



**Kiptoon v Republic (Criminal Appeal 46 of 2019)  
[2022] KEHC 14505 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14505 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL 46 OF 2019  
WK KORIR, J  
OCTOBER 27, 2022**

**BETWEEN**

**HOSEA KIPTOON ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment delivered on 12/7/2019 by Hon. Biwott, SPM  
in Kabarnet SPM's Court SO Case No. 8 of 2019, Republic v Hosea Kiptoon)*

**JUDGMENT**

1. The Appellant, Hosea Kiptoon, was charged with the offence of rape contrary to section 7 of the *Sexual Offences Act*, 2006. The particulars of the charge disclosed that on March 18, 2019 at [Particulars Withheld] location in Baringo central sub-county within Baringo county he intentionally and unlawfully caused his penis to penetrate the vagina of JK without her consent.
2. The appellant faced an alternative charge of committing an indecent act contrary to section 11(a) of the *Sexual Offences Act*, 2006. The particulars of the charge being that on the date and place stated in the main charge, the appellant intentionally and unlawfully committed an indecent act by touching the vagina of JK.
3. The appellant pleaded not guilty and at the conclusion of the full trial he was found guilty and sentenced to serve ten years in prison. He now appeals to this court against both the conviction and sentence.
4. The appellant filed amended grounds of appeal on June 20, 2022 through which he faults the trial court for denying him a fair trial, convicting him on evidence based on shoddy investigations, failing to consider that the prosecution case had not been proved beyond reasonable doubt, failing to consider his *alibi* defence, and imposing the minimum sentence contrary to the holding in *Philip Mueke Maingi v Director of Public Prosecutions & another* [2022] eKLR.



5. The appeal proceeded by way of written submissions.  
Through submissions filed on June 20, 2022, the Appellant contends that the prosecution failed to establish a case against him as the ingredients of the offence of rape were not proved.
6. Turning to the specific grounds of appeal, the Appellant submits that he was not subjected to a fair trial because he was not supplied with all the statements of the prosecution witnesses despite requesting for the same on April 17, 2019. He submits that his rights to be informed in advance of the evidence the prosecution intended to rely on and to have reasonable access to that evidence, and, to adduce and challenge evidence as protected under article 50(2)(j) & (k) of the *Constitution* were thus violated by the trial court.
7. On his claim that the prosecution case was not proved to the required standards, the Appellant argues that the prosecution witnesses were inconsistent and incredible. His case is that the investigating officer, PW6 police constable Jane Macharia, relied on hearsay evidence from the family members of the complainant and never visited the scene of the incident to establish whether the alleged offence happened in the bush or in the appellant's farm. The appellant points out that the only witness who did not belong to the complainant's family was PW5 Solomon Chepchieng. He submits that the recording of the statement by this witness was an afterthought as he recorded it one month after his prosecution.
8. It is the appellant's submission that the matter required intense investigations considering that the complainant confirmed that he had at one time insulted her. The appellant states that the truth of the matter is that the complainant was regularly grazing her livestock on his farm and had threatened him with dire consequences.
9. On his claim that the trial court did not consider his alibi defence, the Appellant submits that although his witnesses were consistent, the trial court turned a deaf ear on his case in preference to the prosecution case. The appellant contends that he was framed by the complainant over a pre-existing grudge arising from the complainant's use of his farm as a grazing field. The appellant submits that his mother Mary Kobilu Chepkurui who testified as DW2 did indeed confirm that she was working in the farm with him at the time of the alleged offence but the trial court ignored her testimony. Further, that the trial court convicted him based on the inconsistent and uncorroborated evidence of PW5 while rejecting his credible defence.
10. The appellant further contends that although the sentence imposed is the minimum sentence provided by the *Sexual Offences Act*, it was unfair, unjust and inconsistent with the Constitution as it denied the trial court the discretion to impose a lenient sentence. Reliance is placed on the case of Machakos High Court Petition No. E017 of 2021 *Philip Mueke Maingi & another v Director of Public Prosecutions* for the holding that the minimum mandatory sentences under the *Sexual Offences Act* fetters the sentencing discretion of judges and magistrates.
11. In rebuttal, the respondent filed submissions dated June 14, 2022 in which it rehashes the evidence adduced at the trial and conclude that the appellant was properly convicted and sentenced. This court is therefore urged to dismiss the appeal. Reliance is placed on the decision in *David Njoroge Macharia v Republic* [2011] eKLR in support of the submission that the Appellant received a fair trial.
12. As was stated in *Okeno v Republic* [1972] E.A. 32, in a first appeal, the appellant is entitled to have the evidence submitted to a fresh and exhaustive examination so that the appellate court can arrive at its own independent decision. In doing so, the appellate court must itself weigh conflicting evidence and draw its own conclusions. In carrying out this task, the appellate court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.



13. Although the appellant's appeal is premised on various grounds, I will start by considering the question as to whether the case against him was proved by the prosecution beyond reasonable doubt. The complainant testified that on March 18, 2019 when she was returning from the forest where she had taken her goats, she saw the appellant following her. suddenly, the appellant held her tightly from behind on the upper chest and neck until she urinated on herself. She testified that she told the appellant that he was hurting her but he continued pressing her until she passed out. Upon regaining consciousness shortly thereafter she found the appellant on top of her. His penis was inside her vagina. He had removed her underwear and biker. Her dress was pushed up to the chest. She stated that the place was bushy and she could not scream since her throat had been squeezed. Her testimony was that after the appellant was through with her he stood aside and that is when she got the chance to go home. When she arrived home she reported the matter to her husband who called a neighbour and a boda boda rider. She was taken to Kabarnet Hospital where she was treated and referred to the police station where she recorded her statement. She stated that she was issued with a P3 form and the same was filled by a doctor. The complainant stated that the appellant was arrested by her husband, sons and neighbours.
14. On cross-examination, the complainant told the trial court that she had known the appellant since childhood. She stated that the appellant had at one time insulted her but she did not follow up on the issue. She reiterated that she did not scream because the appellant held her throat and she passed out.
15. PW2 Evans Kiptoo and PW3 Alex Karoney were not present at the place and time of the alleged rape.
16. PW4 Zakayo Chepkonga is the medical officer who filled the P3 form for the complainant. His testimony was that the complainant was seen on the date of the alleged sexual assault. PW4 stated that when he examined the complainant she had an injury to the neck and left index finger. Her clothes had no bloodstains. Upon examining the vagina, he noted that the labia minora was reddish but there was no discharge. He observed that the vagina had been penetrated by a penis. PW4 further testified that a high vaginal swab revealed blood in the urine but no sperm was seen. The witness produced the P3 form as an exhibit.
17. The other important evidence in this case was that of PW5 Solomon Chepchieng. He told the court that on March 18, 2019 at about 2:45 p.m. he was at his home when he received a call from the complainant's husband asking him to go to his home. He immediately went there and found the complainant crying. The complainant told him that she had been raped by the Appellant. He called a boda boda rider for her and told her to go and report the matter to the police and seek treatment.
18. The investigating officer PW6 police constable Jane Macharia restated the evidence of the complainant and confirmed that the appellant was taken to the police station by members of the public. She told the trial court that she did not visit the scene. Further, that the appellant denied raping the complainant.
19. In his unsworn testimony, the appellant who testified as DW1 stated that on the material day he worked in his farm from 2:00 p.m. to 4:00 p.m. The next day he went back to the farm where he worked until midday. He later went to the shopping centre to charge his mobile phone and that is when the sons of the complainant arrested him and took him to the police station.
20. The appellant further testified that the complainant used to graze her goats on his farm and when he raised the issue with her, she promised to do something sinister to him. He told the court that the charge against him was malicious and that PW5 had problems with him and that is why he recorded his statement one month after the incident.
21. The mother of the appellant who testified as DW2 confirmed that she was indeed in the farm with the appellant on the date and time it is alleged he raped the complainant.



22. Two of the appellant's grounds of appeal are that the trial court convicted him on inconsistent evidence and failed to consider his alibi defence. The judgement that convicted the appellant was a very short one. I will reproduce it as hereunder:

“From the evidence given, the complainant and accused knew each other well before 18/3/2019. Identification is not in question. The questions remaining would be whether PW1 was penetrated by accused using his penis or not. Whether PW1 consented to it or not.

PW4, who examined PW1, confirmed that PW1 was penetrated in the vagina. That the vagina was hyperemic (reddish) and had blood. Penetration by accused using his penis was confirmed. PW4 went on to tell [the] court that PW1's throat was tender and index finger injured. This supports PW1's claim that accused used force to subdue her. That she never consented to the penetration. It was forced on her. That she was injured to the point of urinating on herself.

I have considered accused's defence. I find no merit on it. He was not framed as alleged. I dismiss it.”

23. The decision as reproduced above does not contain the reasons as to why the trial magistrate believed the evidence of the complainant. Section 124 of the *Evidence Act*, Cap. 80 requires corroboration in criminal cases except in sexual offences. However, in sexual offences, the trial court is required to record in the proceedings the reasons for believing the victim. I reproduce the provision:

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

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

24. One may say that corroboration in the instant case was provided by the medical evidence. However, it was important for the trial magistrate to at least state why he believed the evidence of the complainant and not that of the appellant. It is also noted that although the trial magistrate indicated that he had considered the defence case, there is no analysis of the evidence of the appellant and his witness.
25. In considering the evidence placed before it by the parties, a trial court has to take into account the evidence as a whole before deciding the side to believe. The prosecution case or the defence case cannot be considered in isolation. In this case what was before the trial court was the word of the complainant against that of the appellant. The appellant had denied meeting the complainant on the material day. His witness confirmed that she was indeed with him on the date and at the time of the alleged rape. The evidence of PW4 is that the complainant was penetrated. However, this evidence does not appear to support the testimony of the complainant who testified that the appellant completed the act. In saying that the appellant completed the act, it is presumed that he ejaculated. If that was so, a high vaginal swab carried out shortly after the incident ought to have disclosed semen. There was no semen seen by PW4. The contradictory testimony of the prosecution witnesses ought to have been considered alongside the appellant's evidence that he had a long running dispute with the complainant because she had invaded his land. Although this issue did not come out clearly during the cross-examination



of the complainant by the appellant, there is an admission by the complainant that the appellant had insulted her prior to the alleged rape. This confirmed the existence of bad blood between the two prior to the incident which is the subject of this appeal. The appellant's claim that the complainant had threatened him was therefore not farfetched.

26. The record also shows that DW2's testimony that she was with the appellant at the time of the alleged rape was never tested by the prosecutor by way of cross-examination. The testimony of DW2 was therefore unchallenged. Taking the evidence of DW2 into account and in view of the inconsistency in the testimony of the key prosecution witnesses, the appellant ought to have been given the benefit of doubt.
27. In the circumstances of this case, I agree with the appellant that the case against him was not proved by the prosecution to the required standard. Having reached this finding, it is no longer necessary to consider the other grounds of appeal.
28. I therefore find merit in the appeal and allow it. The conviction of the appellant is set aside and the sentence quashed. The appellant is forthwith set at liberty unless otherwise lawfully held.

**DATED AND SIGNED AT KABARNET THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**W. KORIR, JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**H. K. CHEMITEI, JUDGE**

