



**Odero v Republic (Criminal Appeal E312 of 2023)
[2025] KEHC 3544 (KLR) (Crim) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E312 OF 2023
CJ KENDAGOR, J
MARCH 18, 2025**

BETWEEN

JOHN OWUOR ODERO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and sentence in the Magistrates' Courts
Sexual Offences Case No. S/O 258 of 2018 and judgment of the 2nd day of
November 2023 by the learned Magistrate, Hon. Okwane at Makadara)*

JUDGMENT

Introduction

1. The Appellant was charged with the offense of rape contrary to Section 3 (1) (a) (b) and (3) of the Sexual Offences [Act No 3 of 2006](#). Particulars of the offense being that on 9th November, 2018 within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of P.A.O without her consent. The Appellant was also charged in the alternative with the offense of committing an indecent act with an adult contrary to Section 11 (a) of the Sexual Offences Act No 3. Particulars of this offense being that, on 9th November, 2018, in Nairobi within Nairobi County the Appellant intentionally touched the vagina of P.A.O with his penis against her will. The Appellant pleaded not guilty to the charges and particulars of the offenses.
2. The Court delivered the judgment on 2nd November, 2023 in which it found the Appellant guilty as charged and convicted him as per the provisions of Section 215 of the [Criminal Procedure Code](#), Cap 75 Laws of Kenya. It sentenced the Appellant to serve 10 years' imprisonment less the time he spent in custody.



3. The Appellant was dissatisfied with the conviction and sentence and appealed to this Court vide an Amended Petition of Appeal dated 4th October, 2024. He listed the following Grounds of Appeal;
 1. That the learned magistrate erred in law and in fact in convicting the Appellant for offences charged when there was no sufficient evidence to prove the prosecution charges.
 2. That the learned magistrate erred in law and in fact in convicting the Appellant for offences charged when the crucial ingredients of the offence were never established.
 3. That the learned magistrate erred in law and in fact in convicting the Appellant for offences charged on uncorroborated and contradictory evidence of the witnesses.
 4. That the learned magistrate erred in law and in fact in convicting the Appellant for offences charged by totally failing to evaluate the evidence by the complainant PW1 and the Appellant on the issue of consent between two adults PW1 and DW1 which lasted for not less than 2 hours with a rape without any screaming from the complainant, despite being surrounded by other people who were cleaning the church in the same compound at a very close range.
 5. That the learned magistrate erred in law and in fact in convicting the Appellant for offences charged as she relied on her own conjectures thus arriving at a wrong decision.
 6. That the learned magistrate erred in law and in fact in convicting the Appellant for offences charged as she relied on evidence provided by PW4 to prove penetration as an element of the offence charged whereas the records are to the contrary, as no sexual object was mentioned in the P3 Forms and other medical reports.
 7. That the learned senior Resident magistrate erred in law and fact and seriously misdirected herself in holding that the prosecution had proved its case beyond reasonable doubt whereas the evidence was merely circumstantial and full of contradictions and failed to appreciate and find that the prosecution had failed to prove the charges beyond a reasonable doubt as the basic ingredient in criminal law.
 8. That the learned senior Resident magistrate erred in law and fact in finding that basing on evidence on record Pw1 (victim) was raped as a result of penetration without consent whereas the evidence tendered by prosecution was to the contrary.
 9. That the learned senior Resident magistrate erred in law and fact in finding that PW4 had proved forceful penetration of the victim PW1 with a sexual organ by DW1 yet the evidence on medical records was to the contrary as no sexual organ or object was specifically mentioned by PW4.
 10. That the learned senior Resident magistrate erred in law and fact in finding that PW4 lack of spermatozoa does not mean lack of penetration whereas naturally and scientifically all male sexual organs produce spermatozoa contrary to such position.
 11. That the learned senior Resident magistrate erred in law and fact in finding that PW1 resisted the sexual acts by the DW1 whereas evidence on record shows that the kitchen was very close to the church with other people cleaning the church in the same compound and no screams were made by the PW1 to alert other nearby church members for help thus evidence on record is to the contrary.



12. That the learned senior Resident magistrate erred in law and fact in confirming and finding that PW4 was right to state that PW1 was penetrated 99.9 per cent using a sexual organ whereas according to PW1, it was stated that a candle was inserted by DW1 in her vagina.
 13. That the learned senior Resident magistrate erred in law and fact in confirming and finding that PW1 was incapacitated or rendered unconscious by DW1 through simply breathing into the PW1 mouth yet no evidence was produced to confirm that such breathing could cause such unconsciousness for more than 45 or two hours according to evidence on record.
 14. That the learned senior Resident magistrate erred in law and fact in confirming and finding that the testimony provided by PW2 and the testimony of PW1 is consistent as far as consent is concerned and that makes it an offence of rape. That whatever transpired at the time of commission of the offence of rape, PW2 never witnessed by her own eyes the sexual offense as she was only told about hearsay evidence of rape by PW1 and PW3.
 15. That the learned senior Resident magistrate erred in law and fact in confirming and finding that the testimony provided by PW5 was merited to prove the prosecution case yet PW5 only relied on the victim's testimony, witness statements, medical reports without doing ground work investigations at the scene of crime.
 16. That the learned senior Resident magistrate erred in law and fact in confirming and finding that the testimony provided by PW4 was enough to prove penetration by forceful means using a sexual organ yet the medical report is showing that the vagina was normal with no discharge and no physical injuries inside the vagina with old tears at 8 and 4 o'clock and normal anus.
 17. That the learned magistrate erred in law and fact in presuming the Appellant guilty until proven innocent by invoking her personal emotions and theories, which were extraneous matters, the facts and evidence before her which as a result became prejudicial to the Appellant's case.
 18. That the learned senior Resident magistrate erred in law and fact in failing to effectively evaluate the evidence provided by DW1 that candles were being used for prayer purposes and not sexual penetration purposes as opposed to PW1 uncollaborated testimony that the candles were used for sexual penetration purposes.
 19. That the learned senior Resident magistrate erred in law and fact in failing to consider DW1 defence for acquittal purposes but rather imposed a harsh and excessive conviction and sentence yet the evidence of PW1 was uncollaborated since it was merely based on hearsay evidence by PW2, PW3, and PW5.
4. The Appellant asked the Court to quash the conviction and set aside the sentence and set him free.
 5. The appeal was canvassed by way of written submissions.

Appellant's Written Submissions

6. The Appellant submitted that he was framed by PW1, PW2, and PW3 for other ulterior motives. He argued that if penetration truly happened maybe it happened through other external factors other than through a sexual organ. He argued that the whole case was cooked or fraudulently planned between the victim and her brother for the purposes of initiating criminal proceedings against him to ruin his reputation for ulterior motives. He supported this argument by questioning why the victim did not reveal the alleged rape incident to PW2 who had accompanied her to the prayer session. He argued



that PW2 was only informed about it much later after the victim had discussed the incident with her brother and that PW2 was only brought in to supplement and support the plot.

7. In addition, the Appellant argued that there was no sufficient evidence to prove penetration. He submitted that the medical report had shown that there were ‘no physical injuries seen, there was no abnormal discharge, no blood stains, and the vagina was normal. The Appellant also picked an issue with the fact that the doctor who testified in Court and produced the medical report was not the doctor who authored the report. He argued that the lower Court should not have relied on the medical report because the prosecution did not explain that the production of the Author of the Medical report was impossible to secure or any attempt was made to do so.
8. The Respondent did not file submissions despite being given an opportunity to.

Issues for Determination

9. Upon consideration of the facts of this case, the Grounds of Appeal and the submissions made by the Appellant, I find that there are two issues for determination;
 - a. Whether the element of penetration was proved to the required standard thereby warranting a conviction.
 - b. Whether the sentence imposed was appropriate.
10. The role of this Court as the first appellate court is well settled. In *Okeno vs. Republic* (1972) EA 32 and *Mark Oiruri Mose vs. R* (2013) eKLR, the Courts established that a first appellate Court is duty bound to revisit the evidence tendered before the trial Court afresh, evaluate, analyze it and come to its own independent conclusion 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.

Whether the element of penetration was proved to the required standard thereby warranting a conviction

11. The Appellant submitted that his conviction was unsafe because the prosecution did not prove the element of penetration. He argued that the medical report was not sufficient to prove the element of penetration. His line of defense is that the medical report indicated that there were no physical injuries seen, there was no abnormal discharge, there were old tears at 8 and 4 O'clock, and there were abrasions at the posterior. This Court is being invited to relook at the evidence placed before the trial Court and ascertain whether that evidence was sufficient to prove the element of penetration.
12. I have seen the medical report from Mama Lucy Kibaki Hospital where the victim was examined. The examination was done the same day when the alleged rape happened – 9th November, 2018. The Medical Report was filed by one Dr. Esther Mawia but it was produced in Court by Dr. Farah Mohamed. Before I turn to the contents of the medical report, I shall first address myself on whether the Medical report was properly produced in Court. This is because the Appellant has argued that the Court should not have relied on the medical report because it was not produced by the author and the prosecution had not proved that it was impossible to procure the attendance of Dr. Esther Mawia.
13. I have seen the record on what transpired during the production of the Medical Report in Court on 8th June, 2022. Before Dr. Farah Mohamed produced the medical report, he disclosed to the Court that Dr. Esther Mawia was no longer working at the hospital. The Prosecutor stated that Dr. Esther Mawia was unable to attend Court and asked the Court to allow Dr. Farah Mohamed to testify and produce the documents on behalf of Dr. Esther Mawia. According to the Record, the Court asked the



- Counsel for the Appellant (Accused then) whether he had any objection. I note that the counsel for the Appellant said he had no objection. The Court went ahead and allowed the prosecution's oral request.
14. Based on these facts, and noting that the Appellant did not have any objection to the production of the Medical report by a person who was not the author, the Appellant cannot at this stage make such an argument. This Court is convinced, based on evidence on record, that the Appellant (through his advocate on record) gave an express nod to have Dr. Farah Mohamed to testify and produce the documents on behalf of Dr. Esther Mawia. I thus find that the medical report was properly produced in Court.
 15. Having settled that issue, I now turn to the contents of the medical report. It says that there were no physical injuries, there was no abnormal discharge, there were old tears, and the anus was normal. Concerning the external genitalia, the report showed that there were abrasions at the posterior. The lower Court seemed to have relied on the doctors' testimony which opined that the abrasions were a sign of a forceful penetration. In his testimony in Court, the doctor concluded that there were 99.9% chances that the penetration was by a genital organ. The lower Court analyzed this evidence and concluded that there was no consent and thus the offense of rape had been proved.
 16. I have analysed the contents of the medical report and the testimony of the victim to ascertain whether they collaborate each other. The victim testified that she was feeling pain on her private part after the alleged rape incident.
 17. However, I have noted great contradictions in the victim's testimony and the totality of the evidence produced before the lower Court. The victim seems to have two very different accounts of what transpired during the prayer session. In her testimony in court, the victim stated that she lost consciousness during the prayer session and she could not tell what really happened during the session. She claimed that the Appellant blew air on her mouth as a result of which she lost her consciousness.
 18. For avoidance of doubt, I shall reproduce what she said in Court: "He came and removed my pant and he breathed on me and I went unconscious. When I woke up, I found Jenipher had come and she saw my skirt was up... I went to the toilet and I was feeling pain in my vagina and it was wet. I was feeling dizzy I was feeling like I was raped When John (Appellant) blew air in me I lost consciousness I could not remember anything." During Cross-Examination, she stated; "John blew air to me and I lost consciousness. When I went conscious I cannot tell what happened he had unzipped before he blew air on my mouth. After I regained consciousness, I could tell I was raped. My pant was wet I can't tell if I was raped or not because I lost consciousness."
 19. On the other hand, the victim gave a very different version to the medical officer at Mama Lucy Kibaki Hospital when she went to report the incident. The narration of the victim as captured in the medical report is as follows: "On reaching there the pastor kept on sending Josephine to go get something which were to be used during the prayers. Once she was out of sight, the pastor went ahead undressed me put his finger into my vagina. I tried to resist but told me it's part of the prayers. He also went ahead and inserted candles into my vagina. Then lastly told me to sit on his laps and insert his penis into my vagina. I resisted but he closed my mouth and went ahead his penis into my vagina." The medical report was properly produced in Court, and the medical doctor narrated the highlighted part during trial.
 20. This Court cannot reconcile the two divergent narrations of what happened during the prayer session. In one version, the victim claimed that she became unconscious during the prayer session and could not remember what happened to her. In the other version, she does not mention about becoming unconscious at any time during the prayer session. In the second account, she painted a picture of someone who was in full control of her mental faculties and who knew all that which was happening



around her. She told the medical officer at Mama Lucy Kibaki a detailed account of how the Appellant inserted his fingers and penis into her vagina. She even told the medical officer how the Appellant closed her mouth and how he told her to sit on his lap during the alleged rape ordeal.

21. The two versions are properly before this Court, and this Court finds real difficulties in reconciling the evident contradictions in the two versions. For these reasons, I find no reasons to believe that the victim was telling the truth about what transpired during the prayer session. The alleged incident happened behind a closed door and the only people who know what happened are the Appellant and the victim. It was upon the victim to convince the Court that she was telling the truth and give the Court reasons to believe her. She did not.
22. I find that penetration by the Appellant was not proved. The case for the prosecution was riddled with contradiction and inconsistencies especially on what transpired during the prayer session.
23. I find that the conviction was not safe. I allow the appeal. The conviction is quashed and the sentence set aside.
24. Appellant is to be set at liberty unless otherwise legally held.
25. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 18TH DAY OF MARCH, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Irumba Advocate for the Appellant

Mr. Omondi, ODPP for Respondent

