



REPUBLIC OF KENYA



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**Wekesa v Republic (Criminal Appeal 18A of 2024)
[2025] KEHC 856 (KLR) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 18A OF 2024
DR KAVEDZA, J
JANUARY 16, 2025**

BETWEEN

DENNIS WEKESA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence on 5th June 2023 in Kibera Chief Magistrate's Court Sexual Offence Case No. 6 of 2020 before Hon. A. Mwangi, CM)

JUDGMENT

1. The Appellant, Dennis Wekesa, was charged and after a full trial convicted for the offence of rape contrary to section 3 (1) (a) (b) (c) as read with section 3 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the appellant on the 7th Day of November 2019 at around midnight in Westlands Sub-County Nairobi County, unlawfully and intentionally caused his penis to penetrate the vagina of LMB without her consent. He was sentenced to serve 10 years imprisonment.
2. He faced a second charge of Robbery with Violence contrary to section 296(2) of the *Penal Code* but was acquitted by the trial court.
3. Being aggrieved with the conviction and sentence, he filed this appeal on the grounds that; the learned trial magistrate failed to recognise that crucial witnesses were not availed by the prosecution, that the medical findings did not corroborate the testimony of the complainant, and that there were material contradictions in the prosecution case. He further contended that the learned trial magistrate failed to appreciate that online rides can be tracked. Still, no maps were produced to establish the route, time taken, and whether the rider stopped anywhere before the completion of the ride. He challenged the totality of the prosecution case, that it did not meet the threshold to sustain a conviction for rape.
4. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the



witnesses testify in order to assess their demeanour thereof. (see *Okeno v Republic* [1972] EA 32 and *Kiilu and Another v Republic* [2005] 1 KLR 174)

5. To proceed with this task, I shall outline the evidence emerging from the trial court. The prosecution called three witnesses in support of their case.
6. LMB, the complainant, testified as PW1 that on November 6, 2019, at around 8:00 pm, she had dinner with friends in Parklands until midnight. She used the Bolt app to request a boda boda to her Kileleshwa residence. The rider, identified as the Appellant, Dennis Wekesa, picked her up. She saw him clearly under sufficient lighting at the gate.
7. The Appellant took an unfamiliar route, but PW1 trusted him and did not check the map. He stopped in a dark area, claiming he needed to relieve himself, then suddenly attacked her. He strangled her, dragged her into the forest, and injured her neck, back, knees, ankles, and pelvic area. PW1 was terrified, frozen in fear, and unable to scream due to the strangulation.
8. The Appellant attempted to sexually assault her multiple times but was initially unsuccessful as she resisted. He later forcibly made her remove her trousers and had sexual intercourse with her after threatening her. She stated that she complied out of fear for her life. He also touched and kissed her without her consent and made further advances, including touching her breasts.
9. Following the assault, the Appellant compelled PW1 to remount the motorcycle. Upon stopping at a petrol station, he instructed her to wait while he refuelled, retaining possession of her bag, which contained valuables, including her phone, wallet (around Kshs. 16,000), ID card, credit card, house keys, and glasses. Seizing the moment, PW1 fled to a busy road, flagging down a vehicle occupied by three men. Despite initial apprehension, she entered the vehicle out of greater fear of the Appellant. One occupant identified himself as a police officer and escorted her home.
10. Her flatmate admitted her, as she had lost her keys. She recounted the ordeal and later sought medical treatment at Aga Khan Hospital. PW1 reported the incident to the Spanish Embassy on 8th November 2019 and recorded a statement at Parklands Police Station on 11th November 2019. A P3 form confirmed her injuries; her bag and contents remained unrecovered.
11. PW1 firmly restated on cross-examination that the sexual intercourse was non-consensual and that the Appellant used force and threats, which left her frozen in fear.
12. Dr Daljiv Sokhi (PW2), a medical practitioner at Aga Khan Hospital, examined PW1 on 7th November 2019, the night of the incident. PW1 alleged sexual assault by a motorbike rider. PW2 observed multiple injuries, including bruises on her neck, hips, abdomen, elbow, knees, and heels, with tenderness near the 3rd rib. Her clothes were soiled with mud, and she exhibited anxiety and fear.
13. Her genitalia appeared normal for her age, with no lacerations, bleeding, or discharge, though bruising was noted on the right pelvic area. Laboratory tests were conducted, and she received a tetanus injection before being referred to counselling and HIV testing. PW2 classified her injuries as harm and stated that the absence of lacerations did not preclude penetration.
14. PC John Mukanda (PW3), the investigating officer, testified that on 11th November 2019, he was assigned the case by the OCS. He met PW1 and Mr Moreno, the Spanish Embassy legal counsel, and recorded PW1's statement. PW1 provided a Bolt printout detailing the trip, including the Appellant's name and motorcycle registration number KMEJ 935K, a TFstar make, which was produced as Prosecution Exhibit 3.
15. PW3 wrote to Bolt Kenya Limited for verification. The receptionist confirmed the trip and provided the Appellant's phone number and motorcycle details. On 15th November 2019, PW3 requested the



motorcycle's registration details from NTSA, which were provided and circulated. He also requested Dennis Wekesa's ID details. PW3 sought call data from Safaricom but received no response. Airtel provided details of numbers registered under the Appellant's ID. On 12th March 2020, with DCI assistance, the suspect was traced and arrested. PW1 identified him via a portrait, as she had travelled to Spain and was unavailable for an ID parade.

16. In cross-examination, PW3 confirmed the motorcycle was registered to Mercy Chebet Rono, who refused to cooperate after confirming its sale to the Appellant.
17. When put on his defence, the Appellant, Dennis Wekesa (DW1), testified under oath that he was a Bolt motorcyclist residing in Gachie before his arrest. He recalled receiving a ride request on 6th November 2019. Upon arrival at Analita Apartments, the customer, who appeared intoxicated, seemed surprised and stated she had intended to order an Uber car but mistakenly requested a motorcycle. She voluntarily boarded, and her destination was Kileleshwa.
18. En route via Waiyaki Way, she received a call and redirected him to Club Dejavu in Westlands. Upon arrival, she met individuals outside the club who paid him Kshs. 200. He then left and continued working, keeping his Bolt line active. On 12th March 2020, he received a call from someone claiming to be a police officer, instructing him to report to Parklands Police Station to pick up a client. Upon arrival, he was arrested and charged with rape. He denied the allegations, asserting that no identification parade was conducted and that he only saw the complainant in court.
19. In cross-examination, he admitted carrying the complainant but claimed she was intoxicated and that he merely followed her instructions. He denied all allegations.
20. I have considered the evidence, the grounds of appeal, and the submissions by both parties. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.
21. The elements for rape are well settled in *Simon Kimiti David v Republic* [2017] eKLR where it was stated thus;

“Without corroboration the essential elements of rape consist of the following:

- (1) The act of intentional and unlawful penetration.
- (2) The act of sexual intercourse was done and against the complainant's will.
- (3) The consent is obtained by force or by means of threats or intimidation.”

22. The prosecution was therefore required to establish the following ingredients; penetration, absence of consent, and that the Appellant was the perpetrator of the act.
23. Section 2(1) of the *Sexual Offences Act* defines penetration as: “the partial or complete insertion of the genital organ of a person into the genital organs of another person.”
24. PW1 testified that on the night in question, she called a taxi after meeting friends, but the ride took a horrifying turn. Trusting the rider, she did not check the route. He diverted to an unfamiliar path, claiming he needed to relieve himself, then dragged her into a roadside forest.
25. She recounted how he removed her trousers but initially failed to penetrate her as she struggled. When he returned to retrieve his motorcycle, she put her trousers back on. However, he forced her to strip again, ignored her pleas to stop, and successfully penetrated her.
26. After the assault, PW1 redressed, and the rider forced her back onto the motorcycle to continue the journey.



27. The medical evidence adduced by PW2 corroborated the fact that PW1 had been sexually assaulted. According to the findings of the medical examination, while there were no lacerations, bleeding or discharge, there was bruising in the right pelvic area.
28. The Appellant has challenged the medical evidence on the ground that the fact of the finding that the genital area was normal and without lacerations shows that there was no penetration. However, PW2 affirmed that the absence of lacerations did not rule out penetration, particularly given the age of the victim.
29. Besides, even without elaborate findings in the medical report, this Court can make a determination on penetration with only the victim's testimony, in line with the provisions of Section 124 of the *Evidence Act* (Cap. 80 of the Laws of Kenya), which allows for the testimony of a victim in sexual offence cases to be sufficient without corroboration, provided the court finds the victim trustworthy.
30. While I did not have the benefit of seeing the victim as she gave her testimony, I have thoroughly gone through her testimony, which was very elaborate and consistent, despite being cross-examined twice, by both the Appellant and Mr. Awuor, Counsel for the Appellant, on two separate occasions. She remained forthright that on the fateful night, she was indeed sexually assaulted by the rider who was to take her home. The Trial Magistrate in his Judgement also noted emphatically that PW1 was consistent and trustworthy with her narration, that he had no reason to doubt her evidence. Consequently, it is my finding that PW1 was indeed penetrated on the fateful night.
31. Was there an absence of consent? A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice.
32. In the case of *Republic v Oyier* (1985) eKLR, the Court of Appeal held;

“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 or not caring whether the woman consents or not.

To prove the mental element required in rape, the prosecution has 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.

Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first if the offense was afterward committed by force or against her will; nor is it any excuse that she consented after the fact.”
33. The facts establish the use of force and the absence of consent. PW1 testified that after the rider stopped by the roadside, he pushed her to the ground and strangled her. When she resisted, he dragged her into the forest by her ankles, causing bodily injuries.
34. Medical findings by PW2 confirmed bruises on PW1's neck, right abdominal area, elbow, knees, and heels, along with tenderness on her 3rd rib. These injuries substantiate PW1's account of being violently manhandled before the sexual assault.
35. PW1 was firm that she never consented. Despite the Appellant's attempts to coerce her, she repeatedly resisted and even pleaded with him to stop. She only removed her trousers out of fear, having been strangled and facing a stranger in an isolated area.
36. Consent must be freely given, not obtained through fear or force. PW1's resistance from the outset, the Appellant's persistent attempts to subdue her, and the act of dragging her into the forest all negate



any suggestion of consent. The presence of bruises further confirms her struggle. The prosecution has, therefore, proved beyond reasonable doubt that PW1 did not consent to the sexual or violent acts inflicted upon her.

37. The third issue is whether the Appellant was positively identified as the perpetrator. One of the cardinal principles of identification is that visual recognition must be free from any errors or mistakes. This was revisited by the court in the case of *Paul Etole & Another v Republic* Cr Appeal No 24 of 2002 where the court held that;

“When dealing with visual evidence, the court ought to examine closely the circumstances in which the identification by each witness came to be made, that it should remind itself of any specific weakness which had appeared in the identification.”

38. Upon reviewing PW1’s evidence, it is clear she had a good view of the rider, aided by sufficient lighting from security lights outside the building where she was picked. PW1 identified the Appellant as the rider who later raped her, and the Appellant confirmed he picked her up, though he denied the assault.
39. The Appellant claimed PW1 was drunk, but she denied this. PW2, the medical doctor who examined her shortly after the incident, testified that PW1 was clear-headed and able to recount the events accurately, demonstrating she was capable of understanding her surroundings and identifying the perpetrator.
40. The investigating officer linked the Appellant to the crime by obtaining trip details from Bolt, confirming that the rider was Dennis Wekesa, as identified through his ID and phone number. The Registrar of Persons records corroborated this link. Although no identification parade was conducted, the totality of the evidence, especially PW1’s testimony corroborated by PW3, suffices to establish that the Appellant was the perpetrator of the sexual assault. Therefore, I find that the Appellant was properly identified.
41. The Appellant has submitted that crucial witnesses were never called by the prosecution to prove their case. Particularly, he argues that the people who were with PW1 at the party, together with the three men who took her home on the fateful night should have been called as witnesses as they were the last people to see PW1 before and after the fact.
42. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng’ v Republic* [2014] eKLR).
43. From the testimony of PW1, the incident occurred in a forest by the roadside, in the dark. The said individuals at the party and the ones who picked her up on the road were not eyewitnesses. From the totality of the prosecution’s case, I hold the view that their evidence was not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with the proviso to section 124 of the *Evidence Act*. This ground therefore fails.
44. Based on the foregoing analysis, this court is of the view that the evidence of the prosecution witnesses taken into totality was corroborative and the Appellant was positively identified as the perpetrator of the rape. The Appellant’s defence was a mere denial and did not dent the otherwise strong culpatory evidence adduced against him by prosecution witnesses. This court, having re-evaluated the evidence adduced before the trial court, and the submission made on this appeal, cannot see any reason to



disagree with the finding reached by the trial court. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. The Appellant's appeal on conviction for the offence of rape lacks merit. The same is hereby dismissed.

45. As regards the sentence, Section 3(3) of the *Sexual Offences Act* provides for a minimum imprisonment sentence of ten (10) years for rape, which may be enhanced to life imprisonment. Here, the Appellant was sentenced to serve ten (10) years' imprisonment in count 1 of rape.

46. After considering the circumstances, I find the sentence imposed by the trial court to be appropriate. The Appellant, by virtue of his profession, was entrusted with the safety of passengers, and his actions violated this trust. He not only harmed the complainant but also undermined public confidence in taxi services. Allowing such behaviour would instill fear among passengers, especially those seeking rides at night. Therefore, I see no reason to alter the sentence.

47. The appeal is hereby dismissed in its entirety for lack of merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JANUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant

