



REPUBLIC OF KENYA



**KENYA LAW**  
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**MMW v Republic (Criminal Appeal E160 of 2024)  
[2025] KEHC 4465 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E160 OF 2024**

**DR KAVEDZA, J**

**APRIL 8, 2025**

**BETWEEN**

**MMW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by Hon. C. Njagi (PM) on 28th November 2024 at Kibera Chief Magistrate's Court Sexual Offences Case No. E125 of 2020 Republic vs Moses Mugo Waweru)*

**JUDGMENT**

1. The appellant charged and after a full trial convicted for the offence of rape contrary to Section 3 (1) (a) (b) as read with Section 3 (3) of the *Sexual Offences Act* No 1 of 2006. now Cap 63 Laws of Kenya. He was sentenced to serve ten (10) years imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He complained that his defence was not considered. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being the first appellate court, we are guided by the ruling in *Okeno v R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The prosecution called nine witnesses to support their case. It was the prosecution's case that on 14 November 2020 the complainant (PW3) lived with Bedan Maison (PW2) in a two-bedroom flat. On Bedan's birthday, they celebrated with cake and alcohol, joined by others. The complainant, who first met the appellant in primary school and reconnected through PW2 seven years later, returned home



- exhausted after the party. Bedan and Newton Simiyu (PW4) followed. Larry fell asleep but awoke in agony, witnessing Moses fleeing his room. Emotional in court, he identified Moses as his assailant. Too shocked to speak initially, he later told his mother, MKA (PW1), who arranged medical attention.
5. Bedan (PW2), confirmed the celebration. The complainant left early, and later the appellant called to visit. Bedan allowed him to use his room and stepped out to play video games elsewhere. Returning home, he found Moses gone. Soon after, the complainant texted, revealing the sexual assault. Bedan noted the complainant, typically a light drinker, had overindulged.
  6. Newton (PW4) recalled the complainant arriving home drunk, followed by Bedan. The appellant arrived, entering Bedan's room. After Bedan left, Newton saw the appellant go into Larry's room past midnight. At 5:30 a.m., he observed the appellant exit via the kitchen door. Newton confirmed the appellant, the complainant, Bedan, and Patrick Wachira were present; Wachira slept through the incident.
  7. Mariam (PW1) the complainant's mother called her from the party during the Covid curfew. Later, he confided about the rape. She took him for medical examinations, a DNA test, and to the police.
  8. John Njuguna (PW6), a clinician at Nairobi Women's Hospital, examined Larry on 21<sup>st</sup> November 2020 noting anal trauma and agitation, with no other injuries or DNA evidence. He produced medical forms as evidence.
  9. Chief Inspector Wanjohi (PW5) from the DCI forensic unit reviewed CCTV footage from 19<sup>th</sup> March 2021, producing 12 photographs. The fifth showed a person of interest, though unclearly. His report and certificate were produced as evidence. PC Lilian Mwendu (PW7), the initial investigator, met the complainant and his parents on 21<sup>st</sup> November 2020. Alone and distressed, the complainant reported the appellant raped him, recounting waking in pain as the appellant fled. The appellant later messaged an apology on Instagram before blocking him. PW7 collected CCTV, statements, and samples, producing as evidence, with medical findings confirming the sexual assault.
  10. Pamela Okello (PW8) from the government chemist analysed samples received on 30<sup>th</sup> November 2020 an anal swab and blanket from the complainant. Semen appeared on the swab but not the blanket; with the results being inconclusive, failing to link the appellant to the crime.
  11. Vincent Ongeru (PW9) from Safaricom provided call records for Moses (072444xxxx, ID 3690xxxx) and the complainant (071652xxxx ID 3565xxxx), submitting them as evidence.
  12. In his defence, the appellant stated that on the material day he was invited by PW2 to a birthday party, where he met the complainant and was drinking. He later left with two friends and was dropped at his apartment. PW2 later called him to continue the party at his place, where more people were present. He noted that Ian Osman brought more drinks, and they went to party on the 9<sup>th</sup> floor of Building 10. The complainant was not present. The appellant said he left the 9<sup>th</sup> floor at midnight and went to PW2's room, where the complainant was not present, and he slept on the couch until 6:00 a.m.
  13. He stated that when he woke up, the complainant was on the phone with his mother, and Newton was in the kitchen and helped him open the door. The appellant denied ever sending an Instagram message to the complainant and said he was distressed when he left. He added that DNA results did not link him to the incident.
  14. The appellant recalled one occasion when the complainant was aggressive towards a woman and said the complainant once proposed an unconventional relationship, which he declined. He was aware the complainant had been sodomised but denied any involvement. He confirmed being with Bedan, who later left, and denied going to the complainant's room.



15. I have considered the evidence and the submissions on record. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.
16. Rape is defined under section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.
17. 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.”
18. The prosecution was therefore required to establish the following ingredients; penetration, absence of consent, and that the Appellant was the unlawful perpetrator of the act.
19. On penetration, the complainant alleged that he had been subjected to anal rape. Medical documentation presented in support of this assertion includes the Gender Violence Recovery Centre (GVRC) form, which recorded evidence of blunt force trauma to the anal region at the time of clinical examination. Additionally, the Post-Rape Care (PRC) form, documented healing injuries, specifically bruising at the 6 o'clock position of the anus, though there was no active bleeding. The PRC form further indicated that the observed injuries were consistent with the complainant's account of traumatic penetration. The P3 medical examination form, corroborated the findings similarly noting anal trauma.
20. Collectively, these three contemporaneous medical reports, prepared and signed by healthcare professionals who personally examined the complainant, strongly support the ingredient of penetration which was proved beyond reasonable doubt.
21. On the issue of consent, the complainant consistently maintained that no consent was given to the alleged sexual act. He had returned home after a night of consuming alcohol and engaging in social activities with friends and was in a state of rest when the assault occurred. He categorically stated that he did not, at any point, consent to any form of sexual interaction with the perpetrator. This assertion is further corroborated by the medical evidence, which documented anal trauma indicative of forceful penetration. There is no evidence on record to suggest that the complainant willingly participated in the incident. In light of the totality of the evidence, the element of lack of consent has been established beyond reasonable doubt.
22. On the identity of the perpetrator, the complainant maintained that it was the appellant who raped him. That he woke up to pain in his anal region and saw someone getting off his bed. When keen to see who it was, it was the appellant. He could not tell the time and remained in bed until around 10 am.
23. The other witnesses presented by the prosecution did not witness the alleged acts of rape. This is not peculiar to this matter, as such acts of sexual violence rarely get witnessed by third parties. Circumstantial and collaborative evidence would normally be used in such situations. The proviso to Section 124 of the *Evidence Act* (Cap 80) Laws of Kenya also allows the court to convict based on the



evidence of the victim if the court is satisfied that the victim is truthful and proceeds to give reasons for such a belief.

24. In rape, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* [2015] eKLR citing *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the appellate court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence.”

25. This court has given careful consideration to the entirety of the evidence on record and, in particular, the forensic findings. The DNA analysis report tendered clearly indicates that no DNA profile attributable to the appellant was recovered from the anal swab samples taken from the complainant. This forensic evidence is crucial and cannot be disregarded. In cases of sexual assault, DNA evidence—though not always conclusive—is an important tool in linking an accused person to the offence. In the present matter, the fact that the report did not link the appellant to the offence, raises the issue of whether the remaining circumstantial and testimonial evidence sufficiently and conclusively establishes the appellant as the perpetrator.
26. Upon further scrutiny, contradictions within the prosecution’s narrative are evident. Bedan (PW2), a key witness, stated that he left the house to play video games and, in doing so, permitted the appellant to use his bedroom. However, Newton (PW4) contradicts this account, stating that Bedan was present when the appellant allegedly entered the complainant’s room. This inconsistency raises legitimate concerns about the reliability and accuracy of the witnesses’ recollections and casts doubt on the precise sequence of events on the material night considering the parties had been drinking alcohol. It remains unclear whether Bedan left the premises before or after the alleged incident occurred, an issue that is crucial in determining the appellant’s opportunity to commit the offence.
27. The complainant, in his testimony, stated that he awoke in pain and witnessed the appellant fleeing from his room. However, his account is devoid of any specific details regarding the lighting conditions or visibility in the room at the time. These omissions are not trivial. The reliability of a visual identification, particularly in a dimly lit or dark environment, must be subject to rigorous scrutiny. The absence of clarity on the conditions under which the alleged identification was made significantly weakens the probative value of this evidence.
28. It is further noted that PW4 confirmed the presence of several individuals in the house during the material period. Despite this, the investigating authorities appear to have made no meaningful inquiry into whether any of the other occupants could have accessed the complainant’s room. This oversight reflects a lack of thoroughness in the investigation and weakens the foundation of the prosecution’s case, which appears to rest predominantly on the complainant’s testimony and Newton’s assertions, both of which are subject to the inconsistencies noted above.
29. PW4’s claim that he saw the appellant enter the complainant’s room past midnight and later leave via the kitchen door at 5:30 a.m. is not independently corroborated. No third-party testimony is presented to support this observation despite the presence of other guests in the house as claimed. Furthermore, there is no explanation as to why, if Newton witnessed such an act, he failed to intervene or report the incident immediately. This omission undermines the credibility of his account and further reflects the inadequacy of the investigative process.



30. Additionally, this court notes with concern that the trial magistrate, in arriving at the finding of guilt, appears to have relied on a misconstrued interpretation of the appellant's defence. It was suggested that the appellant had admitted to being in a consensual relationship with the complainant. Upon review of the record, there is no evidence to support such an assertion. To the contrary, the appellant expressly denied entering the complainant's room or engaging in any sexual act with him. He maintained that he slept on the couch in Bedan's room until morning. The magistrate's inference was therefore not only unsupported by the record but also prejudicial, leading to an unsafe conclusion.
31. The issue that this court has to grapple with is whether the contradictions and inconsistencies outlined in the foregoing analysis are so trivial as to be ignored, or whether they are substantial and fundamental to the issues for determination. In *Richard Munene v Republic* [2018] eKLR, the Court of Appeal stated as follows about contradiction or inconsistency in the evidence of the prosecution witness:
- Contradictions, discrepancies, and inconsistencies in the evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies, and inconsistencies are proved, they must be resolved in favor of the accused.
- It is a settled principle of law, however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
32. The test as to whether the contradictions are minor or substantial was laid out in the case of *Sigei v Republic* [2023] KECA 154 (KLR):
- "In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, they must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case."
33. From the above authorities, it is clear that contradictions and inconsistencies, unless satisfactorily explained, would usually, but not necessarily, result in the evidence of a witness being rejected. The contradictions must be grave and point to deliberate untruthfulness.
34. In the premises, the contradictions in witness testimony, the lack of forensic evidence linking the appellant to the crime, and the demonstrable investigative lapses raise serious doubt as to whether the prosecution discharged its burden of proof to the requisite standard. The court must, therefore, approach the appellant's conviction with caution, as the totality of the evidence does not support a finding of guilt beyond reasonable doubt.
35. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF APRIL 2025**

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**D. KAVEDZA**

**JUDGE**



In the presence of:

Mutuma for the respondent

Court assistant – Tonny

