penetrated her vagina and anus with his penis, and she left her underwear in his office out of the confusion. That the clothes were recovered later, as well as the tissue paper that the respondent had ordered that she uses to wipe his penis and herself.
 9. PW2 was P.C. Fatuma Abdalla Salim of Manyatta Police Station who stated that at the time of the incident, she was working at the records office. She stated that on the day of the incident she was at the report office with PC Kemoi and PC Pogisho when PW1 went to collect her belongings after being released. That PW1 asked her to accompany her to the bench outside the office of the OCS and told her that the respondent had raped her. That she called her colleague and PW1 repeated the story then asked for water because she was nauseated after the respondent had asked her to suck his penis. That shortly afterwards, the respondent approached with his vehicle and PW1 asked for a place to hide and she showed her where to hide until the respondent had passed.
 10. That she referred the case to the Deputy OCS and left. That she was later called to escort PW1 to Embu Level (5) Hospital where her samples were taken and she was admitted. She stated that she was not sure whether the office of the sub-county commander was occupied or not at the time of the incident. On cross-examination, she denied the assertion that the respondent had become unpopular with other officers because of confiscating gambling machines. That at the time of the incident, she had been a police officer for 4 years. That PW1 told her that the respondent asked her to suck his penis before and after raping her.
 11. PW3 was P.C. Brian Pogisho Kauai of Manyatta Police Station. He stated that on that day, he reported for duty at 4PM and at 4:10PM Corporal Yegon went to the cells and requested for a prisoner who is the complainant in this case. That there were also other prisoners in the cells but she was the only female. That after about 50 minutes, she returned to the cells to collect her belongings in a shopping bag and she was crying and PW2 went to talk to her. Later, the respondent went and parked his vehicle outside the report office and asked for the OB which he perused while standing outside then he left. On cross-examination, he stated that he did not know the contents of the bag that PW1 had. That at the time of the incident, he had been in the police force for 3 years. On cross-examination, he stated that he did not know that the respondent was conducting a crackdown on gambling machines and bars operating outside the regulated working hours.
 12. PW4 was P.C. Simon Kitheka of Manyatta DCIO office who stated that on 29th May 2020, he went to the office at 8:30 AM and found Corporal Yegon and P.C. Sang with a lady and a gentleman called S.K, and the respondent joined them later. That they alleged that a lady who was a fish vendor had conned S.K of Kshs. 200,000/=. That he called PW1 who availed herself at the station the following day. That when they all gathered again, the allegations were heard and PW1 did not deny anything and it seemed that she had an affair with the said S.K.
 13. That the respondent ordered Corporal Yegon to lock PW1 in the cells. On cross-examination, he stated that PW1 did not own a gambling machine and that he was aware that the respondent was conducting a crackdown on bars and gambling machines that were operating outside operating hours and the gambling machines were burned. He denied knowledge of the fact that some police officers were the owners of the gambling machines impounded by the respondent and that they were not happy with the move.



14. PW5 was IP Peter Tever of Manyatta Police Station who stated that he had reported for duty at around 5:55PM when he was called by PC Sang who told him that there was a lady complaining that she had been raped at the CID offices. That they called PW2 who talked to her and they escalated the matter to the OCS, CI Abdalla, who took the complainant to the office. That he did not participate any further and left the matter in the hands of the OCS. He identified the surroundings of the station compound from the photographic evidence. On cross-examination, he stated that there was an operation to impound gambling machines and the same was teamwork among the officers. That he did not know that some of the machines belonged to police officers. That the operation could not have made the respondent unpopular because it was teamwork. That he did not know much about orderly room proceedings but he knew that the respondent would have been given a chance to be represented.
15. PW6, CI. Yahya Abdalla, OCS Manyatta Police Station stated that on that day, he was at home when he was called back to his office because the complainant had said that she had been raped by the DCIO. That he called the Sub-county Commander Embu and reported the incident to the OCPD after which he called the respondent before leaving the office. That he had been relating well with the respondent as he was insightful regarding crackdown on crime. On cross-examination, he said that he had been at the station for 3 weeks before the incident and he did not know the complainant. That once the matter was reported to him, his duty was to report the same to his boss and the respondent was later subjected to disciplinary proceedings.
16. PW7, Emily Ngaruya, the Sub-county Police Commander Embu North stated that on the day of the incident, the OCS called her and informed her that the complainant had alleged that the respondent had raped her. That she went to the station and called the respondent and other senior officers. That she also called the County boss Mr. Rukunga who directed that the allegations be booked and the matter be investigated. That they opened the respondent's office and found the complainant's underwear and a biker, used tissue paper in the dustbin and 2 empty sacks.
17. On cross-examination, she stated that even though it is not indicated in her statement, the respondent asked the complainant for forgiveness. That it was only PC Sang who had access to the respondent's office. That the OCS did not go to the office of the respondent but only heard that the clothes were found in the respondent's office and that they belonged to the complainant. That she did not know why the case was taken up by Nairobi officers and that she did not know if the respondent was taken through disciplinary proceedings.
18. PW8, IP Sarah Muthoni Guchu, Deputy DCIO Embu West stated that she was instructed to go to Manyatta Police Station on the morning after the incident where she was briefed. That on instructions of PW6, PC Sang opened the DCIO's office and she observed that there was an underwear under the table. That she called scenes of crime officers who processed the scene and recovered evidence. That she then visited the complainant at Embu Level 5 Hospital and spoke to her then recovered her clothes for forensic purposes. On cross-examination, she stated that she did not know when the respondent was arrested but she heard that the respondent underwent orderly room proceedings.
19. PW9, Cpl. Kiboma of scenes of crime Embu produced the photographic evidence of the crime scene and stated that the respondent was known to him.
20. PW10, Pamela Khamala Okello, an Analyst at the Government Chemist stated that she received a request to examine samples obtained from the complainant's body, clothes, the gunny bags found at the scene and the used tissue paper, vis-à-vis sample buccal swabs from the respondent. She isolated the items that had biological value and examined them. Her findings were that some of the samples contained semen which matched the DNA profile of the respondent. She produced the report of her findings as evidence.



21. PW11, PC. Kepkemoi Tonui of Manyatta Police Station stated that on the day of the incident, he was on duty at the report office when Cpl. Yegon requested for release of the complainant who had been booked for stealing. That at around 5PM, the complainant returned to collect her belongings from the cell and she was crying and PW2 went to talk to her. That he later heard that she claimed to have been raped but he did not know who did it. On cross-examination, he said that he did not know how the luggage collected by the complainant came to be in the cells where she was being held.
22. PW12, Cpl. Jackson Kiprotich Yegon of Embu North DCI office Manyatta, stated that the complainant had been brought to the station on an allegation of stealing and the respondent directed that she be held in the cells until around 4:10PM. That he was asked to release her on bond when he noticed he did not have the keys to the general office where form 52 was, he went to this house to get the keys and asked the complainant to wait for him in the yard. That he returned about 30 minutes later and found the complainant in the office of the respondent and they were talking. That he prepared the paperwork which the complainant signed and the respondent told him to leave it on the desk and he went away.
23. That shortly after, he heard that the complainant was alleging that she had been raped by the respondent. On cross-examination, he stated that when he returned the form P52 for the complainant to sign, she was in the office of the respondent at around 5PM but she had been released from the cells at around 4:10PM. That when he knocked on the respondent's door, they would stop talking but when he left, he could hear a conversation going on but wasn't able to hear the words. That he was also present when the OCPD addressed the complaint at around 7PM on that day.
24. PW13, Cpl. Wilson Mosiria of the Special Service Unit at DCI headquarters Nairobi stated that on 2nd June 2020 he received instructions from his boss, Mr. Pius Gitari, to go to Embu and arrest the respondent on allegations of rape. That he used a phone application and got information from an informer on the respondent's location. That he was arrested at Embu Level 5 Hospital parking yard and they took him to Itabua Police Station where he was booked. On cross-examination, he stated that he was informed by the CCIO that the respondent was at large and they arrested him 3 hours after they arrived in Embu.
25. PW14, PC Nicholas Sang of Embu North DCI stated that on 27th May 2020 the complainant was called to the station on allegation of stealing Kshs. 200,000/= from S.K. That on 30th May 2020, the complainant went to the station and he recorded her statement before the respondent assigned him other duties. That when he returned at 5PM, the complainant was with PW2 and alleged that she had been sexually assaulted by the respondent. On cross-examination, he said that he was the custodian of the respondent's office keys. That he was present when the senior officers went to see the office of the respondent following reporting of the incident.
26. PW15, Dr. Phillis Muhonja of Embu Level 5 Hospital examined the complainant and produced the P3 and PRC forms. She observed that the victim had an abrasion on the right inner side of the wrist. That the genital examination showed that the outer vagina wall had a 4cm laceration at 12 o'clock, the labia minora had a 2cm laceration at 4 o'clock and the posterior fourchette which is the lower part of the genitalia had a 4cm by 2 cm abrasion from 4 o'clock to 7 o'clock. She stated that at 7 o'clock in the perianal region there was a linear abrasion going to the anal canal and the anal splinter tone was reduced by 50%, meaning that the strength of the muscle that controls bowel movement was reduced by 50%. That she collected samples for further analysis. That the complainant was offered the relevant treatment and psychological support. On cross-examination, she stated that the complainant did not expressly say that there was a struggle but the injuries sustained indicate that there was forceful vaginal and anal penetration.



27. PW16 was SSP Owino formerly of DCI Embu who stated that he was instructed by the CCIO to go to Manyatta Police Station where a senior officer had allegedly sexually assaulted a member of the public. That he went and spoke to the OCS and the OCPD and he had a chance to see the crime scene where he noticed blood-stained underwear and used tissue paper under the table and 2 sacks spread next to the table. That he reported his observations back to the CCIO. On cross-examination, he stated that the respondent was subjected to orderly room proceedings for being absent from duty without leave even though he was with the respondent on 1st June 2020. That the orderly room proceedings did not seem fair to the respondent.
28. PW17, SSP Margaret Apima stated that on 31st May 2020, she received a phone call from the County Commander Mr. Rukunga concerning the allegations made against the respondent. That she called the respondent to no avail but when the OCPD and OCS reached him he returned to the station. That keys to the office were recovered from the respondent and the crime scene was processed the following day. That after the incident, the respondent continued with his duties though he could not report to the office. That she visited the complainant in hospital and she told her that the respondent had raped her in his office. That she handed over the investigation to one Mr. Wafula of Serious Crimes Department and the samples were sent for analysis. On cross-examination, she stated that there was a nationwide crackdown on gambling machines and illicit brew and the operation was seamless. That by the time the scenes of crime personnel were arriving, the office was closed and she did not know whether there was someone else with a spare key. She stated that she was not aware that the accused and complainant were friends since 2009.
29. PW18, Sgt Fredrick Mongare of DCI Headquarters Serious Crimes Unit stated that he was called and assigned duties in Embu where there were allegations of rape. That on arrival, they found that the suspect had been apprehended and they visited the victim at Embu Level 5 Hospital. That the respondent was interviewed on 08th June 2020 and when investigations were complete, he was charged with the offences.
30. PW19, SP David Khisa Wafula was the investigating officer alongside PW18. He rehashed the facts of the case as stated by previous witnesses and stated that the respondent had been subjected to disciplinary proceedings and verdict was delivered on 8th or 9th June 2020 and he was dismissed from the police service. On cross-examination, he denied the assertion that the complainant was related to DCI Kinoti by marriage. He stated that if the complainant and the accused person had spent the previous night together at Belavista lodging, he was not aware of the same. That he could not tell whether the quality of the tissue which was examined by the government chemist matched the quality of the tissue found in the respondent's office. That the sacks that were allegedly used as a mattress were not examined by government chemist. That the complainant's panty was stained with menses and spermatozoa and she could have worn it during or after the incident.
31. At the end of the prosecution's case, the court found that a prima facie case had been established and the accused person was put to his defence.
32. In his testimony as DW1, the respondent stated that when he was transferred to Embu, he led a crackdown of gambling machines and confiscated 112 of them which were destroyed by burning, a fact that embittered many of his colleagues. That in 2009, the complainant was his girlfriend for 4 years. That after the alleged incident, he was subjected to unfair orderly room proceedings and was denied a chance to be represented while in custody. That on 1st June 2020 he was on his way to Itabua Police Station and was not away from duty as alleged but the orderly room proceedings culminated into his dismissal from the service.



33. He narrated that on the day when he ordered the release of the complainant on free bond, PW12 took her to Bellavista hotel where the complainant asked him to give her Kshs. 200,000/= with which to pay the debt and he promised to give her the money. That they stayed at the hotel and had consensual sex in a room where he paid Kshs. 500/=. That he made the payment for the room and their refreshments via M-Pesa and had statements to show for this. That after the event, the complainant demanded the Kshs. 200,000/= but he told her to wait until he handed her case over to someone else and the complainant left. That at around 7:15PM, PW12 received a call and he left hurriedly. That soon thereafter, he also received a call from PW7 asking him to go to the station and when he went they asked him about the allegations and when he denied they called the complainant. He stated that he had consensual sex with the complainant as his former girlfriend at Bellavista Hotel and the OCPD ordered that the complainant be taken to hospital.
34. That he then went to his office that night to pick his jacket and there was nothing untoward, no tissue papers or clothes were there. That 2 other officers beside himself had the keys to his office. That the sacks that were in his office were for his personal use. That at the time of the alleged offence, there was a large number of people at the station because many people had been arrested for flaunting Covid-19 rules. On cross-examination, he stated that there was bad blood between him and many of his colleagues because of the operation confiscating the gambling machines as a result of which many of his colleagues had been transferred. That he interrogated the complainant in the presence of 3 officers but he did not disclose that they had a relationship before. That the complainant did not have access to his office and that no used tissue was recovered from his office because he saw what was recovered.
35. Upon the close of the defense case, the trial magistrate considered the evidence that was adduced and acquitted the respondent of all the counts citing that they were not proved to the required standard. In this appeal, the parties filed their written submissions.
36. The appellant submitted that on the element of identification of the assailant in a rape case, the respondent was sufficiently identified in the circumstances. Reliance was placed on the Court of Appeal case of Peter Musau Mwanzia v. Republic (2008) eKLR. It also relied on the meaning of intentional and unlawful penetration as defined under section 2 of the Sexual Offences Act and added that this was established through the testimony of PW1 and PW15. That the testimony of PW10 also corroborates the evidence of PW15 as to the presence of spermatozoa in the mouth and vagina of the complainant.
37. That the samples were reliable in line with the provisions of section 36 of the Sexual Offences Act which allows for samples to be collected at any place as appropriate as stated in the case of Bonface Kyalo Mwololo v. Republic (2016) eKLR. On the argument on consent, reliance was placed on sections 42 and 43 of the Sexual Offences Act and the cases of Nicholas Kiprotich Rono v. Republic (2022) eKLR and Republic v. Oyier (1985) eKLR. That PW1 testified that the respondent overpowered her and forcefully penetrated her anal orifice and the vaginal and this indicates coercive penetration. On the third count, reliance was placed on section 24 of the Sexual Offences Act and stated that PW1 said that when the respondent took her to his office, she complied because she was afraid that he had a gun and would hurt her.
38. That the joinder of counts was not prejudicial to the respondent in light of section 135 of the Criminal Procedure Code and the case of Republic v. Collins Ndung'u Kinyua & 5 Others (2022) eKLR. That the testimony of PW10 was corroborated by PW2, PW3, PW4 and PW5 who placed the respondent at the scene of the crime. It was its argument that whatever contradictions that might have been noted at the trial do not materially affect the strength of the appellant's case and reliance was placed on the case of MTG v. Republic (2022) eKLR.



39. The respondent submitted that the petition of appeal is invalid as it does not disclose which count the appellant contests. It is his argument that identification of the perpetrator was not proper because even though the respondent was arrested soon after the alleged incident, he was not subjected to a medical examination to ascertain if his genitals also had injuries. That the trial magistrate rightly took issue with how the samples for examination were handled from the time of collection to analysis, stating that the same was questionable and portrayed a scenario that would have resulted in contamination of the samples. That the trial court's finding that the testimony of PW1 was not sufficient to prove penetration, should be upheld. That the trial magistrate rightly held that the respondent was not in a position of authority over the complainant within the meaning of the Act and that the Form P52 and Occurrence book were deliberately not produced in evidence.
40. That it would have been double jeopardy if the trial magistrate had convicted him for rape and for abuse of position of authority as the latter involves consensual sex. That the contradictions in the appellant's evidence are detrimental to its case, for instance, the used tissue paper alleged to have been found in his office was not produced as evidence but PW10's findings indicated that the same had semen but no blood, yet PW1 stated that she wiped herself after the incident and blood and semen were found on her underwear.
41. The issues for determination before this appellate court are as follows:
- a. whether the prosecution adduced sufficient evidence to prove the charges beyond reasonable doubt; and
 - b. whether the trial court considered extraneous factors in reaching its decision.
42. The trial court determined the issue herein but it is now upon this court to re-examine the evidence before making its own finding. In a trial for rape, the issue of consent goes to the core. In the case of *Okeno vs. Republic* (1972) EA 32 the court held:-
- “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 must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”
43. The respondent faced 3 counts as stated in the charge sheet. I have noted that the first and the second count are similar and for purposes of this appeal, I will determine them as one charge. In order to do so, we must contextualize the case and the circumstances under which the offence was committed. Section 3 of the Sexual Offences Act provides:
- (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.

In other words, the elements of rape are as follows:

- a. Penetration
- b. Lack of consent
- c. If there was consent it was obtained by force, or threats or by intimidation.

44. On the issue of penetration, PW1 testified that the respondent made her suck his penis, he sucked her breast, he forcefully penetrated her vagina and anus with his penis. 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. According to PW15, the injuries sustained by the complainant were sustained through forceful penial penetration. She also noted that the splinter muscle lost 50% of its functionality. PW10 also testified that most of the samples had semen and not blood stains and the semen matched the DNA profile of the respondent. From the evidence, there is no doubt that indeed there was forceful penetration of the vagina and the anus.
45. The other aspect that goes hand-in-hand with penetration is identification of the alleged assailant. None of the appellant's witnesses saw the respondent sexually assaulting the complainant, but circumstantial evidence will apply in this case. The respondent was at his usual place of work and the testimonies of PW1, PW2, PW4 and PW12 place him at the scene of crime at the time when the alleged incident occurred. From the evidence, PW1 stated that she was called from within the cells to sign form P52 before being released on free bond, when the respondent called her into his office and raped her. PW2 stated that after the incident and as she was at the reporting office, the respondent was leaving the station and when PW1 saw him, she asked for a place to hide so that the respondent could not see her. PW3 stated that when PW1 raised alarm about the incident, the respondent was on his way out of the station and he passed by the reports office where he requested for the OB which he perused while standing outside before he left the station. The respondent, in his defense also stated that he indeed was in his office on that day and even after the incident when the samples were being collected from his office later that night.
46. On the element of consent, the Sexual Offences Act defines it as follows:

42. Consent

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

The element of consent in rape cannot be overstated. Whether or not consent was expressly denied or was denied at first and then given later and vice versa, are matters of fact and can be determined using evidence. In the case of *Charles Ndirangu Kibue v Republic (2016) eKLR*, the court held thus:

"One of the central elements of the offence of rape is the question of whether the complainant consented to the penetration by an accused. Additionally, it should also be noted that the complainant



must also have the capability to consent as well. Chief Justice King in Question of Law Reserved on Acquittal (No 1 of 1993), said:-

“The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.”

47. PW1 stated that she did not scream or raise any alarm because she was afraid that the respondent would hurt her. DW1 stated that he had consensual sex with the complainant before the allegations were reported at the station. He said that the complainant was his girlfriend sometime in 2009 for a period of 4 years and that he had promised her Kshs. 200,000/= before the consensual sex they had at Bellavista hotel the previous night. In my view, this cannot be true. The evidence available to this court shows that from the time the complainant was arrested on 30th May 2020, she never left the cells until 31st May 2020 when she was released on free bond and just before she was sexually assaulted by the respondent. It is clear before peradventure that from the police station, the complainant was taken straight to Embu Level (5) Hospital where she was admitted for a number of days as she was being treated for the injuries that she sustained after she was sexually molested.
48. PW15 testified that the injuries detailed in the P3 were sustained through forceful penetration of the vagina and the anal orifice. This shows the absence of consent because otherwise, the injuries would not have been sustained. PW1 herself also testified that the respondent had his way with her against her wishes. In my view, there is sufficient proof that consent was not obtained.
49. From the circumstantial evidence, PW1 was released from the cells and soon afterwards, she was called into the respondent’s office where the incident occurred. The immediate next occurrence was that she spoke to PW2 who called PW14 of the DCIO’s office and they escalated the complaint to the deputy OCS. That PW2 was later called upon by the OCS to escort PW1 to Embu Level 5 Hospital. From this series of events, I am not persuaded that PW1, after being in the cells for 2 days, went outside the station to Bella Vista Hotel to be with the respondent on the same day when she was granted free bond and before she left the police station. I have also noted the M-Pesa messages of payments made to Bella Vista Hotel and the same are not enough evidence to prove that the complainant was with the respondent at the said hotel.
50. As regards the third count, section 24 of the Sexual Offences Act provides:
 24. Sexual offences relating to position of authority and persons in position of trust
 - (1) Whoever being the superintendent or manager of a jail, remand home or children’s or any institution or any other place of custody established by or under any law takes advantage of his



or her official position and induces or seduces any inmate or inhabitant of such jail or institution, remand home, place or institution to have sexual intercourse with him or her, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of a sexual offence relating to a position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.

51. The respondent was the DCIO at the police station and he is the one who authorized detention of the complainant. He is also the one who authorized her release on free bond before the other officers took over processing of the P52. He was held as a person in authority and who was in-charge of the complainant as a suspect at the police station. Pw1 stated that upon her removal from the cells, the respondent called her into his office where he said some unpleasant things to her before raping her. It was her testimony that she did not raise alarm when the incident occurred because she was afraid that he would harm her.
52. To me, the respondent lured her into his office and took advantage of the complainant, knowing that she was subordinate to him and that she wouldn't report the matter. It was the testimony of PW3 that when the complainant was hiding and the respondent was on his way out of the station, he passed by the report office and perused the OB while standing outside. From the evidence, I gather that the respondent could have perused the OB to check whether the incident had been reported by the complainant who had left shortly before him. In my view, the respondent is guilty of the 3rd count.
53. When faced with similar facts, the court in the case of Richard Ochieng Orwa v Republic [2016] eKLR upheld the appellant's conviction in light of section 24 of the Sexual Offences Act and held thus:

“The prosecution also proved that the appellant was a person in authority as the headteacher of the Academy where PW 1 went to school. The evidence is clear that he procured sexual intercourse and as such I find and hold that he was properly convicted on the second count.”

54. On the issue of whether the trial court considered extraneous factors in reaching its decision, I have perused the trial court's judgment and note that the trial magistrate indeed erred when he went out of his way to raise issues which had not been raised by the prosecution or the defense at the stage of the judgment without giving the parties a chance to address him on the said issues. Issues for determination must only be deduced from the evidence available before the court and from issues raised and argued by the parties. None of the parties raised an issue about how exhibits and samples were collected and handled but the trial magistrate took it upon himself to raise and determine these issues, thereby misguiding himself. From the trial court's decision, there is no sufficient analysis of the actual and the material and relevant evidence that was adduced yet there was plenty to be considered. The learned magistrate chose to ignore the cogent evidence by way of DNA that linked the respondent to the offence without a doubt, thus causing a lot of injustice to the complainant by acquitting the respondent.
55. Precedence has severally held that the court, in this adversarial legal system of ours, must not involve itself in litigating cases as that is the realm of the litigants. In the case of Michael Muraya Kirara v County Commissioner Murang'a County & another [2016] eKLR the court rendered itself on this as follows:

“The respondents having not adduced any evidence to that question, it was not open to the trial magistrate to resolve it in favour of the respondents. By so doing, the trial magistrate descended into the arena of the dispute and this blurred his vision with regard to the



controversy between the parties. That was an error on his part. The trial magistrate may have thought that the appellant's case was hopelessly weak."

56. As stated earlier, I shall treat counts 1 and 2 as one count of rape which has been proved overwhelmingly. The 3rd count shall be treated as the second count for purposes of this decision. In the end, I find that the charges have been proved beyond reasonable doubt. The appeal is hereby allowed with orders as follows:

- a. The judgment of the trial court is hereby set aside; and
- b. The respondent is hereby found guilty and I hereby convict him under Article 165 of the Constitution of the offences of;
 - i. rape contrary to section 3(1)(a)(b) as read together with Section 3(3) of the Sexual Offences Act No. 3 of 2006; and
 - ii. abuse of position of authority contrary to section 24(2)(a) of the Sexual Offences Act No. 3 of 2006

57. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF DECEMBER, 2023.

L. NJUGUNA

JUDGE

