



**Mahera v Republic (Criminal Appeal E091 of 2023)  
[2025] KEHC 6758 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6758 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E091 OF 2023  
A. ONG'INJO, J  
FEBRUARY 6, 2025**

**BETWEEN**

**MANGITI THOMAS MAHERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of Hon. M.O Obiero , Senior  
Principal Magistrate and delivered on 13th December 2023 in Kevancha  
S O. Case No. E054 of 2022, Republic v Mangiti Thomas Mabera)*

**JUDGMENT**

**Background**

1. The Appellant, Mangiti Thomas Maheba was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 19<sup>th</sup> day of October 2022 at Kuria West Sub County within Migori County he raped Peninah Magabe Joseph without her consent.
3. Based on the evidence of 3 Prosecution Witnesses and the Appellant's defense the trial Magistrate found that the Prosecution's evidence on record proved that the Appellant had committed the offence as charged and he was convicted and sentenced to serve 20 years' imprisonment.
4. Aggrieved by the conviction and sentence, the Appellant lodged the Appeal herein vide Petition of Appeal filed on December 28<sup>th</sup> 2023 on the following grounds:

That the trial court erred in both law and fact by failing to comply with Article 50 (2)(g) and (h) of *the Constitution*;



That the trial court erred in both law and fact by not considering that the ingredients of the offence were not proved to the required standard;

That the trial court erred in both law and fact by not observing that the evidence tendered were contradictory hence could not support conviction but rather total acquittal.

5. The Appellant prayed that the conviction be quashed and sentence set aside.
6. This Appeal was canvassed by way of written submissions.
7. The Appellants' undated submission having been filed on 5<sup>th</sup> September 2024 and the Respondent's submissions are dated 15<sup>th</sup> October 2024.
8. The Prosecution's evidence was that while PW3 was on her way from the market the Accused person pulled her from behind, took her to the bush and caught her neck and strangled her. That he started pulling her underpants and that he also removed his pant and he saw his penis, that he saw some ladies he ran away. The Complainant said that she explained to the ladies what had happened and she went back home and informed her son Mwita.
9. The Complainant said that she was taken to the Assistant Chief's home and to the hospital and later to the Police Station. The Complainant said she knew the person who took her to the bush and it was Mangiti but she did not know the name of Accused person in the dock.
10. In the cross-examination she said that the person who took her to the bush did not do anything to her.
11. PW1, Tobia Omondi Simba, the Clinical Officer at Bugumbo health Center, produced P3 and PRC forms prepared by his colleague Peter Jan Makongore at Nyamekongoroto Health Center in respect to the treatment of the Complainant herein on allegations of rape. He said that the Complainant was aged 69 years old. He said that there was a small tear and laceration on the vaginal wall which was inflamed.
12. PW2, Sgt Isaac Oluoch of Masaba Police Post effected arrest of the Appellant on 21<sup>st</sup> October 2022 at 6 a.m When placed on defence, the Accused Person gave a sworn statement and said that he does not recall what happened on 19<sup>th</sup> October 2022 but on 21<sup>st</sup> October 2022 as he was preparing to go to work Police Officers went and arrested him and took him to Masaba Police Post and subsequently to Kehancha Police Station.
13. The Appellant said that the Complainant was his neighbor but he did not rape her.
14. The Appellants submitted that it is true the provisions of Article 50 (2) (g) were complied with but considering that this is a serious case, it was the duty of the trial court to comply with Article 50(2) (h) for fairness of justice.
15. The Appellant submitted that the Prosecution case was fabricated to score goals as the Complainant did not say that she was raped. She said in court that the person who took her to the bush did not do anything to her and that there could not be penetration. He also said that the Clinical Officer who examined the Complainant did not attend Court to testify and he complained to the Court. He said that his identity was mistaken.
16. The Respondent's submitted that although the Complainant testified that she was not raped the Court observed that she was elderly and had slight memory problems. It was also submitted that the P3 and PRC forms indicated that there was a small tear at the perennial which looked fresh and that the findings confirmed that there was rape. That the ingredient of penetration was therefore proved.



17. On whether there was consent the Respondents submitted that the victim informed the trial Court that the Appellant pulled her from the back and started struggling with her and took her to the bush and started pulling her pant. That further the Appellant caught the Complainant on her neck and strangled her while pulling her pant while removing her pant.
18. The Respondents argued that the Prosecution exhausted all the ingredients of rape and the Appellant was properly convicted.
19. Although the Respondent has submitted that they have already addressed themselves to the issue of the positive identification of the assailant, this Court has not seen any such submissions.
20. The Appellant faulted the trial Court for not calling the Medical Officer who treated the Complainant and his objection to the same was dismissed and PW1 proceeded to testify on behalf of Peter Jan Makongore.
21. The Respondent submitted that they can call any number of witnesses to prove the elements of their case and that the crucial witnesses in this matter including the victim testified.

### **Analysis and Determination**

22. In a first appeal, the duty of the court was held in *Mark Oiruri Mose vs. R* (2013) eKLR thus;  
".... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze 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."
23. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are whether the ingredients of the offence of rape were proved beyond reasonable doubt.
24. Section 3 (1) of the *Sexual Offences Act* provides:
  - (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."
25. Section 3(3) of the *Sexual Offences Act* Provides:
  - (3) A person guilty of an offence under this section 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."
26. The key ingredients of the offence of rape are intentional unlawful penetration of the genital organ of one person by another without consent.
27. In the case of *Republic v Oyier* [1985] KLR 353 the Court of Appeal held that;
  1. 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.



2. 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.
  3. 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 offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
28. The Prosecution was therefore required to establish penetration, absence of consent and that the Appellant was the perpetrator of the act.
  29. On the element of penetration, the Complainant testified that Mangiti Thomas Mahenga the Appellant herein pulled her from behind and took her to a bush where he caught her neck and started strangling her and that he pulled her underpants and he also removed his pant and that she saw his penis but when the assailant saw some ladies he ran away.
  30. In Court the Complainant said that she knew the person who took her to the bush as Mangiti but she did not know the name of the person in the dock. In cross examination she said that the Accused did not do anything to her. Although PW1, the Clinical Officer produced PRC and P3 form indicating that a small tear and laceration were observed on the Complainant’s vaginal wall her evidence that the person who pulled her to the bush did do anything to her vitiates the allegation that she was raped.
  31. The Respondent submitted that the Complainant had slight memory problems but that claim is not indicated anywhere in the trial Court’s record and it is therefore a claim that is not substantiated or proved.
  32. This Court therefore finds that the evidence tendered by the Prosecution against the Appellant in the trial Court was not sufficient to prove the offence of rape beyond reasonable doubt against the Appellant.
  33. This Appeal is therefore successful, the conviction is quashed and sentence set aside. The Appellant shall henceforth be set at liberty unless otherwise lawfully arrested.

Right of Appeal of fourteen days explained.

**DATED, SIGNED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025**

**HON. JUSTICE A. ONGINJO**

**JUDGE**

In the presence of: -

