Wambui v Republic (Criminal Appeal E020 of 2024)
[2025] KEHC 1953 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E020 OF 2024

DKN MAGARE, J

FEBRUARY 24, 2025

BETWEEN

MARTIN GITHUI WAMBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Case Number: MCSO/E013/2022 at Mukurweini Law Courts delivered by Hon. D.N. Bosibori (SRM) on 30th April, 2024)

JUDGMENT

1. This is an appeal from the judgment and sentence in Mûkûrwe'inî MCSO/E013/2022 by Hon. D.N. Bosibori on 30.04.2024. The appeal is against both the conviction and sentence.

2. The Appellant had been charged with rape contrary to Section 3(1)(a) and (b) as read with Section 3(3) of the *Sexual Offences Act*. The particulars were that on 21.11.2022 at around 1930 hours in Mûkûrwe'inî, within Nyeri County, intentionally and unlawfully caused his penis to penetrate the vagina of MMC without her consent.

3. There was an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*. The particulars were that on 21.11.2022 at around 1930 hours in Mûkûrwe'inî, within Nyeri County, the Appellant intentionally touched the vagina of MMC with his penis against her will.

4. The Appellant was tried and convicted. He was sentenced to 10 years imprisonment. He was aggrieved and filed a petition, setting out the following grounds of appeal:

    a. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose

evidence was and remains doubtful occasioning a serious prejudice as it was not collaborated by the medical officer.

b. That the learned trial magistrate erred substantially by convicting the appellant without considering that the appellant herein was not properly identified by the victim as the conditions were not favorable for a proper identification.

c. That the learned trial magistrate again erred in both law and fact in failing to appreciate that the critical elements of rape were not proved to the required standards in law occasioning a serious miscarriage of justice.

d. That the learned trial magistrate further erred in both law and fact in not considering that the whole prosecution case was riddled with contradictions and material discrepancies which were capable of unsettling the verdict hence a prejudice.

e. That the learned trial magistrate further erred in law and fact in convicting the appellant without considering the DNA analysis brought by the Government Chemist Analyst which placed the complainant out of scene.

f. That the instant matters proof by prosecution and investigator was below the required standards of proof and therefore capable of impeaching the whole substance of the matter.

Evidence

5. The Appellant was charged on 28/11/2022 and pleaded not guilty. He was remanded in prison. Though given a bond, he did not raise it. The accused was taken to Nairobi for DNA extraction. His plea to have the bond terms changed was declined. The matter was fixed for hearing on 18.1.2023 and 25.1.2023.

6. The complainant testified as PW1, stating that she was 21 years old. On 21.11.2022, she was at work when she met her cousin N, who asked her to buy vegetables for her grandmother. She was with her employer, Lilian Wambui, at Mûkûrwe'inî before proceeding home. She hailed a random motorcycle, a big green one. She could identify the rider as a tall, dark youth. The agreed fare was Kshs. 50/=. She was carrying heavy luggage, including a 10 kg sack of vegetables. She realized, just before being dropped a few yards from home, that she had dropped her phone. They used the main road to Mûkûrwe'inî to search for the lost phone in vain.

7. The Appellant took the complainant to the nearby coffee plantation, removed the underwear and raped her. He strangled her as he did so. After the rape ordeal, the victim fled. She met two men who assisted her. The men took the victim to their home and phoned her aunt TW who stays at Gikondi. Her uncle AK also came. They took the victim to the hospital alongside Baba Kui. They went to Mûkûrwe'inî Hospital, where she was treated and sent for laboratory tests. She was given medication to prevent pregnancy.

8. She was asked to return the following day, but the results were not out. They later went to the scene, where they retrieved a condom used during the incident. They went to Nairobi, where DNA was extracted. She identified the Appellant at the bus park. She saw the accused under the moonlight. She did not know the registration number of the motorcycle, but it was green and long. She was shown the motorcycle belonging to the accused. It was long but did not have luminous green cup holders.

9. On cross-examination by the court, she stated that there was no moonlight at the scene. She did not know how the Appellant was arrested. Her evidence was that she did not have anything in her possession when the Appellant raped her.

10. On cross-examination by Mr. Baru, she stated that she used to stay with her grandmother, RM, since June 2022. She stated that she did not take the cabbages home as she gave MW to keep until she returned. She indicated that she did not indicate that she left cabbages with Margaret. She stated that she was new in Mûkûrwe'inî. She stated that the motor cycle looked different from the one that the accused had.

11. On 22.11.2022, she testified that she went back to the police station and accompanied the police to the scene where they got a condom at the scene. On cross-examination, it was her stated case that she stayed with her grandmother, RM, since June 2022. She did not take the cabbages home. She gave them near home to one MW, her cousin, to keep for her until she returned. She testified further that there were other riders and no one witnessed the incident. The scene was dark with no moonlight. She could not tell whether he wore a condom or not as she didn't see him wear it. The accused was thereafter brought to Mûkûrwe'inî Police Station and was lined up among other men, and she identified him. She recognised him as he had cut his hair.

12. On re-examination, she testified that the accused had no helmet or reflector jacket and she recognised him while she was asking him to board the motorcycle. PW1 was subsequently recalled. She testified that on the material day she wore a pink T-shirt, kitenge skirt and greenish jumper which she produced in evidence.

13. PW2 was AK, uncle to PW1. He was phoned at 9 pm by his sister, who resides in Gikondi, informing him that PW1 was at home and her grandmother had sent her to buy cooking oil. She also informed that PW1 had been diverted on the road and raped by a rider but rescued by two men. They went to Muya's home and found PW1 crying. They took PW1 to Mûkûrwe'inî Hospital and later to Mûkûrwe'inî police station. On cross-examination, it was his case that PW1 stayed with his mother. PW1 did not tell him the details of the incident.

14. PW3 was John Muya Maingi. He did not know the accused. He left Kiharu shopping centre on 21.11.2022 at 8.30 pm with Jenesio Mwangi his neighbour. As they got near their home, PW1 came running and crying. She held Mwangi's waist and asked him to assist her. She told them she had been raped. There was coffee plantation on one side and banana plantation on the other side of the murram road. She came from coffee side. Kibui also came. He asked them to escort PW1 to the police station.

15. On cross-examination, his stated case was that PW1 fled from a coffee plantation. They did not hear screams before. Someone came after PW1, where they were standing while they were interrogating PW1. He asked him what the problem was and he fled to the opposite direction. No one else was at the road. He could have caught PW1 again if they were not around.

16. PW4 was Jenesio Mwangi Waithaka. On the material day at 8.30 pm he was with PW3. PW1 emerged from a coffee plantation and told them a bodaboda rider had assaulted her. That her mouth had been blocked so that she could not scream. His wife, Hanna Wangui phoned TW, PW1's aunt. On cross-examination, it was his case that it was very dark, and he could not recognize the assailant. PW1 only said she had been assaulted.

17. PW5 was TW. On 22.11.2022 at 845 pm she was phoned by Hanna Wangui who told her to go to Muya's home and see PW1 who had been raped. On arrival, she found PW1, who informed her she had been raped, assaulted, and strangled. She asked that PW1 be taken to the hospital and police station. On cross-examination, she testified that PW1 was crying, and she did not examine her body to check for injuries.

18. PW6 was Lillian Wambui. She had employed PW1 as a Salonist. PW1 had been an employee for about 7 months. PW1 stayed with her grandmother. On 22.11.2022, she was to open shop, but by

10 am, she had not opened. Her neighbor, Mercy, told her that N, M's cousin, was looking for her to inform her that PW1 would not be going to work as she had been raped on 21.11.2022. She went to Mûkûrwe'inî Hospital and found PW1 there. They later went to the police station where they recorded their statements.

19. On cross examination, it was her case that PW1 told her that she had been slapped, strangled and raped. She was present when the doctor interrogated PW1. She said that she was in pain.

20. PW7 was MMM. He testified that on 21.11.2022, AK visited him and requested that he escorts him to Gikondi, his niece had been raped. They arrived and found PW1 who narrated to them that the rider had diverted and raped her. They took PW1 to Mûkûrwe'inî Police Station and later to Mûkûrwe'inî Hospital. On cross-examination, it was his case that PW1 had dirt on the back of her clothes. He did not peruse the medical records or observe her injuries.

21. PW8 was James Kariuki Wanjau. He testified that he knew the accused. He used to buy milk from farmers. On 22.12.2022, the accused was selling his motorcycle, shiny green in colour and registration KMFX 424H. he sold it to Samuel Wachira on 23.12.2022. It was in November and not December 2022. The next day, they were given the log book in the accused's name. He testified that he used the motorcycle for 2 days before he was alerted by other riders that the owner had committed an offense. He asked Samuel Wachira to register a report with the police, and the motorcycle was seized 5 days later. On cross-examination, he testified that the accused was his former colleague for three years. There were several similar motorbikes. He did not know the complainant. He was present when the motorcycle was bought and was last with it.

22. PW9 was Samuel Wachira. He was a police officer, GSU No. 115186, based at Allsops Police Station. The accused sold the motorcycle to him at Ksh. 88,000/- about 5-6 months ago. He was with PW8, and the log book was transferred from the accused to him. On cross-examination, it was his case that he could not recall the motorcycle registration number. The logbook was not in his name; it was in Benson Co. based in Nakuru. He did not know if the accused was a rider.

23. PW10 was Pamella Khamala Okello, a Government Analyst. On 1.12.2022, she received a condom in a clear plastic container. She also obtained a buccal swap sample from one Martin Githui. She also received a Kitenge skirt and a pink T-shirt. She examined the items. The skirt, light green jumper, and T-shirt were not stained with semen or blood. The inside of the condom was found to be stained with semen but not blood, but the outside had none. The DNA profile matched the swabs from Martin, and the epithelial cells outside the condom generated the DNA profile of an unknown female person. On cross-examination, she stated that the epithelial cells were from an unknown female person. The sexual intercourse, if any, did not connect the accused person to the complainant. There was sex between the accused and another person, not the complainant.

24. PW11 was No. 102108 PC Elizabeth Mwikali of Mûkûrwe'inî Police Station. She investigated the rape case herein. PW1 had been examined at Mûkûrwe'inî Hospital. There were treatment notes, as well as the PRC form and P3 form. Based on the evidence, she established that rape had occurred and the accused was the suspect, based on which the accused was arrested. On cross-examination, it was her case that PW1 informed her that she did not consent to sex.

25. PW12 was Winnie Njoki Mwangi, Clinical Officer. She produced the treatment notes. On examination of PW1, no lacerations or bruises were found. The hymen was old and broken, and other genitalia were normal. On cross-examination, it was her stated case that no injuries were seen, and there was no proof of penetration. There is also no evidence of sexual assault. The clothes were dirty but with no blood stains.

26. DWI was Martin Githui Wambui, the accused. He hailed from Gikondi. On 21.11.2022 at around 7.30 pm, he was at Mûkûrwe'inî bus park where he ferried clients using a motorcycle. PW1 asked whether he should ferry her to Leisure Resort near Mûkûrwe'inî. She also asked about the charges, and he told her Kshs. 50/=. He did not know her before. She requested him to take her back to Mûkûrwe'inî where she had purchased some items. She said she had also left the mobile phone there. Before they returned, another customer came requesting to be taken to Gikondi. PW1 agreed that they be ferried both. The second client was his ex-girlfriend. He asked PW1 to watch over the motorcycle as he escorted his ex-girlfriend on alighting at Mbari ya Nyutu. He ended up engaging in sexual intercourse with his ex-girlfriend, and when he returned, he found PW1 nowhere and the motorbike on the ground. PW1 fixed him as he did not rape her.

27. On cross-examination, he stated that he did not know PW1 and that he left her with the motorbike as he escorted his ex-girlfriend. PW1 did not pay the fare. It was his case that it was not normal for a rider to go and leave a customer waiting with the motorbike.

Submissions

28. The Appellant filed submissions on 31.10.2024. It was submitted that the conviction was unfounded and the Appellant should be acquitted. The ingredients for rape were not proven to the required standard. He cited Section 3 of the *Sexual Offences Act*, 2006.

29. He also relied on Woolimington v DPP (1935) AC 462 to submit that the prosecution had not proved his guilt beyond reasonable doubt. It was further submitted that the identification was not proven. There were no identification parades. Reliance was placed, inter alia, on Njihia vs. Republic (1986) KLR 422.

30. It was also submitted that there were material contradictions in the witness testimonies of the prosecution. He cited Philip Nzaka Watu vs Republic (2016) eKLR.

31. On the other hand, the Respondent filed submissions on 11.11.2024, by which it was submitted that the prosecution proved penetration, absence of consent, and identity of the perpetrator. They cited Okeno v Republic 1972 EA 32 to canvass the argument that all the ingredients were proved to the required standard.

32. Therefore, it was submitted that the prosecution discharged its burden of proof against the Appellant. Reliance was placed on Charles Ndirangu Kibue vs Republic (2016) eKLR to submit further that PW1 did not freely agree to submit and so consent.

Analysis

33. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the Court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

34. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

35. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

36. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

37. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

38. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

39. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

40. The burden of proof is on the state and never shifts. In this case, the sole issue is whether the state discharged that burden. For rape to occur, three elements must be present. If one of them is missing, the offence is not proved. These are:

    a. Penetration

    b. Lack of consent

    c. The Accused is the perpetrator.

41. The state sought to prove that there was penetration. However, the medical evidence was succinct that there was no sexual activity. The offense is stated to have occurred on 21.11.2022 at 1930 hours. The complainant was examined on 26.11.2022. There was no evidence of recent sexual activity. The PRC showed an old broken hymen. The genitalia were normal and no bruises or lacerations. There were no spermatozoa seen or any evidence of sexual assault or penetration. The medical report dated 22/11/2022 also shows no evidence of sexual assault. It is, therefore, clear beyond peradventure that there was no medical evidence of penetration.

42. The second aspect is whether there is any other evidence of penetration. The examination carried out by the Government Chemist was that the spermatozoa belonging to the Appellant were found in the condom at the alleged scene of the crime. However the epithelial cells outside the condom did not belong to the complainant. The clothes the complainant wore were not stained by blood or semen. The epithelial cells were of an unknown female.

43. This then rhymes with the Appellant's postulation that he was having sex with his ex-girlfriend. The court and the state did not shake the defense evidence on cross-examination. The complainant did not pay when taken to Leisure Resort on the pretext that the phone was lost. The defence was clear that there was an identification parade, but the same was not produced.

44. The defence evidence was consistent. What emerges is that the complainant had her eyes fixed on the Appellant. However, the Appellant picked a different girl and ended up having sex with her. This must have irked the complainant, who then set up the appellant. She must have felt jilted. However, there was no evidence that the Appellant was interested in her. Paradoxically, the complainant informed PACS that she had moved on as she had no physical wounds. The story is that her phone was lost to trap the appellant, who did not know. How could the complainant buy vegetables that end up not being there at all? How could she board a motorcycle knowing she would not pay if her phone had been lost? She had other ulterior motives that destroyed the Appellant's life, for whom scientific evidence is clear that he did not commit the offense.

45. This is not a case where the accused is given the benefit of the doubt. It is a case where there is clear and unchallenged evidence that there was no rape. The ownership of the motorcycle is irrelevant as the Appellant does not deny ferrying the complainant. He only said that he ended up having sex with a different girl. Medical evidence supported the defence case. Further, the medical evidence showed no penetration on the material day. In other words, the complainant gave false evidence to the police.

46. The state should pursue charges of giving false information to the police in this case. The evidence was glaringly clear that the offence never occurred. Lastly, the question of broken hymen cannot be a reason to believe in rape. First, the hymen was old broken as at the time of examination, barely 24 hours later. It could not possibly have been the subject of the alleged rape. There were no inflammations, bruises, or lacerations. Further, the evidence of sex with the other unknown female was evident. It is even surprising that the court did not notice that the skirt did not have stains, when the complainant was said to have been pulled into the coffee plantation. Evidence of PW12 was clear that rape was only in history but there was no evidence of the same. The P3, part B, was not filled. This is the part where it is indicated whether any harm was done.

47. PW11 Maintained a clear chain of custody. This means that the results on the condom were genuine. According to PW10, the condom from the scene was exculpatory material.

48. The judgment of the court below dealt much with the legal standards of rape and not inculpatory and exculpatory evidence. The court did not give the Appellant the benefit of doubt to which he is entitled.

49. In the circumstances, the court considers that the offence was not proved to the required standards. The case against the Appellant was not proved. The appeal is thus allowed. The Appellant is set free unless otherwise lawfully held.

50. In the circumstances, the conviction is untenable. I allow the appeal and set aside the conviction and sentence. In lieu thereof, the Appellant is set at liberty unless otherwise lawfully held.

Determination

51. In the upshot, I make the following orders:-

i. The appeal is merited and is allowed.

ii. The trial court's judgment on conviction and sentence is set aside.

iii. The Appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF FEBRUARY 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Appellant – present

Court Assistant – Michael