



**Mzungu v Republic (Criminal Appeal E055 of 2021)  
[2022] KEHC 14703 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14703 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E055 OF 2021  
A. ONG'INJO, J  
OCTOBER 24, 2022**

**BETWEEN**

**MWARUWA MZUNGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of Hon. B. Koech, Senior Resident Magistrate, delivered on 9th day of May 2019 in Kwale Chief Magistrate Court Sexual Offence Case No. 60 of 2018)*

**JUDGMENT**

1. The appellant Mwarua Mzungu was charged and convicted for the offence of rape contrary to section 3(1)(9) & (c) as read with section 3(3) of the Sexual Offence Act No. 3 of 2006.
2. Particulars were that the appellant on the 26<sup>th</sup> day of March 2018 at 1.00am at [Particulars Withheld] village, [Particulars Withheld] location, Kinango Sub-County within Kwale County Intentionally and unlawfully caused his penis to penetrate the vagina of AS by use of force.
3. Based on the evidence of 5 prosecution witnesses and the appellants defence on oath the trial Magistrate found that the prosecution had proved their case beyond all reasonable doubt convicted the appellant and sentenced him to serve 16 years imprisonment.
4. The appellant was aggrieved by the conviction and sentence and he lodged appeal herein on the following amended grounds of appeal filed on March 15, 2022:-
  - i. That the trial misconstrued the relevant penal law.
  - ii. That the trial court erred in both law & fact by imposing a sentence that was beyond the one prescribed by the relevant law.
  - iii. That the trial court erred in fact by failing to consider my mitigating factors.



5. The prosecution's case was that the complainant was asleep in her house with her grandchildren when on March 26, 2018 when at 1.00am the accused knocked at her door and her grandson MM woke her up and told her there was someone at the door. That the appellant demanded for the door to be opened and when asked what he wanted at that time of the night he threatened to force the door open & enter through the window. The complainant said he recognized the voice of the person as that of the appellant as he was known to her.
6. That when the appellant try to enter by force she started crying. PW 1 said that in 2016 the appellant had gone seeking her daughter and that he tried to strangle her and she intervened.
7. That when the appellant stopped threatening her grand-children told her to open the door. That when she opened and they started running towards a neighbours place the appellant pursued her and caught up with her & raped her. She said her grandchildren ran into different directions. She said the appellant held her from behind strangled her and removed her biker & had sexual intercourse with her. That when the appellant left after defiling her she went to a neighbour's house while crying and found her grandchildren at the neighbours home.
8. That she slept at the neighbours place until the next day when she reported to her son and the son accompanied her to police station where a report was made and she was also taken to hospital. The complainant said that she was injured on the throat as appellant tried to strangle her. She said the appellant was her neighbour and had been following her daughter-in-law for a while. Complainant said that she saw appellants bicycle on the material night.
9. PW 2 the grandson of the complainant – MM testified that on March 26, 2018at 1.00am testified that he was asleep in his grandmother's house and he was with the grandmother and brother in the house when he heard a knock at the door. That he woke up & informed the complainant. That when appellant was asked what he wanted he insulted the complainant and said she was a gossip. That the appellant then kicked the door and the complainant started screaming and he said if they didn't open the door he would force it open or enter through the window.
10. That when the complainant screamed they heard accused person's voice from afar. That they then opened the door and PW 1 told them they should run to a neighbours house. That as they were running the appellant caught up with the complainant. That they went to JM's home but he could not respond because he was old.
11. That they went to another neighbours home and their grandmother found them there and said the appellant had raped her. PW 2 said the following morning they found appellants motorcycle & PW 1 took it to a neighbour and the appellant later took it. PW 2 said that appellant would go to their home when drunk. PW 2 said his mother was not at home.
12. PW 3 Titus Kamuu a clinical officer examined the complainant on allegations of rape & said he observed bruises & lacerations. He said there was no active bleeding. He said lab tests revealed pus cells indicating infection. PW 3 filled & signed P3 form confirming inquires on the complainant's private parts.
13. PW 4 P.C. Elizabeth Mutamu investigated the offence. She said the complainant was accompanied to station by the village chairman to report allegations of rape by a person known to her. She said the complainant was accompanied to station by the Village Chairman to report allegations of rape by a person known to her. She said that after appellant had raped the complainant he went back to her house & burnt clothes & carried millet.



14. PW 4 said the appellant used to burn charcoal in the forest where he stayed and they only managed to arrest him after 3 months after the Chief traced him. When the appellant was placed on defence he gave sworn statement & said that on 26<sup>th</sup> he left home using his bicycle and went to [Particulars Withheld] where he left the bicycle and went to get charcoal from the forest. That he returned at 8.00am and started drinking. He said he was with Mweni Muinde & Mudena Mutati. He said he got drunk & he didn't know what to do.
15. That at 1.00am he left to go home. That at Mweni's home the mother-in-law was there and he didn't know she was the complainant. That on arrival he knocked & Mweni opened and he got in. That in the morning he saw his bicycle was missing. That he went back to where he had been drinking the previous night and he asked the mnazi seller if he had left his bicycle. That he explained to his boss that the motorcycle had been stolen. That he reported to village elder & they started looking for motorcycle. That they found the motorcycle at John Mbithes & he was told that it is the complainant took it there. That Chairman told him to take it. That he went to his place of work & after 2 months he was arrested and charged.
16. He said he didn't commit the offence. He said he had a relationship with complainant's daughter-in-law who was not called as a witness. He said he is HIV Positive.
17. This appeal was canvassed by way of written submissions. In his submissions the appellant at paragraph 3 said:

“while it is true that I am not protesting the conviction entered owing to the weight of the evidence that was adduced against me, I however have reservations on the measure of punishment that was imposed thereof”.
18. The appellant argued that the words ”liable to a term not less than 10 years does not connote a mandatory imposition of the sentence and that the trial Magistrate had discretion to impose even a lesser sentence. The appellant cited the hold of in [DWM v Republic](#) [2016] eKLR.
19. The appellant argued that the trial Magistrate did not demonstrate that his mitigation had been considered in the sentence imposed and that the trial Magistrate also construed the relevant law to be a mandatory minimum law. The Appellant argued that the words “shall be liable to” in section 3(3) of the [Sexual Offences Act](#) only provided the maximum penalty which may be imposed & a lesser punishment can be imposed under the same law.
20. The appellant was aggrieved that the trial Magistrate only considered the aggravating factors in the sentence & not the fact that he was a 1<sup>st</sup> offender.
21. The appellant also relied in the holding in [Swabir Bukbet Lablied v Republic](#) CA CR Appeal nos 52 of 2018 where the court of Appeal held:-

“It is common ground that where a sentence is couched under the prefix “shall be liable to such as in the case above the same connotes that the sentence prescribed therein is not the mandatory sentence rather it is the prescribed maximum sentence. Therefore, the sentencing court is clothed with discretion to determine the appropriate sentence of course, taking into account the surrounding circumstances of each case, see this court's decision in [Fred Michael Bwayo v Republic](#) [2009] eKLR”.



22. The appellant argued that he was charged under a law that provides for a liability to imprisonment for 10 years which is the maximum penalty. He argued that the trial court erred to impose a sentence that was beyond the maximum prescribed penalty of 10 years and proceeding to adjust it to 16 years.
23. The appellant draw the courts attention to the difference between the prefix “shall be liable to” and “shall be sentenced to” & urged that his sentence be reviewed. Section 3(3) of the *Sexual Offences Act* provides:-
- “A person guilty of the offence under this Section shall be liable upon conviction to imprisonment for a term which shall not be less than 10 years but which may be enhanced to imprisonment for life”.
24. The trial Magistrate while sentencing the appellant had this to say:-
- “I have considered the mitigation given by the accused person. I have also considered him as a 1<sup>st</sup> offender. I have taken into consideration the circumstances of the offence charged. The offence of rape carries a minimum sentence of 10 years. The accused attacked & raped a vulnerable woman & he knew that he was having sexually transmitted disease i.e HIV/Aids as such, I sentence him to 16 years imprisonment”.
25. The interpretation of the meaning of section 3(3) of the *Sexual Offences Act* by appellant is incorrect. The Section says that:-
- “A person found guilty shall be liable upon conviction to imprisonment for a term which shall not be less than 10 years but which may be enhanced to imprisonment for life”.
26. This court finds that the sentence meted out by the trial Magistrate was within the law. The appeal is dismissed save that the appellant should serve the sentence imposed to take effect from June 11, 2018 when he was 1<sup>st</sup> arraigned in court pursuant to section 333(2) of the *Criminal Procedure Code* as it appears he was in remand custody throughout his trial.
27. Right of Appeal - 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS**

**24<sup>TH</sup> DAY OF OCTOBER 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

***In the presence of:-***

*Ogwel – Court assistant*

*Mr. Ngiri for Respondent*

*Appellant – present in person*

***Hon. Lady Justice A. Ong'injo***

***Judge***

**24/10/2022**

