



REPUBLIC OF KENYA



KENYA LAW
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**Mbargig v Republic (Criminal Appeal 91 of 2018)
[2022] KEHC 15629 (KLR) (Crim) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 91 OF 2018

JM BWONWONG'A, J

NOVEMBER 17, 2022

BETWEEN

JOHN SAMUEL MBARGIG ALIAS JOHN ADESIRE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. M. Mutuku, SPM, on 8th May 2018 in Milimani Chief Magistrates Court in Criminal Case No. 983 of 2018 Republic vs John Samuel Mbargig alias John Adesire)

JUDGMENT

1. The appellant has appealed against his conviction and sentence of ten (10) years imprisonment and in addition, he was sentenced to a fine of Kshs. 200,000 in default to serve a further one (1) year imprisonment in respect of rape contrary to section 3(1) (a) (b) as read with section 3 (3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. In the alternative, he was charged with four counts of committing an indecent act with an adult contrary to section 11 (A) of the [Sexual Offences Act](#) No. 3 of 2006. In addition, he was charged with the offence of being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 52 (2) of the [Kenya Citizenship and Immigration Act](#) No. 12 of 2011.
3. He pleaded not guilty, and was tried and convicted on all counts. He was sentenced to serve ten (10) years imprisonment and in addition he was sentenced to a fine of Kshs. 200,000 in default to serve a further one (1) year imprisonment.
4. Being dissatisfied with the decision of the trial court, he filed a petition of appeal in this court.



5. In a summarized form, the grounds raised in his petition of appeal are that the trial magistrate erred in law and fact by relying on the prosecution's case which was not proven beyond reasonable doubt, the trial court erred by ignoring evidence that proved that the complainant was having sexual relations with her boyfriend when the alleged crime took place, the trial magistrate erred in law and fact by not observing that there was contradictory and uncorroborated evidence produced by the prosecution, the trial magistrate erred by rejecting the appellant's defence, the trial was not free and fair and the sentence imposed was very harsh.
6. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs. Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oiruri Mose v R* [2013] e-KLR, that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
7. MNG (name withheld) (PW 1), testified that she is a 19-year-old student at [Particulars Withheld] University. On June 6, 2016, the appellant came to her class and asked for donations to assist in raising school fees to enable him complete his education at [Particulars Withheld] University. After class, he approached her and they went and had tea at the school cafeteria. They talked about repentance, and spirituality among other things. She told the court that the appellant informed her that she was a sinner and needed to repent or else she would die. He also convinced her to break up with her boyfriend to enable her to begin the process of repentance, which she did.
8. The next day, she met the appellant and bought him breakfast. They talked about African spirituality and how he would help her fight the spiritual wars she was facing. She gave the appellant Kshs.2,000 with which he used to buy anointing oil. They went to a hotel at Nyandarua House along Latema road. In the hotel room, the appellant gave her the mixture which she drank and told her to take a shower and apply it to her body. The appellant threatened her that failure to have sexual intercourse with him would be catastrophic as she would not be 'saved'. They engaged in sexual intercourse and the appellant cautioned her against telling anyone.
9. The next day she met the appellant for further prayers at Swanga House along Accra road. The appellant informed her that she had to freely submit herself to him for sexual intercourse for the prayers to work and she did. She also brought Kshs. 4,000 which she gave to him. On June 10, 2016, she testified that she had sex with the appellant at Nyandarua House. She told the court that she consented to the act albeit by threats and pressure. On June 11, 2016 she had sexual intercourse with the appellant at Nyandarua House. The appellant informed her that it was the final time they were having sexual intercourse as all her demons had been exorcised. He then took her back to school.
10. When she went home she informed her boyfriend who took her to a VCT Centre for HIV testing. Her brother also came and took her to Nairobi Women's Hospital, where she was examined and a PRC form was filled. She reported the matter to Central Police Station and was later examined by a government doctor who filled out the P3 form. She told the court that at the time, she was suffering from depression and submitted to the appellant due to the coercive nature and he used the Bible and God which she believed. She insisted that she agreed to be prayed for not to be raped.
11. PMG (Pw 2), a brother to the complainant testified that on June 12, 2016, he received a call from her sister (PW 1), who informed him that someone had taken advantage of her. He proceeded to pick her and took her to Nairobi Women's Hospital for examination and treatment. He also called her parents and liaised with police officers, which led to the arrest of the appellant. He told the court that his sister was not insane but depressed and at times she relapsed.



12. JN (PW 3), the boyfriend of the complainant told the court that on June 12, 2015, she went to visit her at school since she was unreachable on phone. She informed him that a man of God had told her to cut ties with him, since he had joined the 'Illuminati'. She then narrated to him, her encounter with the appellant.
13. Dr. Pius Kigamwa (PW 4), a consultant psychiatrist testified that the complainant suffers from a mental disorder known as Schizo-Affective disorder and is on medication and psychotherapy. She was on mood stabilizers and her decision-making was impaired. That as a result of her condition, her judgment and decision-making may have been impaired. She was also vulnerable to psychological pressure.
14. Kinuthia Edward Mbuthia (PW 5), a clinical officer produced the PRC report filled by Dr. Maureen Nyonga, who was unavailable to present the same. On examination of the complainant, the hymen was broken, no physical injuries were noticed, her genitalia seemed normal save for whitish discharge. A urinalysis test indicated traces of white blood cells, which could have indicated prolonged periods without food or an infection. All tests conducted were negative and the necessary treatment was given. The witness concluded that there was evidence of penetration due to the broken hymen.
15. Dr. Joseph Kagunda (PW 6), a government analyst at the Government Chemist laboratory testified that on October 21, 2016, he received a police memo accompanying some samples for testing. He was required to analyse the samples and determine the presence of biological evidential material. His findings were that there was a match of the DNA profile generated from the panty with the swabs belonging to the complainant.
16. No. 96109 PC Maureen Kanyakur (PW 7), the investigating officer told the court that an incident of rape was reported on June 13, 2016. The suspect was the appellant, who had coerced the complainant into sexual intercourse in an attempt to lead her to 'salvation'. She conducted investigations, took statements, and charged the appellant with the offence. Further, the appellant did not have any passport or identity documents nor did he have a visa or permission to be in Kenya.
17. Dr. Kizzi Shako (PW 8), testified that she examined the complainant 8 days after the alleged incident. Her genitalia were normal and had multiple tears on the hymen, which appeared to be old. No other injuries were noted.
18. The trial court found that the appellant had a case to answer and put him on his defence. He made an unsworn statement and testified that he is a dual citizen of South Africa and Uganda. He testified that he is a gospel musician and was not in Kenya illegally as he was on transit to Uganda. He denied any knowledge of the offence he was charged with. He testified that the prosecution failed to bring CCTV footage to show that he was ever at [Particulars Withheld] University, as alleged by the complainant. He told the court that the PRC report from Nairobi Women's Hospital was a forgery and the medical evidence did not implicate him in any way with the offences he was charged with.

Analysis and determination

19. For the offence of rape to be sustained, the ingredients; intentional and unlawful penetration, lack of consent, or that consent was obtained under duress or coercion needs to be proved by the prosecution witnesses. Section 3 (1) of the *Sexual Offences Act* states that a person commits the offence of rape if;
 - “He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
 - a) The other person does not consent to the penetration; or



- b) The consent is obtained by force or by means of threats or intimidation of any kind.

20. In grounds 1, 2 and 3 of the appeal, the appellant challenged the totality of the prosecution's evidence as being contradictory and uncorroborated. He argued it was not sufficient to warrant a conviction that is beyond reasonable doubt. He further argued that the trial court erred by ignoring evidence that proved that the complainant was having sexual relations with her boyfriend, when the alleged crime took place.
21. The appellant challenged the medical evidence of Dr. Pius Kigamwe (PW 4) that the complainant was a vulnerable witness. He claimed that due process was not applied by the court when dealing with vulnerable witnesses pursuant to the provisions of the *Sexual Offences Rules* of 2014 (Special arrangements for vulnerable witnesses (3) (4)) and section 31 (4) of the *Sexual Offences Act* No. 3 of 2006. Further, no medical report was produced by PW 4 to prove the claim that PW1 had a mental disorder or any conditions related to mental health.
22. On identification, the appellant submitted that no identification parade was conducted to identify him. He argued that his identification was never corroborated by any individual. The appellant submitted that the evidence tendered did not prove that he was ever at [Particulars Withheld] University as alleged, or he ever visited the various hotels named by the complainant, where the alleged incidents took place.
23. The witnesses presented by the prosecution did not witness the alleged acts of rape. This is not peculiar to this matter, as such acts of intimacy rarely get witnessed by third parties. Circumstantial and corroborative evidence would normally be used in such situations. The proviso to section 124 of the *Evidence Act* (cap 80), Laws of Kenya also allows the court to convict based on the evidence of the victim if the court is satisfied that the victim is truthful and proceeds to give reasons for such a belief.
24. In rape, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* [2015] e-KLR citing *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the appellate court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”

This court has noted from the medical report that the doctor noted no lacerations or any signs of lacerations or any other physical injury which in my view is material because for the offence of rape to be sustained, the prosecution must prove the element of force, intimidation, threats or any other undue influence by the perpetrator to engage in sex.

The proviso to section 42 of *Sexual Offence Act* describes consent as;

“For the purpose of this Act, a person consents if he or she agrees by choice and has freedom and capacity to make that choice.”

25. It is also important to get to the bottom of the elements of intent and an unlawful act of the rape itself to find out if the evidence tendered at the trial proved the said elements to the required standard.

Section 43 (1) of the *Sexual Offence Act* provides as follows: -

- (1) An act is intentional and unlawful if it is committed-



- a) in any coercive circumstance;
- b) under false pretenses or by fraudulent means; or
- c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

26.

- (2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is-
 - (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
 - (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or...
 - (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.”

In *Republic v Oyier* [1985] e-KLR, the Court of Appeal held that:

“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.

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.”

- 27. The complainant testified that she was coerced into having sexual intercourse with the appellant on four different occasions between 7th and June 11, 2016. The reasons advanced are that she did not resist the advances of the appellant as she was afraid that she would 'die' as the appellant had convinced her that she was a sinner and the only way she would be cleansed was through sexual intercourse with him. She also gave the appellant money when they met.
- 28. In his testimony, PW 4 testified that the complainant suffers from a mental disorder and was therefore susceptible to manipulation. A report was produced in court dated June 23, 2016. The report indicates that the complainant suffers from Schizo Affective disorder and was on medication and therapy. It also indicated that her judgment and decision making may be impaired.
- 29. It is my view, that the medical report produced lacked in material particulars of the patient in that condition. There report did not provide the medical history of the complainant, the treatment history and medical directives and how the condition affected complainant's judgement or decision making. The report also failed to indicate whether the complainant is always in a lucid state or otherwise.
- 30. That notwithstanding, the key ingredient of rape is not just penetration as indicated by broken hymen, which is reflected in the P3 but lack of consent. A charge of rape can only be sustained if that element is proved beyond doubt. The prosecution should show that either there was no consent in which case, show that there was some resistance or that consent was obtained through threats, coercion or by any other means well stipulated under section 43 (1) of the *Sexual Offence Act*. That fact should come out clearly from the evidence.



31. I find that the trial court erred in convicting the appellant after finding that she was lucid during the rape that is charged. The key element of lack of consent was not established beyond doubt, though penetration was established. I therefore, agree with the appellant that it was not safe for the trial court to convict the appellant on the charge of rape based on the evidence tendered.
32. In addition, the appellant was charged with the offence of being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 52 (2) of the *Kenya Citizenship and Immigration Act*, No. 12 of 2011. For this offence, he was fined Kshs. 200,000 in default to serve a further one (1) year imprisonment. In his petition of appeal, the appellant did not challenge this conviction and sentence.
33. The upshot of the analysis is that the appeal partly succeeds. His conviction is quashed and the sentence is set aside. The appellant is hereby set free unless he is held on other lawful warrants.
34. It is hereby recommended that the appellant be deported to his country of origin namely Uganda or South Africa; since he holds dual citizenship of those two countries.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH OF NOVEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua :Court Assistant

The appellant in person

Ms. Ntabo for the Respondent

