



REPUBLIC OF KENYA



**Wanyoike v Republic (Criminal Appeal 6 of 2019)  
[2022] KEHC 12107 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 12107 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL 6 OF 2019  
GWN MACHARIA, J  
MAY 26, 2022**

**BETWEEN**

**EZEKIEL CHEGE WANYOIKE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in the  
Chief Magistrate's Court at Naivasha in Criminal case No. 8 of  
2017 delivered by Hon. E. Kimilu (PM) on 8th February, 2019)*

**JUDGMENT**

1. The appellant, Ezekiel Chege Wanyoike was charged with the offence of rape contrary to section 3 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on the night of 27<sup>th</sup> and January 28, 2017 at [particulars withheld] village in Naivasha sub-county within Nakuru County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of TMK, without her consent.
2. He faced an alternative charge of indecent act with an adult contrary to section 11a of the *Sexual Offences Act* No 3 of 2006. The particulars were that on the night of 27<sup>th</sup> and January 28, 2017 at [particulars withheld] village in Naivasha sub county within Nakuru county, he intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of TMK, without her consent.
3. He pleaded not guilty to the offences. After a full trial, he was found guilty of rape and convicted accordingly. Consequently, he was sentenced to serve fifteen (15) years imprisonment. Being aggrieved by his conviction and sentence, the appellant filed the instant appeal.



## Grounds of Appeal

4. The appellant raised a total of ten (13) grounds of appeal comprising of: four (4) grounds *vide* his petition of appeal filed on February 20, 2019; three (3) grounds *vide* a document titled amended grounds of appeal filed on September 3, 2020; and, six (6) grounds through his supplementary petition of appeal filed alongside his written submissions on February 16, 2020. These can be summarised into the following nine (9) grounds: -
  1. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellant's right to a fair trial was violated during trial as the prosecution did not discharge its duty of disclosure pursuant to the provisions of article 50(2)(e).
  2. That the learned trial magistrate erred in law and fact by failing to find that the prosecution's case was marred with contradictions and inconsistencies.
  3. That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence.
  4. That the learned trial magistrate erred in law and fact in convicting the appellant on inconclusive evidence.
  5. That the learned trial magistrate erred in law and facts in shifting the Burden of proof to the appellant.
  6. That the learned trial magistrate erred in law and facts in failing to consider the fact that the complainants age was not proved.
  7. That the learned trial magistrate erred in law and facts in failing to find that there was no sufficient evidence to proof that there was any penetration as required.
  8. That the learned trial magistrate erred in law and facts in failing to consider the fact that the alleged used condoms were never produced in court as exhibits and any evidence relating to them was of no evidential value.
  9. That the sentence in the circumstances of this case was excessive and the court failed to exercise its discretion to mete a lenient sentence.

## Summary of Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See *Okeno v Republic* (1972) EA 32).
6. The prosecution's case can be summarized as follows: On January 27, 2017, the complainant PW1 TMK left Nakuru at about 7.00pm for Narok. Upon reaching Naivasha at 9.00pm, the driver of the vehicle she was travelling in changed his mind and decided not to go all the way to Narok. The driver handed PW1 over to the appellant who was the conductor in a vehicle that was purportedly heading to Maai Mahiu and gave the appellant her bus fare. While on their way, the appellant told PW1 that the vehicle was going to Longonot and asked her to alight then he would help her get a motor cycle to take her to the highway to board another vehicle. They alighted and boarded one motor cycle which took them to the appellant's home area in [particulars withheld], unbeknownst to PW1. On reaching there, he commanded her to alight and released motor cyclist. Noting that she was in danger, PW1



- decided to go and find her way to the highway on her own and called her brother in law PW2 KMN to inform him about the developments.
7. While she was still on call with PW2, the appellant grabbed her from the back causing her to fall down and scream. Since the call had not been disconnected, PW2 heard the commotion from the other end of the line then the phone went off. The appellant strangled PW2 and threatened to kill her if she continued screaming. He took away her handbag, mobile phone and shoes then pulled her into their home where he took her to his mud house. PW1 pretended to be suffering from a heart problem and told the appellant that she needed water to swallow medicine. The appellant gave her back shoes and took her to his cousin's pub to get some water. She did not get an opportunity to signal anybody that she was in danger because the appellant kept threatening her.
  8. After taking water, the appellant took PW1 to his house where he pulled her to his bed and told her that he would do to her whatever he wanted. She was able to see him well since the house had electricity and the light was on. The appellant then switched off the light, wore a condom and pulled out PW1's trouser and pant. PW1 took out a bottle of spray from the jacket she was wearing and sprayed the appellant's eyes. He slapped her and switched on light and pinched her ear with the ear-ring on until she bled. Thereafter, he raped with the condom on then slept. After a while, he woke up and raped two more times without wearing a condom. At about 6.00am in the morning, the appellant opened the door, gave her back her clothes and phone and told her to go away as he did not want to be seen with her. He however followed her to the stage where PW1 boarded a matatu back to Naivasha town.
  9. Meanwhile, PW2 left Narok for Naivasha at around 5.00am since he was worried about PW1 as her phone was switched off throughout. PW2 received a text message from PW1 that she had been kidnapped and raped. He told her to go and report the incident at the police station. As such, PW1 alighted at Naivasha town and went to make report at the police station where she was referred to Naivasha District hospital for treatment. PW2 joined her at the hospital later. He found her with a swollen face with scratch marks on her face and neck.
  10. After treatment, they went back to Naivasha police station where PW1 described her perpetrator to the investigating officer, PW5 No 61396 CPL Albert Otuko of Naivasha police station. Since she was able to remember the appellant's house, she took PW5 and one PC Ng'ang'a there but they did not find him. PW5 arrested the appellant that evening at around 7.00pm at [particulars withheld] stage and took him to the police station for interrogation then locked him up in the cells.
  11. The following day which was a Sunday, PW1, PW2, PW5, the appellant and the aforesaid PC Ng'ang'a proceeded to the appellant's house. Upon conducting a search in the house, PW5 recovered two used condoms, two empty packets of sure condoms, an unused condom, one broken ear-ring belonging to PW1 as it resembled the other which she was wearing and Caesar spray belonging to PW1. The used condoms had been dumped at a corner in the appellant's bedroom and they had blood stains since PW1 was having her menses at the time of rape. PW5 collected the exhibits for analysis. They passed by Naivasha Sub-County hospital where PW1 and the appellant were examined and their blood and saliva samples taken for purposes of DNA analysis. PW5 also obtained PW1's clothes being her panty and blood stained blouse. He took the samples to the Government chemist in Nairobi for analysis.
  12. On February 2, 2017, PW4 Henry Kiptoo Sang, a government analyst at the Government chemist, Nairobi with over ten (10) years' experience received the following items at their laboratories in Nairobi: blood sample in a bottle marked A1 with the appellant's name; blood sample in a bottle B1 with PW1's name; two used condoms in white plastic container marked 'C'; black under pant in a khaki envelop - D1 - with PW1's name; white flowered blouse in an envelope marked D2 – with PW1's name. Accompany the items was a police exhibit memo form. The same was to be examined to establish



any similarities on human body fluids. Upon examination, PW4 established the following: the two condoms (item C) had human blood but no semen were detected on them; the under pant (D1) and blouse (D2) had human seminal stains. DNA analysis established that the DNA on condoms matched PW1's blood sample marked B1 whilst the DNA on the seminal fluids on the under pant and blouse matched the appellant's blood sample. He disposed the condoms after evaluation. PW4 then prepared and signed a report on March 22, 2018. He produced the report together with the exhibit memo form in evidence.

13. During trial, PW3 Benjamin Kuria, a clinical officer from Naivasha Referral Hospital produced the medical evidence on behalf of his colleague Sylvester Mesa who examined PW1 but was away on study leave. According to the post rape care report, PW1 was examined at the facility on January 28, 2017. On physical examination, she had an injury on the left ear lobe which was bleeding and a painful neck. She wore a blood stained white blouse with blue and green flowers. On genital examination, she had a broken hymen and lacerations on her vagina walls. A high vaginal swab revealed the presence of pus cells and spermatozoa. It was concluded that she had been raped.
14. Her P3 form was filled on January 30, 2017. On examination, she had lacerations at 6 o'clock on her vagina but had no discharge. The probable weapon used was determined to be penile penetration while the degree of injury was classified as grievous harm. PW4 produced the P3 for and post rape care form in evidence.
15. Upon being placed on her defence, the appellant elected to give an unsworn testimony and called one witness. He testified that he met PW1 at the bus stage on January 27, 2018 at 9.30 pm. She was stranded and told him that she was heading to Narok from Nakuru. They talked and PW1 agreed to go with him to his place. Since they were doing the last trip, he took her in their matatu and they alighted at Karagita then boarded a motor cycle to [particulars withheld] at Sanctuary. PW1 asked for water which he bought for her water while he took soda. They stayed in the club up to 11.00pm and then went to his house where they spent the night. They woke up late the next morning and left the house in a rush. They parted ways at Naivasha bus stage and PW1 boarded a matatu to Narok. He gave her his mobile number. He was arrested later that day at around 8.30pm while closing business and taken to Naivasha police station where he was told that he had raped PW1. According to him, PW1 consented to going to his place and they parted ways peacefully. In his view, PW1 must have gone to her boyfriend who raped her.
16. DW2, Ezekiel Chege Kamiri was the appellant's cousin. He testified that on the night of the alleged offence, went to a pub where he was with a lady who was unknown to him although they looked like friends. They greeted him and sat on a separate table. The appellant ordered for water and soda. The lady drunk the mineral water as the appellant took the soda. After forty (40) minutes, the two walked out together. Three days later, he learned that the appellant had been arrested. He informed his uncle that he had seen the appellant and a lady walked out of the pub together.
17. On cross-examination, DW2 stated that the appellant used to work in a matatu plying the Nakuru-Naivasha and Naivasha Oserian route. He also stated that the appellant lived about 500 meters from the pub although he did not know where they went from the pub.

### **Analysis and Determination**

18. The issues that arise for determination are:
  - i) Whether the appellant's right to a fair trial under article 50(2) (e) of the *Constitution* was violated?



- ii) Whether the prosecution proved the offence of rape against the appellant beyond reasonable doubt?
- iii) Whether the sentence was harsh and excessive?

**Whether the Appellant’s right to a fair trial under article 50(2) (e) of the Constitution was violated?**

- 19. The appellant alleged that his right to a fair trial was violated during trial as the prosecution did not discharge its duty of disclosure under article 50 (2) (e) of the Constitution since he was not supplied with statements. On the other hand, the respondent disputed this allegation noting that the appellant ably participated in the trial.
- 20. I have perused the record. I note that on January 30, 2017, Hon Gesora ordered that the appellant be supplied with all relevant documents before the matter could be set down for hearing on priority basis. Thereafter, the trial proceeded before Hon E Kimilu and at no point did make any further request to be supplied with witness statements. If anything, the record shows that he fully participated in the trial by cross examining the prosecution witnesses and was also able to give a defence. I therefore find that the appellant’s right to a fair trial was not violated.

**Whether the prosecution proved the offence of rape against the Appellant beyond reasonable doubt.**

- 21. Counsel for the appellant submitted that the evidence adduced herein was inconclusive and did not prove the case against him to the required degree. Counsel also faulted the trial magistrate for shifting the burden of proof to the appellant by concluding in her judgment that the accused failed to challenge the evidence on record. He argued that the appellant was not required to discharge any burden under the law and the court could not place any on him. Further, counsel faulted the prosecution for failing to determine PW1’s age since in his view, all offences under the Sexual Offences Act are pegged on age of the victim. In addition, he faulted the trial court for failing to consider the appellant’s defence.
- 22. According to the respondent however, the prosecution proved its case beyond any reasonable doubt. It submitted that the appellant’s defence was rightfully dismissed by the trial magistrate because it did not overturn the watertight evidence presented by the prosecution.
- 23. The offence of rape is provided for under section 3 of the Sexual Offences Act as follows:
  - “(1) A person commits the offence termed rape if—
    - i. He or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
    - ii. The other person does not consent to the penetration; or
    - iii. The consent is obtained by force or by means of threats or intimidation of any kind.”
- 24. In order to prove the offence of rape therefore, the following elements must be satisfied: that that there was penetration which was intentional and unlawful; that there was no consent from the victim or that such consent was not freely obtained (See Leonard Njeru v Republic [2014] eKLR); and the positive identification of the perpetrator.
- 25. As to whether there was an unlawful penetration of PW1’s genital organ, I note that PW1 gave clear and uncontroverted testimony on how the appellant had sexual intercourse with her thrice on the material night with and without a condom. Her testimony was corroborated by the medical evidence



produced by PW3. A genital examination showed that she had a broken hymen and lacerations on her vagina walls and a high vaginal swab revealed the presence of pus cells and spermatozoa. It is therefore clear that there was sufficient evidence of penetration.

26. As regards consent, section 42 of the *Sexual Offences Act* stipulates that a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. In *Republic v Francis Otieno Oyier* [1985] eKLR the Court of Appeal held as follows:-

- “ 1. The lack of consent is an essential element of the crime of rape. The *mens rea* in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
2. To prove the mental element required in rape, the prosecution had to prove 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.
3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”

27. PW1 narrated how the appellant lied to her that he was going to escort her to the highway to get a matatu then turned against her. She testified that she tried to get away but the appellant strangled her and threatened to kill her if she raised any alarm. She narrated how he dragged her to his house without any prior agreement between them. Further, testified that she sprayed the appellant's eyes in an attempt to protect herself but the appellant slapped her so hard before forcefully having sex with her. PW1's testimony was well corroborated by PW2 who testified that PW1 informed him about her predicament and he heard the commotion between from the other end of the line before their call was disconnected. From the foregoing, it is clear that PW1 did not consent to having sex with the appellant. His violent actions did not give PW1 room to freely choose to engage in sexual intercourse with him. Further, PW1's injuries on the neck and earlobe which were confirmed by the medical evidence produced by PW3 are also consistent with the use of force and the lack consent.

28. As regards the identification of the perpetrator, the appellant's advocates contended that the evidence of PW4 should not have been given any consideration by the trial court since the black under pant and blouse allegedly belonging to PW1 were not identified by PW1 when she was giving her evidence. Further, counsel contended that the blood samples were taken un-procedurally. It was submitted that under section 36 of the *Sexual Offences Act*, the taking of blood samples can only be done through a court order and not at the direction of the investigating officer as was done in this case. Counsel urged that the total effect of all these legal omissions is that the entire evidence obtained from the samples taken from the appellant was of no evidential value.

29. In *Abiud Muchiri Alex & another v Republic* [2015] eKLR the Court of Appeal pronounced itself as follows regarding the collection of blood samples: -

- “...Such samples are to be extracted by a police officer of or above the rank of inspector. They are either extracted voluntarily with the written consent of the person from whom they are extracted or by with an order of court compelling such involuntary extraction of the samples.”



30. In the case of the *Republic v Timothy Mwenda Gichuru & 2 others* [2017] eKLR, Gikonyo J, held that:
- “... But I must state here that although our statutory law on provision of blood sample is sprinkled in various statutes, the core of the matter is that courts may direct a person charged with serious offence to provide blood samples for purposes of DNA testing if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence...
- .... Therefore, the manner in which the blood sample for DNA testing and sampling is obtained is a matter of the *Constitution* and the law. Accordingly, where a person has not given blood samples voluntarily, an order of the court is required to compel the person to provide the blood sample.”
31. In the present case, there is no doubt that PW5 did not obtain a court order prior to taking the blood sample of the appellant. There is also nothing on record to show that the appellant consented to the taking of his blood sample which connected him to the offence after a DNA analysis. I am therefore in agreement with the appellant’s counsel that the extraction of blood samples from the applicants was done contrary to law and thus the evidence of PW4 relating to the appellant’s blood sample has no evidential value.
32. Be that as it may, I note that the appellant himself did not deny that he was with PW1 on the material night and that they in fact spent the night in his house. In my view, this corroborates PW1’s testimony which settles the issue of positive identification. Further, it suffices to point out that having established that PW1 did not agree to going with the appellant to his house, his defence that there was a prior mutual arrangement between them becomes automatically unbelievable. I therefore find that the prosecution proved that the appellant committed the offence.
33. In view of the foregoing, I am satisfied that the prosecution proved the elements constituting the offence of rape to the required standard. The appellant’s conviction for the same was therefore sound and is accordingly upheld.
34. As regards the sentence, the appellant submitted that under article 50(2) of the *Constitution*, an accused person has a right to the benefit of the least severe punishment if convicted for an offence. It was argued that the appellant was a first offender and was apologetic in his mitigation. Further, it was submitted that there were no aggravating circumstances in this case hence the fifteen years’ imprisonment was excessive. On the other hand, the respondent argued that the same was proper as the trial magistrate carefully considered the circumstances of the case.
35. In the recently decided case of *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & anor*: Machakos HC Petition No E017 of 2021, Odunga, J found that minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent that they deny trial courts the discretion to consider the peculiar circumstances of each case so as to arrive at an appropriate sentence informed by those circumstances. However, the learned judge held that courts are at liberty to impose sentences prescribed under the Act so long as they are not deemed to be the mandatory minimum sentences.
36. Under section 3(3) of the *Sexual Offences Act*, a person convicted of rape is liable to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life. If this provision is considered in light of the above authority, it means that courts are at liberty to impose a lesser or harsher sentence for the offence of rape depending on the circumstances of the case at hand.
37. In the present case, the record shows that the appellant was given an opportunity before the trial court to tender mitigation. Thereafter, the trial magistrate sentenced the appellant to fifteen (15)



years imprisonment after rightfully taking into account the fact that he took advantage of PW1 and abused her trust after lying to her that he would assist her to get a vehicle to wherever she was going. Notwithstanding the appellant's mitigation, the offence and the circumstances under which it was committed were serious. A deterrent sentence was deserving.

38. I cannot find any reason for interfering with the learned magistrate's exercise of discretion in the circumstances.

### **Conclusion**

39. In the upshot, this appeal lacks merit and is hereby dismissed in entirety. The appellant's conviction and sentence are accordingly upheld. It is so ordered.

**DATED AND DELIVERED IN NAIVASHA THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

.....

**GW NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

Mr Gichuki DK for the appellant.

Ms Serling for the respondent.

Appellant - present.

