Wachania v Republic (Criminal Appeal E042 of 2023)
[2025] KEHC 4259 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4259 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E042 OF 2023

AK NDUNG'U, J

APRIL 4, 2025

BETWEEN

MICHAEL MUREITHI WACHANIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E012 of 2021 – B. Mararo SPM)

JUDGMENT

1. The Appellant, Michael Mureithi Wachania, was convicted after trial of rape contrary to Section 3 (1)(a)(c) as read with Section 3 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 10/11/2020 at around 2100hrs in Laikipia central sub-county, willfully and intentionally caused his genital organ namely penis to penetrate the anus of SK aged 31 years old without his consent. On 17/05/2023, he was sentenced to seven (7) years imprisonment.

2. Being aggrieved by the conviction and the sentence, he filed a petition of appeal filed on 29/05/2023 and amended supplementary grounds of appeal accompanying his submissions. The conviction and sentence have been challenged upon the following grounds –

    i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.

    ii. The learned magistrate erred by failing to note that the prosecution's case was full of contradictions, inconsistence and uncorroborated.

    iii. The learned magistrate erred by failing to note that there was no proper identification.

    iv. The learned magistrate erred by failing to note that the charge sheet was defective.

v. That the sentence was harsh and excessive.

Amended supplementary grounds of appeal

vi. The learned magistrate erred convicting him on a medical evidence that was illegally and unprocedurally produced thus contravening section 77 of the *Evidence Act*.

vii. The learned magistrate erred convicting him without appreciating that his right to challenge evidence as per Article 50(2)(k) of *the Constitution* and Section 208(3) of the *Criminal Procedure Code* was violated rendering the entire proceedings defective.

viii. The learned magistrate erred by quashing his defence of alibi without giving cogent reasons thus violating Section 212 and 169 of the *Criminal Procedure Code*.

3. The appeal was canvassed by way of written submissions. In his submissions, he argued that the case was founded on a single witness evidence and the offence is alleged to have been committed at night and the complainant was drunk hence, it behoved upon the prosecution to avail cogent and plausible evidence implicating him. The trial court did not also warn itself on the matter of admitting single witness evidence. That PW1 claimed that he had seen him during the day wearing a green jacket and at night during the attack but no such jacket was produced. Further, PW1 claimed that he identified him using the light from the torch of his phone but no such phone was produced to verify the intensity of the light and whether PW1 owned a phone. It could not be assumed that he owned a phone without proof and if he had a phone, he would have been reachable as the trial record shows he was not reachable on two occasions. Further, the complainant testified that he identified him through the light from his phone whereas during cross examination, he testified that he had a torch.

4. That after the ordeal, he testified that he called a boda boda friend and informed him that the Appellant had sodomised him but the boda boda rider was not availed as a witness. PW2 talked of Mr Theuri who was not called to testify and members of the public who purportedly arrested him were not called. PW1 testified that there was a previous occasion which was not verified as it had not been reported hence the case was full of hearsay evidence. He further testified that he was hit on the head and lost consciousness but the medical evidence was clear that he had no injury on the head. That considering that PW1 was drunk and the mode of lighting is in doubt, and the fact that he was hit and became unconscious, it cannot therefore be said that the circumstances of identification were favourable. Further, PW1 credibility was dented by the fact that he had refused to avail himself in court for a long time and the court did not record his demeanour.

5. He submitted that the medical evidence was illegally produced in contravention of Section 77 and 72 of the *Evidence Act* since PW4 failed to inform the court whether he was familiar with the handwriting and signature of the maker of the P3 and PRC forms. Further, Article 50(2)(k) of *the Constitution* and Section 208(3) of the *Criminal Procedure Code* were violated since the court failed to inform him of his right to cross examine the medical officer and it cannot therefore be said that he was accorded a fair trial based on the fact that he was not represented. That his alibi defence was not controverted as there was no evidence to investigations that were carried out, no witnesses were interrogated to find the truth of the matter and the investigating officer did not visit the scene of crime. As to sentence, he urged the court to revise the same to a lesser sentence.

6. In rejoinder, the Respondent's counsel urged the court to ignore the amended grounds of appeal filed alongside the submissions as no leave had been sought. As to whether the case was proved, he submitted that penetration was proved by the evidence of PW1 which was corroborated by PW2 and PW3. That the Appellant tried to challenge the evidence as a mere fabrication however PW1's evidence was not shaken on cross examination. That the complainant did not consent to the heinous act as he testified

that the Appellant hit him on the head and he remained unconscious only to wake up and found his trouser drawn down and had been sodomized. As to identification, he submitted that the Appellant conceded that he knew the complainant. The complainant also recognised him on the material night using his phone flashlight. PW2 testified that she went to the complainant's house who reported that he was sodomised by the Appellant. That he denied but admitted that it had happened previously. That his defence was considered and trial court found that it did not dislodge the water tight testimony by the prosecution.

7. On the sentence, he submitted that the sentence was not only lawful but lenient and that the Appellant did not demonstrate that the sentence was manifestly excessive, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle to allow this court interfere with the sentence.

8. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

9. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

10. The evidence before the trial court was as follows. PW1, the complainant testified that on the material day, he was leaving the club when he met the Appellant who was hiding in a forest. He had a phone which he shone on him. They fought but he was hit on the head and he lost consciousness and when he regained consciousness at around 9:00p.m, he noticed that he had been sodomised. His trouser and pants had been drawn down and his anus was aching. He called Simon who was supposed to pick him up and they decided to report the matter the next day which they did. The Appellant was arrested by a mob at his home. That he could not hold his faeces and he was taken to hospital. He testified that he knew the Appellant who was a neighbour and that it was the second time he was doing it as he had previously done it while they were drinking and it was shameful.

11. On cross examination, he testified that it was between 7:00pm and 8:00pm and it was dark and cloudy. That his jacket was jungle green and his clothes were not recovered. That they struggled. He was drunk and he saw him using a torch and he identified him using his clothes. That he was arrested by the mob and admitted. That many people have green shirts and that they had met during the day. On re-examination, he testified that his torch was on and that it was not the first time. He told the boda boda operator that it was the Appellant.

12. PW2 testified that she was contacted by Mzee Theuri who informed her that the thing for his son had returned. She had heard of it a month ago. That PW1 said that the Appellant had sodomized him. She informed Theuri to go to complainant's house and Theuri informed her that the complainant had sent him a message threatening to kill himself. They went to the complainant's house and found him sleeping and he informed them that they had gone to the shopping centre and Ndungu was to drop them. It rained and he started to walk and that near the primary school, they met the Appellant who hit him and sodomised him. That they went to the Appellant's aunt place and they interrogated him. He denied but admitted that it had happened previously. They took him to police station.

13. On cross examination, she testified that she did not witness the act but was told what he did and that he said that on 15/10/2021, he had slept with the complainant.

14. PW3, a clinician testified that he had the P3 form and PRC form for the complainant who was seen by Halima Chudo who had since left the hospital. He testified that the complainant had history of sodomy by a male person who hit him on the head and he lost consciousness and when he got up, he found himself naked with severe back pains. On examination, there was anal tear, tenderness, loose sphincter, no discharge noted, no spermatozoa seen, calcium oxidate seen and no pus cells. He produced the P3 and the PRC form as Pexhibit1 and 2 respectively.

15. In his unsworn defence, the Appellant testified that on the material day in the evening, he went and bought cigarettes and returned home. It was raining and at 8:30pm, he took medicine and slept. On the next day, people he did not know went to his home and said that something had happened the previous night and it was alleged he was involved. He was taken to police station where the investigating officer told him to admit but he refused. That it was a plan and the matter should have been resolved at the chief's office.

16. The Appellant was charged with the offence of rape contrary to Section 3(1)(a)(c) and (3) of the *Sexual Offences Act* which provides that;

    (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;

        (c) the consent is obtained by force or by means of threats or intimidation of any kind.

    (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.

17. The prosecution thus had the onus to prove the main ingredients of the offence of rape being intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In Republic vs. Oyier[1985] KLR 353 the Court of Appeal held that;

> " 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".

18. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if he did not, that his understanding and knowledge were such that he was not in a position to decide whether to consent or resist.

19. A to whether penetration was proved, the complainant testified how he was attacked at night by the Appellant who was hiding in the bushes. He hit him on the head and he lost consciousness and when he woke up, his trouser was drawn and his anus was aching when he tried to defecate. He went to hospital as he could not hold his bowels.

20. The trial court found that penetration was proved through the complainant's evidence which was corroborated by medical evidence. The Appellant however attacked the medical evidence on account that the P3 and PRC forms were not produced by the maker contravening section 77 of the *Evidence Act*.

21. It is true that the PRC and P3 forms were produced by Salat Guyo, a clinician who produced the same on behalf of Halima Chudo who he said had left the hospital. He did not however testify whether he was familiar with her handwriting or signature and how long he had worked with her.

22. It is trite law that evidence touching on expert opinion should be tendered by experts as provided under section 48 of the *Evidence Act* and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar field of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence as provided under section 33 of the *Evidence Act* which states that;

> " Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases–"...

23. Such evidence is admissible and by dint of section 77 (1) of the *Evidence Act*, the evidence is presumed genuine and authentic. The provisions of section 77 of the Act on its own allows a person other than one who prepared a report to produce it provided that the presumption of authenticity is met and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it. The section provides;

> " 77
>
> (1) In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he processed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, Ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject matter there of".

24. Courts however has a discretion if called upon not to call makers of such documents if the interest of justice so demands. The law is that the condition precedent to the operation of section 77 is compliance with section 33 which requires that a basis be laid before a witness other than the maker of a document can competently tender the evidence.

25. In the instant case, no explanation was tendered as to why the maker could not produce the P3 and PRC forms. PW3 did not attest to the handwriting or the signature of the maker. It therefore follows that the medical evidence was irregularly produced and could not be relied upon to convict the Appellant. That said, it is trite law that the fact of rape can be proved through evidence other than medical evidence. The evidence of the victim alone could suffice.

26. In Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) the court stated ;

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

27. This is in line with section 124 of the *Evidence Act* which states that;

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. I have perused the judgment of the learned magistrate and note that he based the conviction on the complainant's evidence and the medical evidence. Nothing more was added. As seen earlier, the medical evidence was not properly produced hence he should not have based the conviction on the medical evidence. Apart from analysing the complainant's testimony, he did not comment further on the complainant's testimony.

29. The correct legal position is stated in the case of Chila v. Republic [1967] E.A 722 thus:

> " The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

30. As to identity, the uncontroverted evidence before the trial court was that the complainant and the Appellant knew each other. The Appellant conceded to this fact in his submission. This was therefore evidence of recognition and not identification of a stranger. Madan J.A in Anjononi & 2 Others v Republic [1980] eKLR stated that;

> " ...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"

31. Even though this was the evidence of recognition, it must pass the test of proper visual recognition as was held in the case of Cleophas Otieno Wamunga v Republic [1989] eKLR, thus;

> " It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction"

32. The Court of Appeal in the case of Joseph Muchangi Nyaga & another v Republic [2013] eKLR addressing the issue stated that before acting on evidence of visual recognition, the trial court must

make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently. This is in accordance with the dictum in R vs Turnbull [1976] 3 ALL ER 549 where the court stated that;

> "...the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed (sic) between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"

33. In the case of Paul Etole & Another V Republic C.A No. 24 of 2000 page 2 and 3 Court of Appeal stated:

> "The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

34. Section 124(2) of the *Evidence Act* provides:-

> "124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

35. In the case of Olweno –v- Republic(1990) KLR 509 Khamoni, J as he then was held:-

> " 1. Where the only evidence of identification of an accused person is given by a single witness, the court should scrutinize that evidence under two different tests:
>
> a) The first test should be whether the conditions under which the single witness claims to have identified the accused person were such that there was positive identification.
>
> b) The second test to which the evidence of a single witness should be subjected to is whether it could be relied upon, without any other evidence, to sustain a conviction."

36. Applying the above tests in our instant case, the circumstances surrounding identification were that the incident took place at night. PW1 testified that it was dark and cloudy and that the Appellant was hiding in the forest and he was wearing a green jacket. He had a phone which he shone the flashlight on him. They fought but he was hit on the head and he lost consciousness. He was drunk but he saw him using a torch and he identified him using his clothes and that they had met during the day. He told the boda boda operator that it was the Appellant.

37. What can be gathered from above is that the intensity of the light from the phone flashlight was not interrogated by the trial court. The distance between him and the attacker was also not interrogated. The time he took to observe the attacker was also not interrogated and it is also not lost that the complainant lost consciousness as he was hit on the head.

38. I find the trial court failed to warn itself of the danger of relying on uncorroborated evidence of a single witness to convict the appellant. Neither did it record reasons for believing that the victim was telling the truth as envisaged under Section 124 of the *evidence Act*.

39. Section 124(2) of the *Evidence Act* provides:-

> " 124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

40. Even assuming that the court's finding was anchored on the above section, the same would not have met legal muster as no reasons were recorded for believing the victim.

41. As it were, a reading of the trial court record indicates that the court took the view that the evidence of the complainant was corroborated by that of PW3, the clinician. In light of the foregoing, this was an incorrect finding as the medical evidence is vitiated by the factors explained above, viz, the failure to comply with Section 33 of the *evidence Act*.

42. In the end, based on the evidence on record, the conviction was unsafe. The appeal succeeds in its entirety. The conviction of the Appellant is quashed and sentence set aside and substituted thereof with an order acquitting the Appellant who shall be set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 4TH OF APRIL 2025.

A.K. NDUNG'U

JUDGE