



REPUBLIC OF KENYA



KENYA LAW
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**Kithinji v Republic (Criminal Appeal E142 of 2023)
[2025] KEHC 1678 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E142 OF 2023
CJ KENDAGOR, J
FEBRUARY 14, 2025**

BETWEEN

CHRIS KITHINJI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence arising in Tigania Law Courts Sexual Offences case number E015 of 2022 delivered on 23rd November, 2023 by Hon. J. Macharia, S.P.M)

JUDGMENT

1. The Appellant was charged with the offence of rape contrary to Section 3 (1) (a) (b) as read with Section 3(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 7th day of July, 2022 at [particulars withheld] within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.M.M. without her consent. In the alternative, the Appellant was charged with committing an indecent act with an adult contrary to Section 11 (a) of the *Sexual Offences Act*. The particulars of the offence were that on 7th July, 2022, at [particulars withheld], within Meru County, the Appellant intentionally touched the vagina of A.M.M. with his penis without her consent.
2. He was convicted on the main charge of rape and was sentenced to 10 years' imprisonment. He was aggrieved by his conviction and sentence, hence this appeal. He has outlined six grounds of appeal listed below:
 - i. That the Learned trial Magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.
 - ii. That the Learned trial Magistrate erred in matters of law and fact by failing to note that the Clinical Officer's report does not connect the Appellant with this offence.



- iii. That the Learned trial Magistrate erred in matters of law and fact by failing to note that the sentence is harsh and excessive in the circumstances of this case.
 - iv. That the Learned trial Magistrate erred in matters of law and fact by failing to note that the key witnesses were not called.
 - v. That the Learned trial Magistrate erred in matters of law and fact by not observing that the evidence adduced by the prosecution witnesses were uncorroborated and inconsistent.
 - vi. That the Learned trial Magistrate erred in matters of law and fact by rejecting the Appellant’s defence without giving any cogent reason.
3. This being a first appeal to the High Court, I am reminded of my duty to revisit the evidence presented before the trial court and to subject it to a thorough and exhaustive analysis to draw my own independent conclusions bearing in mind that unlike the trial Court, I did not have the benefit of seeing and hearing the witnesses. This duty has been crystalized in a long line of authorities, including *Okeno v Republic*, [1972] EA 32; *Njoroge v Republic*, [1987] KLR 99; *Patrick v Republic*, [2005] 2 KLR 162, among others.
 4. I have carefully considered the grounds of appeal, the entire evidence presented before the trial Court and the written submissions filed by both the Appellant and the respondent.
 5. I have also read the judgment of the learned trial magistrate. Having done so, I find that the issue for determination is whether the prosecution established the offence of rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the *Sexual Offences Act* to the required standard of proof beyond any reasonable doubt.
 6. This Court has re-evaluated the evidence in this appeal in light of the submissions made on this appeal. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;
 - “(1) A person commits the offence termed rape if—
 - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - (b) the other person does not consent to the penetration; or
 - (c) the consent is obtained by force or by means of threats or intimidation of any kind.”
 7. The main ingredients of the offence of rape created in Section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. The prosecution was, therefore, required to establish penetration, lack of consent, and that the appellant was the perpetrator of the act.
 8. The Complainant testified that she was asleep at home when she heard someone trying to break in. She stated that the assailant, armed with a metal object, kicked the door open after several attempts. As he struck her with the rod, they struggled, and she managed to throw it aside. She testified that she had a flashlight and was able to identify her assailant, Kithinji (the Appellant). Despite her efforts to push him out, he overpowered her, prompting her to plead for her life.
 9. She testified further that the Appellant then hit her with a bottle on both sides of my cheeks, and both hands and large scars were seen on her face. She stated that the Appellant used his teeth to bite her



breasts and thighs, hit her using fists and his head and tore her clothes and raped her as he lay her on top of a canvas.

10. The Appellant, in his defence, denied the charge, asserting that it was a fabricated accusation. He explained that there was a grudge between him and the Complainant's husband after their goats trespassed on his land, and they had vowed to retaliate.
11. In describing the rape ordeal, the Complainant stated that the Appellant continued to strangle her as he dropped his pair of trousers using one hand and raped her. She stated that the Appellant left when he grew tired, and she got up and crawled on her knees to her neighbour's house, where she was then escorted to the police station and the hospital.
12. PW2 produced medical treatment notes where the Complainant was examined on the same night of the ordeal; she relayed findings that the Complainant's clothes were blood-stained and were covered in mud and further that she was confirmed to have been raped as her urine showed pus cells, spermatozoa. She also gave findings of the other injuries described by the complainant.
13. PW3 was a neighbour to the Complainant; she confirmed that the Complainant came to her home in the wee hours with visible injuries and stated that she had been attacked and raped by the Appellant whom she described as Kithinji. PW3 stated that the Appellant is known as Kithinji and was their neighbour, and the Complainant went on to describe him as "Kithinji who has bought land at Mukunga's."
14. After careful consideration of the defence presented, I find it to be incredible and lacking in credibility. Notably, the issue regarding the presence of bad blood only emerged during the testimony of the Appellant, raising concerns about its authenticity. Furthermore, I see no compelling reason for the Complainant to fabricate such a serious allegation against the Appellant, particularly given the corroborating evidence and the context of the incident.
15. I examined the circumstances surrounding the Complainant's identification of the Appellant. The Complainant strongly asserted that she could confidently identify the Appellant as the assailant, noting that she had known him for over three years. She vividly recounted the incident, describing it as a harrowing experience that lasted approximately three hours. During this time, she stated that they struggled actively. Additionally, she was able to recognize him by a distinct scar on his face, a feature the trial Court noted down in the proceedings. This collection of details eliminates any doubt in my mind regarding the Complainant's ability to identify the Appellant as her attacker with precision and certainty, devoid of any room for error.
16. This leads me to conclude that the Complainant's account is both truthful and consistent and that the Appellant was indeed the assailant. Her testimony is supported by that of the neighbour and the medical findings confirming that she was sexually assaulted; there was no consent and it constituted rape.
17. This Court, therefore, holds that the prosecution established to the required standard of proof. The conviction was proper and was supported by the law and evidence.
18. I will now briefly turn to the sentence. Section 3 (3) of the Sexual Offences Act provides that a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. The Appellant was sentenced to 10 years' imprisonment. The accused was treated as a first offender, and his mitigation was recorded and considered as captured in the proceedings. The sentence was lawful. It was neither harsh nor excessive.



19. I uphold the conviction and the 10-year sentence. In compliance with Section 333 (2) of the *Criminal Procedure Code*, the sentence shall run from 7th July, 2022 when he was arrested. The appeal is dismissed.

It is so ordered.

DATE, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 14TH day of FEBRUARY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr Omondi, ODPP for Respondent

