Nyambura v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 9269 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E026 OF 2024

GL NZIOKA, J

JUNE 23, 2025

BETWEEN

KELVIN NDUNGU NYAMBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in MCCR E064 of 2023 by Hon. Barasa (PM) at Naivasha Chief Magistrates Court delivered on the 6th August, 2024)

JUDGMENT

1. The appellant Kelvin Ndungu Nyambura was arraigned before the Chief Magistrate's Court at Naivasha charged vide Chief Magistrate's Criminal Case S/O No. E064 of 2023, with the offence of rape contrary to section 3[1][a] as read with section 3[3] of the *Sexual Offences Act* No. 3 of 2006 [herein the Act].

2. The particulars of the charge are that, on diverse dates between 1st day of June, 2023 and 26th day of November, 2023 in Naivasha Sub-County within Nakuru County, intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely anus of HKN without his consent.

3. The appellant was charged in the alternative count with the offence of indecent act with an adult contrary to section 11A of the Act.

4. The particulars of the alternative charge are that on diverse dates between 1st day of June, 2023 and 26th day of November, 2023 in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully did cause his hands to come into contact with the genital organ namely anus of HNK.

5. The charges were read to the appellant and he pleaded not guilty thereto. The prosecution case proceeded to full hearing with the prosecution calling a total of six [6] witnesses in support of its case.

At the close of the prosecution case, the appellant was placed on his defence and by a judgment dated 6th August, 2024, the trial court found the appellant guilty of the offence of rape, convicted him and sentenced him to serve fifteen [15] years imprisonment.

6. However, the appellant is aggrieved by the conviction and sentence and has filed the appeal herein on the following grounds verbatim reproduced;

   a. That the learned trial magistrate erred in law and facts by convicting the appellant with inconsistent evidence theorizing conspiracy and fabrication against the appellant.

   b. That the learned trial magistrate erred in law and facts by convicting the appellant and yet penetration was not proved.

   c. That the learned trial magistrate erred in law by convicting the appellant and yet the identification of the appellant was not positively proved by recognition.

   d. That the appellant prays to be supplied with a copy of the court's proceedings and its judgment.

   e. That further grounds shall be adduced at the hearing of this appeal.

   f. That the appellant wishes to be present during the hearing and determination of this appeal.

7. However, the appeal was opposed on the grounds of opposition dated 30th April, 2025 which states as follows:

   a. That all the ingredients of the offence of rape were proved to the required standards.

   b. That the prosecution's evidence was consistent, corroborated and devoid of any fabrication.

   c. That the sentence meted is lawful.

8. The appeal was disposed of vide filing of submissions. The appellant submitted that the prosecution was required to prove three ingredients of the offence being; the perpetrator's identity, unlawful penetration and that the penetration was without the victim's consent.

9. However, the appellant submitted that he is not challenging the issue of identification as the complainant is his brother challenges the element of penetration and consent.

10. On the issue of penetration, the appellant relied the definition of penetration as provided for under section 2 of the Act and argued that for penetration to be proved, it must involve the genital organs. That the complainant herein in his testimony did not refer to the genital organs but referred to "a thing" despite being an adult aged 41 years old.

11. The appellant further submitted that on 1st June 2023 one of the days the complainant alleged to have been raped, he was in remand having been arrested in the month of March of the same year in relation to Naivasha Criminal Case No. 339 of 2023 and was only discharged on 14th August 2023.

12. The appellant argued that, as relates to the allegations of rape on 26th November 2023, the evidence of [PW3] Nyambura Nganga was that she was informed by [PW2] Moses, that the appellant had beaten the complainant for refusing to be raped. That her evidence was corroborated by the evidence of [PW6] PC James Mwangi the Investigating Officer who stated that the complainant refused to be raped and ran away.

13. Further, the PRC form and P3 form filled on the 28th and 29th November 2023, respectively indicated that the injuries the complainant suffered were one month old which contradicted the complainant's evidence that the injuries were inflicted between the month of June and August.

14. The appellant further submitted that the case was poorly and casually investigated and that the prosecution failed to prove all the elements of the offence beyond reasonable doubt. He relied on the case of Langat v Republic [2024] KEHC 4406 [KLR] where the High Court stated that the case was investigated casually and poorly that the prosecution case was weak and inadequate and held that the prosecution failed to prove the charge beyond reasonable doubt and quashed the conviction.

15. However, the respondent in response submissions dated 30th April 2025 cited the case of Ochanga v Republic [2024] KEHC 3446 [KLR] where the High Court set out the key ingredient of the offence of rape being; lack of consent, that the complainant physically resisted or if not, that s/he did not understand and know that she was in a position to consent or resist, and where the complainant yielded due to fear or duress it is not an excuse the complainant consented.

16. The respondent submitted that the ingredients of the offence were proved through the evidence adduced by the prosecution witnesses. That the complainant testified that the appellant attacked him hitting him on the chest, back and head until he bled then threatened him with a knife while holding his throat and proceeded to remove his "thing" and inserted it in the complainant's anus.

17. Furthermore, [PW4] Preston Otega corroborated the complainant's evidence through the production of the P3 form and PRC form which noted that the complainant had healed wounds on the face, stomach and back, that his anus was wider than normal and tender on palpation. That the injuries noted on the complainant's body are an indication that the complainant resisted and did not therefore consent to the penetration.

18. On the identity of the perpetrator the respondent submitted that the appellant was properly identified by the complainant, [PW2] Moses and [PW3] Nyambura that the appellant was the complainant's brother and they all lived in the same house.

19. Finally, on sentence, the respondent submitted that the offence of rape is punishable by a term of imprisonment of not less than ten [10] years but which may be enhanced to life imprisonment. That the trial court considered the aggravating and mitigating circumstances and noted that the appellant was not remorseful and as such the sentence was appropriate and lawful.

20. In considering the appeal, I note that the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion taking into account the fact that this court did not have the benefit of the demeanor of the witness.

21. In this regard, the court thus stated in the case of Okeno v Republic [1972] EA 32; -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya v R., [1957] E. A. 336] 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. [Shantilal M. Ruwala v R., [1957] E.A. 570]. 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; it must make its own findings and draw its own 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, see Peters v Sunday Post, [1958] E. A. 424."

22. To revert back to the matter herein, the appellant has been convicted of the offence of rape. The offence is provided for under section 3[1] of the Act which states:

> " Rape is an act where a person intentionally and unlawfully causes penetration with their genital organs, and the other person does not consent to the penetration, or the consent was obtained through force, threats, or intimidation."

23. The elements of the offence are well settled that, as follows;

    a. Penetration which refers to the insertion of the genital organs into private part of the victim.

    b. Lack of consent by the victim or the consent was obtained through force, threats or intimidation.

    c. The penetration is intentional and not accidental or lawful.

    d. The accused person committed the act of rape.

24. In the instant case, the evidence of penetration was led by [PW1] Haron Kamau Ndungu who testified that on 1st June, 2023, the appellant removed his trouser and held him by force. That he then put his thing here [pointing at his anus] and did it 4 times. That he did it to him on two occasions.

25. In cross-examination, PW1 testified that the appellant defiled him on 26th November and that he is the one who held him by force and was taken for treatment.

26. It suffices to note that no one else witnessed the rape taking place. The evidence of [PW2] Moses Kuria Ndungu and [PW3] Nyambura Nganga the complainant's brother and mother respectively is that they were informed of the rape by the complainant.

27. Pursuant to the afore, independent evidence is required to corroborate the complainant's evidence of defilement. In that regard, the evidence that came into play is that of [PW4] Dr. Preston Otego based at Naivasha Sub-County hospital. He testified and produced a P3 form and Post Rape Care [PRC] form filed upon examination of the victim. The perusal of both documents indicates that the injuries to the complainant's anus were noted as "tenderness around anal region on palpation."

28. The question that arises is whether the evidence of both [PW1] and [PW4] prove penetration. In that regard, penetration is defined under Section 2 of the Act as: -

> " The partial or complete insertion of a person's genital organs into the genital organs of another person."

29. Having considered the afore, it is the finding of this court that, in relation to the issues of penetration, I find that the argument by the appellant that the same was not proved because the complainant did not describe the genital organ in detail or specifically and referred to it as "this thing" does not hold water. This is because evidence reveals that the complainant is suffering from cerebral palsy and has difficulty in speech. Similarly, there is no evidence as submitted that he was suffering from a mental disease or he was insane.

30. Further, based on the evidence of [PW1] and [PW4] and the definition of penetration, and the finding that, the complainant's anal region was tender on palpation, and [PW1] evidence that on 26th November 2023 when the appellant tried to rape him, he felt pain, it is clear, that the element of penetration was adequately proved.

31. The next issue to consider is whether, if the rape took place, it was by consent. [PW1] Harrison testified that the perpetrator hit him on the chest, back, head and held him by the throat, pointing a knife at him. [PW2] Moses Kariuki testified that when the complainant reported to him what had happened, he told him that he could "not report at first because", the perpetrator used to threaten him.

32. Further evidence is found in the P3 form, which indicates that, on examination of the complainant, there were healed facial bruises, healed scars on the chin and healed bruises on the abdomen. Also noted were healed scars on the back and bruises on the elbow. The same were found to have occurred within one month of examination and were classified as grievous harm.

33. The question that arises is, whether this evidence of assault corroborates the victim's evidence that he was assaulted during the rape incident. Further, whether the presence of these injuries indicate that consent to rape [PW1] was obtained by threat or duress. It is the considered opinion of this court that, the assault was related to the rape incident and negates consent to the rape. The rape was not consensual.

34. The other issue is whether the appellant is the one who committed the offence. In his evidence in chief [PW1] stated that "on 1st June 2023, Ndungu came and hit me and removed my trouser and held me by force, then put his thing in my anus and did it 4 times." He referred to the appellant by his name "Ndungu". I note that, in his evidence in chief he referred to the appellant as his cousin but in cross examination, he stated that "he was my brother".

35. [PW2] Moses also testified that when [PW1] reported the incident to him, he told his that "Kimani had beaten him and slept with him". It is noteworthy that the appellant's other name is "Kimani".

36. The evidence as led by the prosecution is that both the complainant and the appellant are brothers and lived in the same house. The question that arises is whether in view of the fact that both the appellant and the complainant were brothers, the complainant could mistake him for someone else.

37. In his submissions, the appellant clearly states that, he has "no issue in regards to identification of the alleged perpetrator as the intended perpetrator is a brother. That the bone of contention is on penetration and consent only".

38. As regards consent the evidence of PW1 that, he was assaulted and the doctor's evidence of assault leading to grievous harm, the consent herein was obtained by threats and actual physical bodily harm.

39. Finally, in considering of the defence by the appellant, it is clear from the evidence in the trial court that, he could not avail the case number in which he alleged that he was being held in remand allegedly at the time of offence. He has just referred to the same in the submissions on appeal as being criminal case No 339 of 2023. The court cannot admit fresh evidence at this stage. Furthermore, as noted by the trial court the evidence of alibi was only introduced at the defence stage. I note from cross examination of the witness the appellant alleged that there was land dispute but he did not advance it at the defence stage and developed a new defence all together.

40. The upshot of the aforesaid is that, I find no merit in the appeal against the conviction and I decline to interfere with the same.

41. As regard sentence I find that, the law provides for a sentence for the offence of rape as imprisonment for a minimum of ten [10] years which can be enhanced to life imprisonment.

42. Indeed, the specific sentence to be meted out will depend on the factors inter alia, age, whether the rape was gang rape or an act done within the view of a vulnerable person. Thus, the court can enhance the sentence to life depending on the severity of the offence, mitigating or aggravating circumstances. As

regards vulnerable persons, if the rape is committed within the view of a child, or a person with mental disability or a family member, then the sentence may be enhanced.

43. In the instant matter, the complainant was not just a brother to the appellant but physically challenged by disease of the body described as cerebral palsy and/or had difficult in speech. Therefore, the appellant took advantage of him. As such the sentence of fifteen [15] years meted out is even lenient considering the maximum sentence provide for the offence under the law. I therefore decline to interfere with it. The upshot is that, the appeal is dismissed in its entirety.

44. Right of appeal 14 days explained.

DATED, DELIVERED, AND SIGNED THIS 23RD DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of: -

The appellant present virtually

Ms. Chepkonga for the respondent

Ms. Hannah: court assistant