



**Mbondo v Republic (Criminal Appeal E091 of 2021)
[2022] KEHC 15855 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E091 OF 2021
GMA DULU, J
NOVEMBER 30, 2022**

BETWEEN

GREGORY NZIOKA MBONDO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.A Mayamba in Kilungu Principal Magistrate's Court (S.O) Case No.E017 of 2021 pronounced on 23rd September 2021)

JUDGMENT

1. The appellant was charged in the magistrate's court with rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on July 4, 2021 in Ndolo Location within Makeni County intentionally and unlawfully caused his genital organ namely penis to penetrate the female genital organ namely vagina of RMN (name withheld) without her consent.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to 30 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following amended grounds of appeal –
 1. The magistrate erred by failing to note that the elements of rape were not attained as per the standards of law.
 2. The trial magistrate erred by shifting the burden of proof to the appellant where he stated (page 10 of 17 line 10), "the defence did not dispute the contention of penetration save for culpability".



3. The learned trial magistrate erred by failing to note that no scientific test (DNA) was conducted as per the provisions of section 36(1) of the *Sexual Offences Act* to ascertain whether or not the appellant committed the present offence which was unsuitable to base a conviction.
4. The learned magistrate erred by exceeding the minimum sentence. Thus the 30 years imprisonment sentence is harsh and un-proportionate.
5. The learned magistrate erred in law and fact by failing to order commencement of the sentence to comply with the provisions of section 333(2) of the *Criminal Procedure Code*.
4. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions. Both sides cited decided court cases.
5. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record, both for the prosecution and defence, and come to my own independent conclusions and inferences – see *Okeno –vs- Republic* (1972) EA 32.
6. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call additional witnesses.
7. Pw1 was RMN the alleged victim who testified as to what happened that day at 2:00pm, but said that she did not know her age. According to her, the appellant was the culprit, and took her to a trench, raped her, then carried and returned her to her house and locked her. She lived alone in that house.
8. Pw2 DMN was a young girl of 12 years who took food to the alleged victim on July 6, 2021 at 7:00am, only to find the door closed and on checking the victim told her to give her the food through the window as she could not open the door. When the witness forced the door open the victim asked her to call her mother, who came with her father, F and S.
9. Pw3 EMM the mother of Pw2 stated that on July 6, 2021 in the morning, she gave food to her daughter (Pw2) to take to the victim, and thereafter Pw2 came and called her, and on going there with others, the victim told her that the appellant had “slept with her”. Pw4 FMW confirmed that he went to the victim’s house together with Pw2, and that they reported the incident to the village elder and assistant chief.
10. Pw5 Erick Kasiamani was a clinical officer at Kilungu Sub-County hospital who testified that the victim accompanied by relatives, reported an incident of rape at the hospital. That the victim was medically examined and treated. The findings were that labia majora was swollen, and there were traces of epithelial cells in her urine. The victim’s age was estimated to be 79 years of age. He produced the medical records and P3 form as exhibits.
11. Pw6 Cpl Samuel Kamau was the investigating officer whose evidence was that he was handed over the case on July 6, 2021, and conducted investigations and charged the appellant with the offence. He produced clothes of the victim said to have been blood stained.
12. When put on his defence, the appellant tendered sworn defence testimony and said that in the morning of July 6, 2021 while at home harvesting animal feeds, he was called at 11:00am by F and R to the scene where he found E (the victim) and village elder, and was then told that the victim had been attacked and he was taken to Kyambeke police station where the complainant said that he was the attacker.
13. The elements of the offence of rape are first sexual penetration, secondly lack of consent, thirdly, the identity of the culprit.



14. With regard to the element of sexual penetration, Pw1 the victim stated that she was penetrated sexually in a trench outside her house. The evidence on record is that she disclosed the incident to Pw3 and Pw4 when they came to her house on July 6, 2021. The medical evidence from Pw5 Eric Kasiamani a Clinical Officer at Kilungu was that the victim aged about 79 years had swelling in the labia majora, and epithelial cells were noticed in her vagina.
15. In my view, with the evidence on record, sexual penetration did occur on the victim. I thus find that the prosecution proved beyond any reasonable doubt that sexual penetration occurred on the victim.
16. With regard to consent, the victim stated that she did not give consent to the sexual intercourse. With the evidence on record, of the victim (Pw1), and the injuries noted in her sexual organs in the medical reports, I find that forceful sexual penetration occurred, and thus like the trial magistrate came to the conclusion that the victim did not consent to the sexual intercourse.
17. I now turn to the third element of the identity of the culprit. The evidence on the appellant being the culprit is only that of the victim Pw1. The appellant denies that he was the culprit and states that he was a neighbour of the culprit, and was at home until the July 6, 2021 when he was called from his farm work and told that he had assaulted the victim.
18. Under the proviso to section 124 of the *Evidence Act* (Cap 80), the evidence of a single witness victim of a sexual offence can sustain a conviction provided it is believable and so believed by a trial court, on reasons to be recorded in the proceedings.
19. I have considered the fact that the appellant and the victim know each other well. They were neighbours. The incident occurred at 2:00 pm in broad daylight. There was no existing grudge. Though the victim was 79 years old, there is no evidence of impaired eye sight.
20. The victim described the incident graphically that the appellant initially carried her into the house, then outside to the trench, raped her, then carried her back to the house and shut the door behind her and she was not able to open the door.
21. In my view, the evidence on record, and especially the details given by the victim, is believable as it demonstrates a truthful narration of what occurred that day. On whether the date was 4th August, I am of the view that if there was an error of the date of the incident, such error is curable under section 382 of the *Criminal Procedure Code* as it did not prejudice the appellant.
22. I thus find that the prosecution proved beyond any reasonable doubt that the appellant was the culprit. I will thus uphold the conviction.
23. With regard to sentence, the minimum sentence for rape under section 3(3) of the *Sexual Offences Act* is 10 years imprisonment. This is a serious offence on an elderly woman. The appellant asks that the period he was in custody should have been considered in sentencing him.
24. I note that the appellant was treated by the trial court as a first offender. In mitigation he stated that his wife had died and that he took care of his own children. Though sentencing is an exercise of discretionary power by a trial court, I find that the sentence of three times the minimum statutory sentence herein is excessive, in the circumstances of the case. I will thus reduce the sentence to 10 years imprisonment.
25. Consequently and for the above reasons, I dismiss the appeal on conviction. I uphold the conviction of the trial court. I allow the appeal on sentence, set aside the sentence imposed and order that instead the appellant will serve 10 years imprisonment from the date he was sentenced by the trial court.

Right of appeal explained.



**DELIVERED, SIGNED & DATED THIS 30TH DAY OF NOVEMBER 2022, IN OPEN COURT AT
MAKUENI.**

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GEORGE DULU

JUDGE

