



REPUBLIC OF KENYA



**Muigai v Republic (Criminal Appeal E138 of 2024)
[2025] KEHC 6541 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E138 OF 2024**

DR KAVEDZA, J

MAY 20, 2025

BETWEEN

MICHAEL GITAU MUIGAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. Abdul (PM) on 7th November 2024 at Kibera Chief Magistrate's
Court, Criminal Case No. E613 of 2022 Republic v Michael Gitau Muigai)*

JUDGMENT

1. The appellant was charged with two counts of offences. In count I, he was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. He was sentenced to forty-five years' imprisonment. In count II, he was charged and convicted for the offence of rape contrary to Section 3(1)(c) as read with Section 3(3) of the *Sexual Offenses Act* No.3 of 2006. He was sentenced to serve fifteen years' imprisonment. The sentences were to run concurrently.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In his petition of appeal, the appellant raised grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that his defense was not adequately considered as guaranteed under Article 50 of the *Constitution*. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being a first appeal, it is the duty of this court, as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should, however, bear in mind that it did not see witnesses testify and give due consideration to that. (See *Okeno v Republic* [1972] EA 32).



4. PW1, KWW, testified that on 2 January 2022, after attending church at [Particulars Withheld] Parklands, the appellant approached her requesting to borrow a phone to contact his child. Following a returned call, the appellant informed her that a monetary transfer would be made to her phone. She received approximately Kshs 150 and, accompanied by the appellant, went to a nearby kiosk to withdraw the funds.
5. The appellant then mentioned a potential job opportunity near the [Particulars Withheld]. They proceeded there and remained until approximately 9:00 p.m., conversing. Thereafter, they boarded a matatu to [Particulars Withheld] and alighted near the railway line. At this point, the appellant grabbed her hand and led her toward the railway. He demanded sex, physically assaulted her by punching her mouth, and threatened to gouge out her eyes and kill her.
6. The appellant then forcibly undressed both of them and raped her, holding her neck throughout, thereby preventing her from screaming. He fled with her phone. PW1 sought help from a nearby apartment and was later taken to [Particulars Withheld] Hospital and reported the matter to the police. PW1 later received information from a pastor regarding the appellant's arrest. She positively identified him as the perpetrator both in court and during an identification parade at [Particulars Withheld] Police Station. Upon cross-examination, she confirmed she had been in the appellant's company from 1:00 p.m. until late and remained certain of his identity, though none of her belongings were recovered.
7. PW2, SWW, PW1's sister, confirmed being contacted around 9:00 p.m. by a man named Amos, informing her of the incident. She found her sister injured and traumatised. Earlier that afternoon, PW1 had informed her she was heading to the [Particulars Withheld] with someone regarding a job opportunity.
8. PW3, BOO, a church member, testified that he observed the appellant speaking with PW1 at church and later saw them leave together towards [Particulars Withheld]. He confirmed knowing the appellant, having seen him previously at church.
9. PW4, AWN, recounted finding PW1 bleeding and distressed outside his girlfriend's apartment. He offered his phone for her to contact her sister and helped facilitate her rescue.
10. PW5, Chief Inspector Josephat Mwea, conducted the identification parade on 14 April 2022. PW1 identified the appellant without any prompting. He produced the ID parade form.
11. PW6, a medical officer from Mbagathi Hospital, testified that PW1 had injuries to the chest and neck, had lost one tooth, and had a cracked tooth. Genital examination revealed a broken hymen, dried discharge, and injuries consistent with sexual assault. The P3 Form was produced.
12. PW7, PC Millicent Ochieng, the investigating officer, stated that the stolen phone, a Tecno AB47 Aurora worth Kshs 25,000, and the complainant's ID were not recovered. The appellant was arrested on 10 April 2022 at the same church. M-Pesa records indicated the transferred funds came from EM, who declined further involvement.
13. In his unsworn defence, the appellant claimed he attended church and left at 1:30 p.m., later travelling to Kajiado for work for three months. Upon return, he was arrested and maintained his innocence, alleging fabrication.
14. The appeal was canvassed by way of written submissions, which have been duly considered, and there is no need to rehash them.



15. In count I, the appellant was charged with the offence of robbery with violence. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.
16. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt, leading to a proper conviction and sentence.
17. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and *Oluoch v Republic* [1985] KLR 549).
18. In the present case, PW1 testified that after spending the day in the appellant’s company following church at Parklands, she was violently attacked by him at approximately 9:00 p.m. near the railway in [Particulars Withheld]. The appellant demanded sex and, upon her refusal, assaulted her by punching her in the mouth, threatened to gouge out her eyes, and proceeded to rape her while restraining her by the neck. Following the assault, he fled with her mobile phone, leaving her injured and traumatised.
19. The element of theft was established through PW1’s testimony that her Tecno AB47 Aurora phone, valued at Kshs 25,000, and her national ID were taken by the appellant. PW7, the investigating officer, confirmed this account.
20. The appellant employed actual violence during the incident. He physically assaulted the complainant, punched her, held her by the neck, and raped her. These acts were corroborated by PW2, who observed visible injuries on PW1 shortly thereafter, and by medical evidence.
21. The medical officer confirmed injuries to PW1’s chest and neck, the loss of a tooth, and genital trauma consistent with sexual assault. This evidence clearly demonstrates that violence was used immediately before and during the theft, satisfying the elements under Section 296(2) of the *Penal Code*.
22. The identity of the appellant was conclusively established. PW1 had been with him from early afternoon until late evening. She provided a coherent narrative and positively identified him during an identification parade, as confirmed by PW5. PW3 also independently witnessed them together. The appellant’s unsworn defence that he left the church at 1:30 p.m. and later travelled to Kajiado was unsubstantiated and failed to rebut the prosecution’s case.
23. In conclusion, all the ingredients of the offence of robbery with violence were satisfied. The conviction on Count 1 was lawful and is hereby upheld.
24. In count II, the appellant was charged with the offence of rape contrary to section 3(1)(c) as read with 3 of the *Sexual Offences Act*, No. 3 of 2006.
25. Section 3(1) of the *Sexual Offences Act* defines rape as the intentional and unlawful penetration of the genital organ of one person by another without consent. In *Republic v Oyier* [1985] KLR 353, the Court of Appeal affirmed that lack of consent is a key element of rape. The mens rea is the intent to



have intercourse without consent or with reckless disregard as to whether consent was given. Consent obtained through fear or duress does not negate the offence.

26. Applying this legal framework to the facts, the prosecution proved that the appellant intentionally and unlawfully penetrated the complainant. PW1 gave a clear, consistent, and credible account: the appellant lured her under false pretences, assaulted her by punching her in the mouth, threatened her with death, and then forcibly undressed and raped her.
27. The evidence established a complete absence of consent. The complainant described how the appellant held her by the neck during the assault, restricting her ability to scream, which is indicative of duress and fear.
28. Medical evidence from [Particulars Withheld] Hospital corroborated her account. The doctor confirmed visible injuries to her chest and neck, a missing and cracked tooth, and genital trauma consistent with forced penetration, including a broken hymen and dried discharge. PW2, the complainant's sister, observed her shortly after the incident, noting she was bleeding from the mouth and visibly traumatized, and further supporting the account of a violent sexual assault.
29. The appellant's conduct, which was marked by threats and physical violence that demonstrated that he either knew the complainant did not consent or was reckless as to whether she did.
30. His unsworn defence amounted to a mere denial and did not displace the consistent, corroborated prosecution evidence. Accordingly, the conviction for the offence of rape was sound and supported by proof beyond reasonable doubt. The conviction on count II is affirmed.
31. On sentence, the appellant was sentenced to serve 45 years in Count I and 15 years in Count II. The sentence was to run concurrently. In the sentencing proceedings, the trial court considered the appellant's mitigation, the pre-sentence report, and that he was a first offender.
32. Section 329 of the *Criminal Procedure Code* gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed, despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence-imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
33. The upshot of the above analysis is that the appeal partially succeeds. The sentence of forty-five (45) years imprisonment imposed in Count I is hereby substituted with a sentence of twenty (20) years imprisonment. The sentence of fifteen (15) years imprisonment imposed in count II is maintained. The sentences shall run concurrently from 10th April 2022, the date of his arrest, having spent the entirety of the trial in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MAY 2025

D.KAVEDZA

JUDGE

