Mbarak v Republic (Criminal Appeal E023 of 2023)
[2025] KEHC 5674 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E023 OF 2023

JN NJAGI, J

MAY 2, 2025

BETWEEN

AHMED MBARAK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. M.M. Wachira, PM, in Lamu Principal Magistrate's Court Sexual Offence Case No. E004 of 2023 delivered on 13/7/2023)

JUDGMENT

1. The Appellant was convicted for the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve ten years imprisonment. The particulars of the offence were that on the 12th April, 2023 at around 0700hrs at Lamu Central Sub-county within Lamu County, he intentionally and unlawfully caused his penis to penetrate the anus of MA (herein referred to as the complainant) by use of force and threatening her by strangling her neck with his hand.

2. The appellant was sentenced to serve 10 years imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal. The appeal raises the following grounds: -

    1. That the learned trial magistrate erred in matters of law and fact by failing to take into account the appellant's defence.

    2. That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing the Appellants based on inconsistent and contradictory evidence that was marred with discrepancies.

3. That the Learned Trial Magistrate erred in Law and in fact in failing to consider the circumstances under which the offence was alleged to have been committed.

4. That the conviction and sentence cannot be supported by any scintilla of evidence tendered before the trial court.

5. That the Learned Trial Magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved their case beyond reasonable doubt.

3. The appellant prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

4. The appeal was canvassed by way of written submissions of the appellant and those of the Senior Prosecution Counsel, Ms. Agatha Mkongo.

Appellant's Submissions

5. The appellant submitted that the charge against him was not proved beyond reasonable doubt. That the evidence that the complainant was penetrated by the anus was doubtful as the same was not corroborated by the evidence of the doctor whose findings were that there was no evidence to support penetration in the anus. That without such evidence he should have been acquitted of the charge.

6. The appellant challenged the particular section of the *Sexual Offences Act* under which he was convicted and submitted that in providing for a minimum sentence of 10 years imprisonment the section denies judicial officers the discretion to impose appropriate sentences based on the scope of the evidence presented in the case and the gravity of the offence. He submitted that the trial magistrate sentenced him to the minimum sentence of 10 years provided in the *Sexual Offences Act* and in doing so the court failed to exercise its discretion and consider his mitigation.

7. The appellant referred to the Court of Appeal decision in the case of Evans Wanjala Wanyonyi v Republic (2019) eKLR where the court substituted a 20-year jail term with 10 years' imprisonment where the appellant had defiled a girl of 14 years of age. The appellant urged this court to consider his mitigation and reduce his 10 years' sentence.

Respondent's Submissions

8. The prosecution counsel on the other hand submitted that the prosecution in a charge of rape was required to prove:

1. That there was an intentional and unlawful penetration.

2. That the penetration was committed by the appellant, and that

3. That there was no consent by the victim.

9. Reference was made to the case of Nicholas Kiprotich Rono v Republic (2022) eKLR in this respect.

10. It was submitted that penetration was in this case proved by the evidence of the complainant herself who told the trial court that the appellant penetrated her anus. That though the findings of the doctor was that there were no visible bruises in the anus, there were epithelial cells seen. It was submitted that that fact proved that sexual intercourse had taken place.

11. The respondent submitted that the prosecution witnesses found the complainant tied inside the forest and her under pant was placed nearby. That this proved that she had been raped.

12. On identification of the appellant, the respondent submitted that the complainant knew the appellant as a local porter and identified him as the person who raped her. That the complainant`s mother had seen the appellant in the forest as she and her daughter went to the forest to fetch firewood. That the appellant was positively identified.

13. It was submitted that the appellant carried the complainant into the forest, placed her down and raped her. That when she attempted to scream he tied her mouth, hands and eyes. It was submitted that these acts showed lack of consent on the part of the complainant. That PW5 found the complainant tied up. Therefore, that the charge against the appellant was proved beyond reasonable doubt.

14. The respondent submitted that the appellant in his defence confirmed the evidence of the complainant that he is a loader. That his defence did not cast doubt on the prosecution case.

15. On sentence, the respondent submitted that the sentence meted on the appellant was lawful and merited. The respondent urged the court to dismiss the appeal.

Analysis and determination

16. This being a first appeal it, is the duty of this court to re-evaluate and re-analyse afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that it neither saw nor heard any of the witnesses testify and give due allowance for that. This was the holding in of the Court of Appeal the case of Okeno -v- Republic (1972) E.A 32 and which was reiterated in the case of Kiloly & Another -v- Republic (2005) 1 KLR.

17. I have carefully considered the grounds of appeal, the record and judgment of the trial court and the written submissions filed by both the appellant and the respondent. The issue for determination is whether the prosecution established the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* to the required standard of proof of beyond reasonable doubt.

18. The complainant, PW1, told the court that on the fateful day she had gone to fetch firewood at [Particulars withheld] area in Milimani in the company of her mother. That while they were there she saw a man come from the water. He greeted her and she went on with what she was doing. That as she was walking, the man came from her behind and held her by her neck. He carried her for about 5 meters and put her down. He removed her under pant and told her to lie on her stomach. He then removed his penis and put it in her anus. She tried to make noise but he blocked her mouth and told her to keep quiet. He then tied her hands from behind with a piece of cloth and he also tied her eyes. He then started touching her breasts as she was lying down. She later heard people talking. She was untied and taken to hospital where she was treated and discharged. She identified photographs of her being tied, treatment notes, the white scarf that was used to tie on her eyes, the white scarf which tied her hands and the pink dress she was wearing on the material day, PMF1 -PMFI5.

19. The complainant's mother, PW2, told the court that on the fateful day she went to collect firewood in the forest in the company of her daughter, PW1. That she parted ways with her daughter in the forest, that as she went uphill, she saw the appellant pass by where she was. She later heard her daughter scream. She went to check, called her name but there was no answer. She then went and informed her neighbours that her daughter was missing. She later went and reported at the police station. She returned to the scene and found the complainant lying unconscious. She said that the person who passed her in the forest was the appellant.

20. The complainant's father, PW3, told the court that on the material day 7: 20a.m he got information from a neighbour called Malika that his daughter had disappeared. That he went to the police station but was later called by Malika who informed him that his daughter PW1 had been found. That on 18th

April, 2023 he was going to the office with PW1 when she told him that she had seen the person who had raped her. He called the police who later went and arrested him.

21. Malika Saida Wako, PW4, told the court that on 12th April, 2023 she was going to the market when she saw the complainant's mother running to Spotlight area. That she told them that her daughter had disappeared in the forest. She, PW4, informed some men at Spotlight Mosque about it, they went looking for the complainant at the hills. They followed footsteps and upon reaching the hill top they saw a white pant and later found the complainant. She was tied on the eyes and her hands were tied with a piece of cloth from behind. She confirmed that she was wearing the clothes before court. PW4 called the complainant`s father and informed him that they had found the complainant.

22. PW5, PW6 and PW7 all narrated that on the fateful day they were at Satellite when they heard people saying that a girl had disappeared. That they all went uphill following the footsteps. That they saw a pant on the hill, PMFI 6, they found the complainant tied on her eyes and hands. PW6 took photographs of the pant and the complainant while tied on the eyes and hands.

23. Mnawar Noor PW8 testified that he was on the material day heading home from work when he found villagers saying that there was a girl who had disappeared in the hills as they were fetching firewood. He later heard people saying that the girl had been found. He went out and found PW7 carrying her as she was unconscious. He put her on his motorcycle and took her to King Fahad Hospital where she was treated.

24. Dr. Abdulrahman Yuns Shee, PW9, of King Fahad Referral Hospital told the court that the complainant was taken to their facility on the 12th day of April, 2023. It was reported that she had been raped on the anus at Milimani Satellite as she was fetching firewood. That on examination, the vagina was found to be normal. There were no bruises in the anus. The doctor produced the P3 form and the Post Rape Care form as exhibits, PExh. 3 and PExh. 8 respectively.

25. The Investigating Officer, Cpl Davlin Kerubo, PW10 of Lamu police station testified that a case of rape had been reported at the station. She proceeded to King Fahad hospital where she found the complainant. She told her that she had been raped on the anus by a man that she could identify. Later, the man, the appellant, was arrested. PW10 charged him with the offence.

26. When placed to his defence the appellant stated in a sworn statement that on 18th April, 2023 he went to work where he was carrying goods to the market. That he was done with his work by 8am. He proceeded to rest near the mosque and when he woke up, he found 8 police officers next to him. They handcuffed him and took him to Lamu Police Station. He was charged with raping the complainant and he denied the charges. It was his evidence that he saw her for the first time in court. He said that he did not recall where he was on the 12th day of April, 2023.

27. It is my duty to ascertain whether the above evidence proved the charge against the appellant beyond reasonable doubt.

28. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;

A person commits the offence termed rape if—

i. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

ii. the other person does not consent to the penetration; or

iii. the consent is obtained by force or by means of threats or intimidation of any kind."

29 The main ingredients of the offence of rape as created in Section 3 (1) of the *Sexual Offences Act* are therefore the intentional and unlawful penetration of the genital organ of one person by another coupled with the absence of consent. The prosecution was, therefore, required to establish penetration, lack of consent and that the appellant was the perpetrator of the act.

30. First is the issue of penetration. The doctor in this case did not find evidence to corroborate the evidence of the complainant on the offence of rape. However, lack of medical evidence is not fatal to a charge of rape as the offence can be proved in other ways such as by way of oral evidence of the victim or by circumstantial evidence. This position was fortified by the holding of the Court of Appeal in Martin Nyongesa Wanyonyi vs Republic Criminal Appeal No. 661 of 2010 (Eldoret), citing Kassim Ali v Republic Criminal Appeal No. 84 of 2005 (Mombasa), where the 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.

31. In the absence of medical evidence to support the charge of rape, the question is whether there was sufficient oral or circumstantial evidence to prove the same.

32. The complainant in this case told the court that the appellant carried her for about 5 meters and dropped her down. He then proceeded to rape her. There was no reason for the complainant to lie that she was raped by a certain man on that day. She was found tied on the hands and eyes by villagers who went in search of her. There was sufficient evidence to prove the act of rape through the anus. The question is whether the appellant is the person who raped the complainant.

33. The complainant said that she used to see the appellant loading goods in the beach. That on 18/4/2023 she saw him and alerted her father. Police were called and he was then arrested

34. The complainant`s mother testified that she saw the appellant in the forest as she fetched firewood. That he went towards the direction where the complainant was. She heard the complainant scream. She went to check on her but did not find her. She went to alert other people.

35. There is then the question whether the complainant identified the appellant as the person who attacked her from behind and raped her and whether the appellant is the person the complainant`s mother saw in the forest heading towards the direction where her daughter was.

36. The law is that evidence of identification especially where identification takes place in difficult circumstances should be treated with a lot of care so as to avoid convicting the accused person on evidence of mistaken identity. In Francis Karuiki and 7 others vs. Republic Cr. Appeal No 6 of 2001 [200] eKLR it was held that;

> " The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if satisfied that the identification is positive and free from possibility of error."

37. In Kimea *v Republic (Criminal Appeal 010 of 2020*) [2022] KEHC 104 (KLR) (18 February 2022) (Judgment) the court enumerated the factors to be considered in identification to include such factors as the lighting conditions under which the witness made his/her observation; the distance between the witness; the period of time the witness actually observed the perpetrator and whether the witness had an unobstructed view of the perpetrator.

38. The complainant`s mother did not indicate whether or not she knew the appellant before the material date. No identification parade was conducted after the arrest of the appellant to test whether she could identify him as the person she saw in the forest going towards the direction where her daughter was. She did not state the distance the person was from her when she saw him. Without such details it is not safe to conclude that the appellant is the man the complainant`s mother saw in the forest before her daughter was attacked. I therefore do not find sufficient evidence that the complainant`s mother identified the appellant as the person she saw in the forest before her daughter was attacked.

39. That leaves the complainant as the only identifying witness in the case. The evidence of the complainant is that she saw a man emerge from the water at the sea front. He went and greeted her. He was close to her when he did so. She saw that it was a man she used to see working in the beach as a loader. That she went on with her work. That as she was walking the man came from her behind and held her neck. He carried her for about 5 meters and dropped her down. He then raped her through the anus. When she screamed he tied her hands with a piece of cloth from behind. He also tied her eyes.

40. It is trite law that a court before convicting on the evidence of a single identifying witness, as in this case, should warn itself of the danger of basing a conviction on such evidence. In Roria vs Republic (1967) EA 583 the Court of Appeal stated at page 584 that:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

41. In Kiilu & Another v Republic [2005] eKLR, the Court of Appeal held that;

> "Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."

42. It was the evidence of the complainant that the man who raped her attacked her from behind. The complainant however never stated that she at that time saw the appellant and identified him as the person who had greeted her earlier. She did not explain how she identified him as the same person when the person attacked her from behind. She did not state the interval it had taken between the time the man greeted her and the time she was attacked from behind. She did not state whether she turned back and saw the man who was raping her from behind. She did not say whether she saw the man as he tied her from behind.

43. It is clear from the foregoing that the trial court did not interrogate the evidence of the complainant, which was evidence of a single identifying witness, with the necessary care. The trial court did not make a finding that the evidence of the complainant was that of a single identifying witness. It did not warn itself of the danger of convicting on the evidence of a single identifying witness. In my view, it was not safe to convict on the evidence of the complainant. The same was not free from the possibility of error. The appellant was entitled to the benefit of doubt.

44. In the final end, this court finds merit in the appeal. Consequently, the conviction entered against the appellant is quashed and the sentence meted out on him set aside. I order the appellant to be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 2ND DAY OF MAY 2025

J. N. NJAGI

In the presence of:

Miss Mkongo for Respondent

Appellant – present in person from G.K. Prison Malindi

Court Assistant - Nasra