



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kemei v Republic (Criminal Appeal E040 of 2023)  
[2025] KEHC 6012 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6012 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL APPEAL E040 OF 2023**

**JR KARANJA, J**

**MAY 8, 2025**

**BETWEEN**

**OLGA KIPCHOGE KEMEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant, Olga Kipchoge Kemei, was charged before the Senior Principal Magistrate at Kapsabet for the offence of Rape, Contrary to Section 3[1] [a] [b] [3] of the *Sexual Offences Act*. Alternatively, he faced a charge of committing an indecent act with an adult, Contrary to Section 11 [A] of the Sexual Offence Act.
2. It was alleged that on the 6<sup>th</sup> October 2019 at around 22:00hours at Mosombor – Kaptumo Nandi South within Nandi County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of SJ by use of force or that he intentionally touched her vagina with his penis against her will.
3. After a full trial, the Appellant was convicted on the main count and sentenced to serve ten [10] years imprisonment. However, being dissatisfied with the conviction and sentence he preferred the present appeal on the basis of the grounds set out in the memorandum of appeal dated and filed herein on 26<sup>th</sup> July 2023 by the firm of Oyaro J. & Associates Advocates.
4. In general, the Appellant complains that the trial court erred in law and fact by convicting him on the basis of the prosecution evidence which was insufficient, inconsistent and devoid of credibility. That, his right to a fair hearing was breached when the police medical form [P3 form] was compiled after his arrest and arraignment in court and without the form being supplied to him prior to the hearing of the case. That, the trial court disregarded his defence as well as the pre-sentence report which recommended a non-custodial sentence.



5. At the hearing of the appeal which was by way of written submissions the Appellant was represented by the Learned Counsel, M/s Mabalu.

The State/ Respondent opposed the appeal and was represented by the Learned Prosecution Counsel, M/s. Asiyu.

This court, upon due consideration of the appeal, the supporting grounds and the rival submissions had a duty to reconsider the evidence availed at the trial and draw its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

6. In summary, the prosecution case was that the Complainant [PW1] arrived at Mosombor from Eldoret on 5<sup>th</sup> October 2019 at 10:00pm and met the Appellant whom she had previously known. He then held her hand and asked her to accompany him to his house before he forced her to the ground and held her down. It was then that he removed her inner wear and sexually assaulted her by raping and inserting his manhood [penis] into her mouth.
7. The incident occurred in darkness, but in the process nearby electric lights brightened the scene when they were switched on. This was next to the Appellant's gate to his house at a trading centre. The hat he was wearing fell on the ground. He was arrested on the following day by PC. Naomi Jelimo [PW2] after the incident was reported to the police by the Complainant.
8. A police medical form [P3 Form] was issued to the Complainant. She reported the incident immediately after its occurrence to Sgt. Cosmas Ruto Kiptoo [PW3], who apparently investigated the case and preferred the present charge against the Appellant after which the Complainant was examined by Naomi Langat [PW4], a Clinical Officer at Kaptumo Medical Centre.
9. The examination was conducted on 17<sup>th</sup> October 2019 resulting in a finding that no abnormality was noted, but that the Complainant suffered actual bodily harm.  
  
The Clinical Officer found no evidence of recent penetration, but noted that the Complainant had a urinary infection. The Officer indicated that penetration could not be determined as the Complainant was a sexually active person.
10. The Appellant's case was a denial of having committed the offence and an indication of having been charged without good cause after he failed to assist the Complainant with paying a debt to his relative when she arrived at a construction site where he worked as a building mason.
11. After considering the evidence in its totality the trial court in its judgment delivered on 24<sup>th</sup> May 2023, concluded that the prosecution case had been proved beyond reasonable doubt on the main count of rape. In arriving at the conclusion the trial court rendered itself thus: -

“.....the evidence tendered before this court confirmed that the Complainant was raped. The perpetrator thereof was the accused. The complainant gave straight forward evidence on how she met with the accused while she was from the shop. Though it was night time, she recognized the Accused Person. She positively identified him. When the light went on and cap P. Exhibit 5, which was recovered from the scene was fully associated with him.

Therefore, the contention by the Accused doesn't discredit the Complainant's truthful and well consistent testimony on the attacker.

In conclusion, the prosecution has proved the main count beyond reasonable doubt. The accused is found guilty of the offence contrary to Section 3[1] [a] [c] and [3] of the [Sexual Offences Act](#) No. 3 of 2006.”



12. Basically, the obligation to prove the charge against the Appellant lay with the prosecution upon a standard which is beyond reasonable doubt.

As was held in *Kioko v Republic* [1983]KLR 289 no duty is placed upon an Accused Person to prove or establish his innocence.

It was therefore incumbent upon the prosecution to establish and prove against the Appellant the necessary ingredients of the offence of rape as created in Section 3[1] of the *Sexual Offences Act* which provides that: -

“A person committeee the offence termed rape if –

- a. He or she intentionally and unlawfully commits an act which caused 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.”

14. The elements of penetration and consent are the most important and these had to be established beyond reasonable doubt against an Accused Person if he/she were to be convicted for the offence of rape. In fact, this appeal raises the issue of whether the prosecution proved its case to the required standard, in particular whether there was sufficient evidence in proving that the Appellant had sexual intercourse with the Complainant against her will on the material date and time.

15. The evidence did not raise any substantial dispute with regard to the familiarity of the Appellant and the Complainant [PW1] with each other prior to the date of the alleged offence which in the charge sheet is said to have been the 6<sup>th</sup> October 2019, yet the evidence indicates that it was the 5<sup>th</sup> October 2019. This was a clear contradiction and/or inconsistency which went to the root of the charge with regard to whether indeed the offence was committed on the material date as alleged by the Complainant [PW1] who was the sole witness to lead incriminatory evidence against the Appellant without independent corroboration.

16. Such uncorroborated evidence of a single witness could still be relied upon by a trial court to convict an accused person if it were shown to be credible and reliable.

Indeed, the proviso to Section 124 of the *Evidence Act* provides 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.

17. The truthfulness of the sole witness would therefore be a vital factor for the conviction of an Accused Person on a charge under the *Sexual Offences Act*.

In this case, the trial court found the evidence of the Complainant to be truthful and consistent on the basis that it was not discredited by the Appellant’s defence and contentions that he did not sexually assault her.

18. The element of penetration connotes sexual intercourse and when such act is achieved forcefully and/or without the consent of either party, it amounts to the Criminal Offence of rape.

It is the opinion of this court that in the attempt to establish penetration or an unconsented sexual intercourse between the Appellant and the Complainant the prosecution led evidence which was



insufficient and not cogent enough in proving beyond reasonable doubt the occurrence of the alleged act.

19. There was no medical evidence to prove penetration. The Clinical Officer [PW4] stated categorially that there was no evidence of recent penetration and as the P3 form indicated a history of the offence having occurred on the 3th October 2019 it would follow that recent penetration meant the period between the 5<sup>th</sup> October 2019 to the 17<sup>th</sup> October 2019 when the Complainant was examined and the P3 form filled.
20. In the absence of medical evidence and the existence of contradiction and/or inconsistency on the actual date the alleged offence occurred, the evidence by the Complainant that she was raped by the Appellant on the alleged date and time was doubtful, hence unreliable and ought not have been the basis for the Appellant's conviction by the trial court. Even if penetration was established it could not be stated with certainty when it occurred given the fact that the Complainant was found to be a sexually active individual.
21. This court would deduce from the Complainant's evidence that indeed she may have met the Appellant on the alleged date, but short of having sexual intercourse with her against her will, he displayed acts of gross indecency against her. At most, in the absence of proof of penetration on the alleged date, the Complainant's evidence established an attempt by the Appellant to rape her as demonstrated by his overt acts of indecency.
22. In the circumstances, it is the finding of this court that the conviction of the Appellant on the main count of rape was improper and is hereby quashed and substituted for a conviction on a charge of attempted rape, Contrary to Section 4 of the *Sexual Offences Act* which provides as follows: -

“Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.”
23. Invariably, the sentence of ten [10] years imprisonment imposed on the Appellant by the trial court must and is hereby set aside in favour of a five years imprisonment term in accordance with the aforementioned provision of the *Sexual Offences Act*.
24. In sum, the present appeal is allowed, but only to the extent of the alteration in conviction and sentence of the Appellant by the trial court.

Ordered accordingly.

**DELIVERED AND DATED THIS 8<sup>TH</sup> DAY OF MAY 2025**

**HON. J. R. KARANJAH,**

**JUDGE**

