



**Kirimi v Republic (Criminal Appeal E054 of 2022)  
[2022] KEHC 15506 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15506 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E054 OF 2022  
TW CHERERE, J  
NOVEMBER 21, 2022**

**BETWEEN**

**PATRICK KINOTI KIRIMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against judgment, conviction and sentence in Maua Criminal  
SO Number 105 of 2019 by Hon.A.G.Munene (PM) on 01st February, 2022)*

**JUDGMENT**

**Background**

1. Patrick Kinoti Kirimi (appellant) has filed this appeal against conviction and sentence on a charge of rape contrary to section 3(1) (a) and (c) as read with section 3(3) of the *Sexual Offences Act* No 3 of 2006 (the Act). The offence was allegedly committed between on December 25, 2019 against JNM.
2. Complainant stated that on the night of December 25, 2019 while she was sleeping, appellant who is her neighbour broke into her house through the window and raped her. She screamed and appellant was arrested from her house by PM and SK. Complainant was examined a day after the incident and nothing unusual was found in her genitalia.
3. In his sworn defence, the appellant denied the offence and stated that he was framed due to a dispute he had with complainant's son concerning some water pipes.
4. In a judgment dated February 1, 2022, appellant was convicted and sentenced to serve 10 years' imprisonment.
5. Dissatisfied with the sentence, the appellant lodged the instant Appeal lodged the instant Appeal and in the amended grounds raised the following issues:



- i. Medical evidence did not prove rape
- ii. Prosecution case was not proved
- iii. Sentence was harsh
- iv. Defence was not considered

### **Analysis and determination**

6. I have considered the appeal and I have deduced the issues for determination is whether the prosecution case was proved.
7. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on article 50(2) (a) of the Constitution which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.
8. English case law is also replete with decisions which elucidated this standard of proof in a criminal case. Lord Denning in the case of Miller v Minister of Pensions (1942) AC stated as follows: -

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”
9. The degree of proof in criminal cases was properly established in the classicus English case of Woolmington v DPP 1935 A C 462. Similarly, in Bakare v State 1985 2NWLR, Lord Oputa of the Supreme Court of Nigeria adopted the principle as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
10. Where there is doubt of any kind in a criminal matter, and evidence which would likely advance the case of the prosecution is not adduced, the effect of such an occurrence would go to the benefit of an accused person, in this case, the appellant.
11. After complainant reported that she had been raped, she was examined a day after the alleged rape and was found with a whitish vaginal discharge from which the clinical officer concluded that sexual intercourse had taken place. There were no injuries on external or internal genitalia. On the evidence of the white vaginal discharge, the learned trial magistrate determined that the charge of rape had been proved.
12. I have considered the clinical officer’s evidence and I find that it did no more than support complainant’s evidence and the conclusion that the whitish vaginal discharge was evidence of



penetration. With respect however, the presence of white vaginal discharge alone in a woman's vagina is not conclusive proof that she has had been raped nor is the absence proof of the contrary. What is required to prove that rape has taken place is proof of penetration, an essential fact which the clinical officer's evidence did not establish.

13. From the foregoing analysis, I find and hold that the conviction and sentence imposed on appellant on the offence of rape were unsafe.
14. There is however evidence that appellant gained entry into complainant's house at night, by breaking a window. Accordingly, I find that the prosecution proved the offence of burglary contrary to section 304(2) of the [Penal Code](#) which charge attracts a maximum sentence of 10 years.
15. In the end, the charge of rape is substituted with offence of burglary contrary to section 304(2) the [Penal Code](#) for which the Appellant is hereby convicted. The record reveals that appellant remained in custody throughout the trial from the date of his arrest on December 26, 2019. Consequently, I invoke the provisions of section 333(2) of the [Criminal Procedure Code](#) and substitute the 10 years' sentence imposed on the appellant is substituted with a 2-year imprisonment term from December 26, 2019 when he was arrested.

**DELIVERED AT MERU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022.**

**WAMAE. T. W. CHERERE**

**JUDGE**

**In the presence of-**

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)

