



REPUBLIC OF KENYA



KENYA LAW
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**Mwere v Republic (Criminal Appeal E063 of 2024)
[2025] KEHC 10854 (KLR) (Crim) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E063 OF 2024
CJ KENDAGOR, J
JUNE 11, 2025**

BETWEEN

SIMON MWITA MWERE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence arising in Chief Magistrates Makadara Law Courts Sexual Offences case number 311 of 2021 delivered on 27th May, 2024 by Hon. M. Malingu, SRM)

JUDGMENT

1. The Appellant was charged with the offence of rape contrary to Section 3(1) (a) (b) as read together with Section 3 (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on the 15th August, 2021 at [Particulars Withheld], Nairobi County, the Appellant caused his penis to penetrate the vagina of HMM, a female adultchild aged 33 years without her consent.
2. The Appellant also faced the alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the [Sexual Offences Act](#).
3. The Appellant pleaded not guilty to the charge, and the case proceeded to trial, with the prosecution calling three witnesses. Placed on his defence, the Appellant gave sworn testimony. In a judgment delivered on 27th March, 2024 the Appellant was convicted and he was sentenced to 27 years' imprisonment in a ruling on sentence that was delivered on 27th May, 2024.
4. Being dissatisfied with both the conviction and the sentence, he appealed to this Court vide a petition of appeal dated 29th May, 2024 in which he raised four grounds of appeal;



1. That, the learned trial magistrate erred in law and facts in convicting the appellant when the crucial ingredients of the offence were never established and the prosecution did not discharge their duty to prove the case beyond the reasonable doubt as required in law.
 2. That, the trial magistrate lost direction in evidence after being influenced by the whole set of prosecution witnesses' testimonies without finding that they were not credible and their evidence was suspicious and full of impression and but not proof.
 3. That, the learned magistrate erred in both law and facts by failing to consider that PW1's evidence was coached and that there existed a grudge between the appellant and PW1.
 4. That, the learned magistrate erred in law and facts by convicting and sentencing the appellant to a harsh and excessive sentence in the circumstances of the case based on insubstantial evidence thereby contravening Article 27 (1), 28 and 29 (d)(e)(f) of *the Constitution*.
5. At the appeal hearing, the appellant emphasized his concerns regarding the sentence and urged the court to consider reducing it. The Respondent urged the Court to exercise its discretion on the issue of sentence.
6. As a first appellate Court, I must reconsider and evaluate the evidence in the Court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In *Kiilu & Another V Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate Court as follows:
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
7. Guided by the aforementioned principle, I have reviewed the grounds for appeal, the evidence presented in the trial Court, and the written submissions filed by the Appellant. I have also examined the trial Court's judgment. The key issues for determination are whether the prosecution proved the charges against the Appellant beyond reasonable doubt and whether the sentence imposed was harsh and excessive.
8. The essential ingredients of the offence of rape, as provided for in Section 3 (1) of the *Sexual Offences Act*, include the intentional and unlawful penetration of one person's genital organ by another, along with the absence of consent.
9. In the case of *Republic vs. Oyier* [1985] KLR 353 the Court of Appeal held as follows;
1. 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.
 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her



understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
10. Bearing in mind the above, I will now analyse the evidence on record to ascertain whether the essential ingredients of the charge preferred against the Appellant were established to the required standard of proof.
11. The Complainant testified in Court that on the evening of 15th August, 2021, around 7:00 p.m., she was walking along Donholm Road with groundnuts she intended to sell to nearby shops. She stated that during her walk, she encountered the Appellant, who asked her if she could wash clothes for him at his house for a fee and when she obliged, they went together to his house, where she described the building and location.
12. The Complainant stated that when she arrived at the house on the fourth floor, the Appellant forcibly pushed her inside, removed her clothing, and assaulted her before raping her. She testified in Court that she screamed for help and was able to escape the house while naked, but the Appellant grabbed her and pulled her back inside, accusing her of stealing his phone. She stated that the neighbours did not respond to her calls for help as the Appellant told them that she had stolen his phone.
13. The Complainant stated that the Appellant continued to assault her, forced her to smoke cannabis and ‘kuber’, and raped her again throughout the night. The following morning, he asked her to wash his utensils and leave, and he retained her mobile phone. Upon which she went to report at Soweto Police Station, who then escorted her to the hospital where she was treated.
14. The medical documents produced by PW2 confirmed that the Complainant was examined and treated at the medical facility on 16th August, 2021 - a day after the incident complained of. The medical doctor testified that the genital examination revealed signs of forceful penetration, and spermatozoa were detected. PW2 also confirmed that the Complainant had scratch marks on the neck, as well as bruises and swelling on both the left and right legs.
15. Based on the medical evidence and the heartfelt testimony of the Complainant, I concur with the learned magistrate’s findings. There is compelling evidence indicating that penetration occurred, and it is clear that the Complainant sustained physical injuries, highlighting the forceful nature of the act.
16. The investigating officer testified that the Complainant was able to take the police to the scene of the crime. However, the Appellant had already moved out. Additionally, the officer noted that the neighbours were unwilling to record witness statements, as they did not want to get involved.
17. The investigating officer provided an account of the arrest after locating the Appellant at his new residence. According to the officer, the Appellant was positively identified by the Complainant when he emerged from the house after the police knocked on the door.
18. The Appellant argued that he was mistaken for the assailant. However, the prosecution’s evidence indicates that deliberate actions were taken to locate his whereabouts, and there was no indication of malice or a possibility of mistaken identity. The Appellant was positively identified as the assailant, and given the duration of the incident, which the Complainant described as occurring throughout the night and into the following morning, there was no likelihood of error. Additionally, the defence’s claim that the Complainant and police demanded a bribe is undermined by the genuineness of the



actions taken by both the Complainant and the investigating officer. The trial Court documented the Complainant's demeanour at the hearing.

19. The evidence compellingly points to the conclusion that the Appellant committed the act of rape against the Complainant. The Appellant was afforded a fair trial and the conviction was safe.
20. The Appellant was sentenced to twenty-seven (27) years in prison. He urged this Court to reduce the sentence. The ruling on sentence shows that the trial Court took into account the Appellant's mitigation, the pre-sentence report, which included the Appellant's perspective along with that of the victim, as well as the time the Appellant spent in remand custody.
21. I have considered the manner in which the offence was committed; it was inhumane, particularly considering the physical injuries inflicted and emotional trauma experienced by the Complainant. I conclude that the sentence was neither harsh nor excessive.
22. The upshot of the above is that the appeal is without merit, and the conviction and sentence are upheld.
23. To comply with the provisions of Section 333 (2) of the *Criminal Procedure Code*, the sentence shall run from the 19th November, 2021 which is the date of arrest.
24. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ON THIS 11TH DAY OF JUNE, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant present

Mr. Chebii, ODPP for Respondent

