Lukorito v Republic (Criminal Appeal E034 of 2023)
[2025] KEHC 10343 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10343 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E034 OF 2023

RPV WENDOH, J

JULY 16, 2025

BETWEEN

JOHN JUMA LUKORITO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, John Juma Lukorito was charged with the offence of Rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act*. In the alternative, he faced a charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act*.

2. The particulars of the charge are that on 6/12/2021, at Meza Area in Kwanza Location, he unlawfully caused his penis to penetrate the vagina of LM (the complainant) without her consent and in the alternative, that he caused his penis to come into contact with the vagina of the complainant.

3. The appellant denied the offence and the case proceeded to full trial with the prosecution calling a total of five (5) witnesses. When called upon to defend himself, the appellant testified on oath and called one other witness. The appellant was convicted on the main charge of rape and sentenced to ten (10) years imprisonment.

4. Aggrieved by the conviction and sentence, the appellant preferred this appeal based on the following grounds: -

    1. That the identification parade on which the appellant was identified was irregular;

    2. That there was no evidence to prove the offence of rape;

    3. That the court erred in rejecting his defence;

    4. That some relevant witnesses were not called.

5. The appellant therefore prays that the conviction be quashed and the sentence be set aside and he be set at liberty or the court do order a retrial.

6. This being a first appeal, this court has a duty to exhaustively reexamine all the evidence tendered before the trial court, evaluate it and arrive at its own conclusions but always bear in mind that this court neither saw nor heard the witnesses testify. The court is guided by the decision in Okeno -V- Republic (1972) EA 32.

The Prosecution case: -

7. The trial court took PW1 LM, through voire dire examination and determined that she did understand the importance of telling the truth and consequences of lying on oath and she was then allowed to testify on oath.

8. PW1 testified that she had been sent to the posho mill to get flour; that she found the appellant at the posho mill; that he took her behind the posho mill store where he pulled her dress, removed her panty, opened his zip and removed his thing which he inserted in her thing pointing at her vagina; that he hurt her, and she bled. He told her to go and bath. She went home, bathed and washed her pant. A student assisted her take the flour home. At night, she fell and was taken to hospital at Kwanza and was stitched in her vagina (pointing). PW1 told the court that the person who hurt her works at the posho mill but she did not know his name.

9. PW2 MAO, the complainant's mother testified that the complainant was born on 8/8/1997, suffered cerebral malaria when she was a baby which caused brain damage and resulted in mental disability; that she is not able to care for herself. PW2 recalled sending the complainant to the posho mill; that later, another child brought the flour and did not disclose where the complainant was; that the complainant arrived shortly thereafter and was bleeding but she thought it was her periods. At night, the complainant fell when trying to reach her room and PW2 called neighbours who helped take the complainant to hospital. On examination, she was found to have tears to her vagina and she was stitched. While at the hospital, when the Doctor called PW2 to see what had happened to PW1, and PW2 asked what happened to her, she said "yule Baba" at the posho mill hurt her. Next day PW2 reported to the police station; that the complainant was shown two handcuffed men and she picked the accused as the assailant whom PW2 knew as John and that he sometimes came to do casual jobs for her.

10. PW3 Everline Kipsang recalled 1/12/2021 at about 6.00p.m. she had gone to the posho mill where the appellant (John) worked. After finishing, on her way home, she met the complainant going to the posho mill. PW3 confirmed that the appellant was the person working in the posho mill on that evening.

11. PW4 PC Irene Wanyonyi, was the Investigating Officer in this matter. She received a rape report from the complainant who was accompanied by the mother PW4 arrested the appellant at his place of work and that the complainant identified him at the police station. PW4 took possession of the complainant's leso and skirt P.Exh. 4 and 5.

12. PW5 Nelson Lussiola of Kitale County Hospital produced the P3 form that was filled by Dr. Stella Mukiite who was unwell. The Doctor treated the complainant on 2/12/2021 and found that she had sustained injuries to her vagina which had a tear at 6 O'clock with obvious bleeding; that the tear was 6 cm's and was stitched; that the P3 was filled and replicated the same findings.

Defence Case:-

13. In his testimony, the appellant stated that on 31/11/2021, one Mwenesi picked him up and they proceeded to Kanyarkwat to get sand which he loaded on the lorry and took to St. Joseph's Secondary school. He parked the vehicle and went home. On 1/12/2021, he was picked up by Mwenesi again and at Kanyarkwat, his vehicle got a puncture. Later, he loaded the sand and at Kanyarkwat the vehicle developed mechanical problems. They could not get a mechanic and slept there. It was repaired the next day and went for sand again. On 4/12/2024 he transported tomatoes to Makutano and returned home at 5.00p.m. and went to the posho mill after a request was made and while milling the maize, two men and a woman arrived and informed him that he was required at the police station. He was locked up and arraigned in court on 6/12/2021 for an offence he did not know; that one time, the complainant's mother had lost maize and inquired if he is the one who bought it and that police interrogated him about it and that his maize was given to PW2 and he was released; that PW2 had a grudge against him.

14. DW2 Francis Mwenesi Gasemba testified that he transports sand from West Pokot and that he had employed him as a driver; he stated that on 31/11/2021 he was with the appellant from morning till evening as they transported sand from Kanyarkwat but the lorry developed mechanical problems and it was repaired on 2/12/2021 and they took it to complainants mother; that at one time, the complainant's mother had threatened the appellant that she would do something bad to him; that he travelled to Nairobi on 3/12/2021 and later learnt that the appellant was arrested. In cross examination, he said that they delivered sand at PW2's home.

The appellant's submissions;

15. On identification, the appellant submitted that what was done was not a parade in terms of the law regulating parades; that the identification of the appellant was not safe and no description had been given of him.

16. The appellant also submitted that the medical evidence did not demonstrate that there was penetration; that the Doctor never took specimens to link him to the offence; that the evidence was circumstantial but did not meet the standard of admissibility of such evidence and did not point unerringly at him as held in Abang'a and another -V- Republic CRA.32/1990.

17. He also submitted that the sentence contravenes Article 27,28,47,48 & 50 and that it was harsh and excessive in the circumstances.

Respondent's Submissions.

18. The Respondent also filed submissions and cited two issues for consideration. That is, whether the offence was proved beyond reasonable doubt and secondly whether the appellants defence was considered.

19. On penetration, Counsel submitted that PW1 was examined by PW5 on 2/12/2021 who found a tear in the complainant's vagina at 6 O'clock, the tear was 6 cm and it had to be stitched and that there was excessive bleeding from the vagina, which was evidence of forceful penetration which was consistent with PW1's testimony,

20. It was also submitted that the complainant was registered as a person living with disability i.e., mental challenge but she was able to explain that what was done to her was without her consent.

21. On identification; the Respondent submitted that he complainant pointed out the appellant as the person who took her behind the posho mill which evidence was corroborated by PW2 that, that was

what the complainant reported to her. PW3 was also from the posho mill and had just been attended to by the appellant and met the complainant heading to the posho mill.

22. As regards the alibi defence raised by the appellant, Counsel submitted that it should have been pleaded at earliest possible time to enable the prosecution test its truthfulness. Counsel relied on the decision of R.-V- Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145, for that proposition; that the Appellant had an opportunity to cross examine the prosecution witnesses but never alluded to the alibi. Counsel concluded that the alibi defence was an afterthought.

Determination: -

23. I have duly considered the evidence on record and the rival submissions filed. In my considered view, the issues that arise are, whether the offence of rape was committed; whether the appellant was properly identified as the assailant, whether the appellants alibi was considered and lastly whether the sentence is harsh or excessive.

24. The appellant faced a charge of rape contrary to section 3 (1) as read with Section 3(3) of the *Sexual Offences Act*. Section 3 provides as follows;

    Rape (1) A person commits the offence termed rape if—

    (a) he or she intentionally and unlawfully commits an act which causes 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.

    (2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

    (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

25. The ingredients that constitute the offence of rape and which need to be proved are

    1. Proof of penetration;

    2. Positive identification of the culprit;

    3. Proof of lack of consent by the victim.

Penetration:

26. PW1 demonstrated to the court where the assailant inserted his thing i.e (the vagina) which caused her pain and caused her to bleed. PW2 examined PW1 on the same night and escorted her to hospital at Kwanza once PW2 realised that PW1 did not have her periods but was bleeding because she had been injured. PW5's testimony as to the Doctor's findings did corroborate PW1's & 2's testimony that she bleed as a result of the 6 O'clock tear which the Doctor found on PW1's vagina, which was evidence of forced penetration. The appellant submitted that there was no medical evidence to prove penetration. It is trite law that rape or defilement is not proved by DNA or medical evidence. In AUL -V- Republic (2012) eKLR. The Court of Appeal held, "the fact of rape is not proved by a DNA test but by way of evidence,

Also see Fappyton Mutuku Ngui -V- Republic (2014) eKLR and Kassam Ali -V- Republic CRA. 84/2005. Where the court said "..... absence of medical examination to support the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence." I find that the injuries that PW1 suffered are evidence of forceful penile penetration.

Whether the appellant was the perpetrator:

27. No doubt the complainant is a person living with disability i.e. mentally challenged. However, the court examined her before she testified and she did understand the meaning of oath and effect of telling the truth and was allowed to testify after which she was cross examined by the appellant. The complainant's mental disability is not so critical. She was able to explain herself quite well and she did identify the appellant as the perpetrator i.e. the person who works at the posho mill. That is what she told PW2 soon after the incident. I do agree with the appellant that what the police did in identification of the Appellant was not an identification parade and no one said that it was one. In such circumstances the best form of identification should have been through an identification parade but for unknown reason the police did not mount one.

28. The appellant raised an alibis defence in his evidence, that on 1/12/2021 he went to ferry sand from Kanyarkwat in company of DW2 and their vehicle broke down there and they spent the night there.

29. In Karie -V- Republic (1984) KLR the Court of Appeal said

> An alibi raises a specific defence and an accused person who puts forward an alibi in answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable"

30. In Ssentale -V- Uganda (1968) EA 365, Sir Udo Udoma CJ said

> ..... a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains thought on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."
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> In Rep. -V- Julius M'Mamu Mrungu (2018) e KLR, this court had occasion to say "the burden always remains on the prosecution to prove its case against the accused beyond reasonable doubt."

31. In the case of Karanja -V- Republic (1983) KLR 501 the Court held,

> that the burden of proving the falsity if at all, of an accused's defence of alibi lies with the prosecution. The court also held that the court may; in testing the defence of alibi, weigh it against all the evidence adduced to see if the accused's guilt is established beyond reasonable doubt and if an alibi is raised late in the defence, the court should take into account the fact that the alibi defence was put forward at a late stage of the case that it can not be tested by those responsible for investigation and prevent the suggestion that it's an afterthought"

32. In Republic -V- Sukha Singh (Supra) the Eastern African Court of Appeal said,

> If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

33. In this case, the appellant raised his alibi in his defence for the first time. He had an opportunity to cross examine witnesses or even before the Investigating Officer about his whereabouts on 1/12/2021 to 2/12/2021 but did not do so. Whatever the case, the duty still rests on the prosecution to prove the falsity or otherwise of the alibi. PW1 was consistent that she knew the person who raped her as the man who works at the posho mill. She informed her mother about it on the same night. Even if she did know his name, she knew his face and pointed him out from amongst the people who were at the police station. The appellant cannot have been a stranger to the complainant because according to PW2, the appellant at times used to do for her some casual jobs cutting the fence. In his defence the appellant confirmed that he was known to PW2. He also confirmed working at the posho mill.

34. The offence was committed about 6.00p.m. at daytime. The trial court observed that the complainant was able to clearly express herself though mentally challenged and that her demeanor was of a person who knew what she was testifying about. This court cannot depart from the trial court's observations on PW1's demeanor and I find that the alibi did not in any way dislodge the prosecution evidence.

35. Further to the above this alibi was raised twelve (12) months after the appellant took plea. It should have been raised early enough to allow the prosecution an opportunity to inquire into the truthfulness or otherwise of he alibi.

36. Thirdly, I found several inconsistencies in the defence as to the dates when DW1 and DW2 went for sand. It is not clear when DW2 travelled to Nairobi. His evidence was contradictory. Although DW1 said that he disagreed with PW2 over maize, DW2 said that they had disagreed because DW1 had denied PW2 a lift. DW2 was then not clear who told him about the grudge, PW2 or the appellant. Although DW1 said that the sand was a clients, DW2 said they were delivering the sand to PW2. Lastly, the appellant raised the issue of grudge in his defence for the first time. He never disclosed it to the Investigating Officer or in cross examination of PW2. I find the defence to be riddled with inconsistences and therefore not true and an afterthought.

37. I am in agreement with the trial court that the complainant's evidence on identification of the appellant as the assailant to have been credible and reliable.

Proof of consent.

38. The compliant explained vividly what happened to her; that the assailant took her behind the posho mill, pulled up her dress, removed her pant, opened his zip and removed the trouser and hurt her with his thing by inserting in hers -pointing to the vagina. There is no evidence that PW1 consented to this act. This court believes the appellant must have known from his interaction with the mother (PW2) that PW1 was mentally challenged and took advantage of her. Given her condition, PW1 would not consent to such act and there is no evidence that she did. The tear in PW1's genitalia is proof that the appellant was in a hurry to finish the act.

39. From the above findings, this court is satisfied that the offence of rape contrary to section 3(1) of the *Sexual Offences Act* was proved beyond reasonable doubt. I affirm the conviction.

40. The appellant was sentenced to ten (10) years imprisonment. Under section 3 (3) of the *Sexual Offences Act*, upon conviction, one is liable to imprisonment for a term of not less than ten (10) years. The Appellant was given the minimum sentence despite the fact that the offence was aggravated in that he took advantage of a person living with disability. In my view the sentence is very lenient and the court will not interfere.

41. Consequently, the appeal lacks and is dismissed in its entirety

DATED, SIGNED AND DELIVERED ON 16TH DAY OF JULY, 2025

HON. R. WENDOH

JUDGE

Judgement delivered virtually in presence of; -

Mr. Suter for State

Applicant – present virtually

Juma/Hellen- Court Assistants