



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Michubu v Republic (Criminal Appeal E125 of 2023)  
[2025] KEHC 10725 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10725 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E125 OF 2023  
HM NYAGA, J  
JULY 10, 2025**

**BETWEEN**

**LAWI KIMONDO MICHUBU ..... APPELLANT**

**AND**

**REPUBLIC ..... PROSECUTION**

*(Being an appeal from the Judgment, Conviction and sentence of  
P. M. WECHULI -Principal Magistrate, Tigania Law Courts)*

**JUDGMENT**

1. The appellant was charged before the Principal Magistrate's Court at Tigania with the offence of Rape Contrary to Section 3(1) (a) (c) and (3) of the *Sexual Offences Act*. The particulars of the charge are that on the 4<sup>th</sup> day of May, 2022 at [Particulars Withheld] sub-location, Tigania West Sub-county within Meru County intentionally and unknowingly caused his penis to penetrate the vagina of P. K by use of force.
2. The appellant faced an alternative charge of indecent act with an adult, contrary to Section 11(a) of the said Act. The particulars of this charge are that on the same date and place, he intentionally and unlawfully touched the vagina of PK with his penis against her will.
3. The appellant denied the charges.
4. After a full trial, the appellant was convicted and sentenced to ten (10) years imprisonment. His sentence was to commence from 20<sup>th</sup> August, 2023, when his bond was cancelled upon conviction.

**The Appeal**

5. Vide his Petition of Appeal dated 19<sup>th</sup> September, 2023 the appellant set out the following grounds:-



- a. That the accused person was charged with the inter alia offence of Rape Contrary to Section 3 (1) (a) (c) of the *Sexual Offences Act* No. 3 of 2006 before the trial court vide SO. Case No. E10 of 2022.
  - b. That Subsequently, the appellant was convicted and sentenced on 5<sup>th</sup> September, 2023 to serve imprisonment of ten years pursuant to a judgment delivered on 28<sup>th</sup> March, 2023 in Tigania PM's SO Case NO. E10 of 2022 Republic Versus Lewis Kimondo Michubu.
  - c. That the appellant/applicant is dissatisfied with the judgment and the findings of the learned magistrate and has preferred an appeal herein.
  - d. That the appellants appeal has high chances of success as evidence on the grounds set in the annexed petition of appeal.
  - e. That the appellant is apprehensive that the appeal will be rendered nugatory should the bail/bond be denied as he will have served the sentence or a substantial part of it before the appeal is heard and determined.
  - f. That the appellant/applicant is a family man and the sole bread winner who is suffering from Asthma and needs specialized medical attention
  - g. That the trial court, the appellant/applicant was granted bond of KSh. 150,000.00 with one surety of similar amount and did attend court without fail when required so to do.
  - h. That the appellant/applicant is ready and willing to comply with reasonable bail/bond terms to be imposed by the honourable court.
  - i. That the appellant/applicant is not a flight risk and no prejudice will be occasioned on the part of the respondent if this application is allowed.
  - j. That there was no probative value of the evidence which the learned magistrate relied upon to convict the appellant/applicant.
  - k. That appellant is a person of good reputation and standing in the society with a fixed abode in Kathangari village Machege Location.
  - l. That the appellant has all along co-operated with the trial court during the hearing and until judgment and conviction and undertakes to do the same pending the hearing and determination of the appeal.
  - m. That it is in the interest of justice that the application be allowed as prayed.
6. The appellant also filed supplementary grounds of appeal dated 11<sup>th</sup> October, 2024 which are as follows:-
- a. That the learned magistrate erred in law and fact by relying on the testimony of an incompetent witness to convict the appellant.
  - b. That the learned magistrate erred in law and in fact in convicting the appellant based on contradictory evidence.
  - c. That the learned magistrate erred in law and in convicting the appellant based on insufficient medical evidence.
  - d. That the learned magistrate erred in law and in fact in dismissing the appellants defence.



- e. That the learned magistrate erred in law and in fact in shifting the burden of proof on the appellant.
  - f. That the learned magistrate erred in law and in fact in failing to find that the prosecution's case was fatal for failure to call crucial witnesses.
  - g. That the conviction was against the weight of evidence.
7. Directions were given that the appeal be argued by way of written submissions.

### **Appellant's Submissions**

- 8. The appellant submitted that the element of penetration was not proven nor corroborated by medical evidence. That the complainant did not clearly state the time that the alleged penetration took place.
- 9. It is further submitted that the appellant had in his evidence in defence, shown that at the time of the alleged offence, he had left the home of DW2 for whom he was working and gone to pay school fees for his child. That DW2 was categorical that from 10:00 am to 2:00 pm she was with appellant and he never left her sight.
- 10. It was further submitted that the complainant's evidence cannot be believed as it contradicts the evidence of other witnesses especially her mother. In particular it is pointed out that while the complainant stated that she screamed and was rescued by her uncle, her mother said that she was unable to scream.
- 11. It was further submitted that the clothes allegedly found with the complainant were not shown to her as her mother for identification before production by the investigating offices.
- 12. It was further submitted that the learned magistrate erred when she disregarded the evidence of the appellant and his witnesses yet the same was not contradictory as alleged. That the trial magistrate ended up speculating over the evidence adduced.
- 13. The appellant further submitted that the trial court erred in receiving the evidence of the complainant, yet she was adjudged as unfit to testify. That in such circumstances, the witness was incompetent on account of mental illness.
- 14. It was further submitted that the prosecution failed to call crucial witnesses including the uncle who came to her rescue and no explanation was given. Relying on *Bukenya and Others -versus- Uganda (1972) EA 549*, *Patrick Kathurima – versus – Republic (2015)eKLR* and *Edwin Wafula Kenya – versus Republic (2005) eKLR*, the appellant urged the court to find that such absence of crucial witnesses ought to have made the conviction unsafe.

### **Respondent's Submissions**

- 15. The respondent submitted that the victim had to testify through an intermediary due a mental condition and epilepsy. That through the said intermediary, the complainant was able to clearly state what transpired that day. That she knew the appellant very well.
- 16. It was further submitted that penetration was proven by the clinician who examined the complainant. That the clothes worn by the complainant were soiled, corroborating her evidence on where the offence occurred. It was further submitted that the appellant's defence was unable to displace the prosecution case.



17. Lastly it was submitted that should the appellant appeal against the sentence they would pray for enhancement of the same, taking cognizance of the circumstances of the case.

### **Analysis and Determination**

18. Being a first appeal, the duty of this court was as set out in *Okeno -versus- Republic (1972) EA 32*, where it was held 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 the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.”

19. With that in mind I find that the following issues arise for determination:-
- a. Whether the ingredients of the offence of rape were proven.
  - b. Whether the complainant was competent to testify.
  - c. Whether the trial magistrate disregarded the evidence for the appellant in his defence.
20. The evidence tendered in the trial is summarized as hereunder.
21. PW1 was the complainant. She testified through an intermediary due to her health and mental challenges as set out in the psychiatrist’s report dated 14.7.22 that was presented to the trial court.
22. The witness told the court that she knew the appellant since his home is located just before their local shops. That on the material day she was at home when the appellant went thereat, held her and took her to her uncle’s farm. He then placed her on the ground, removed her clothes, lay on her and had sex with her. That the appellant told her not to tell her mum but she did so anyway. Her mum told her that if it happens again she should scream. On cross examination she said that the appellant held her by hand and that she resisted but he pulled her by force. That although the farm is near their home and people would have seen her being raped, there was nobody at home or on the farm that day. However, an uncle found when she had been raped and when the appellant already had left. That she struggled with the appellant and in the process her skirt got torn. She denied the allegation that she had brought similar charges against other people.
23. PW2 was the complainant’s mother. She said that the victim was 21 years old and was epileptic and memory challenged. The witness stated that on the material day, she had gone to look for animal fodder. When she went back home the complainant told her that the appellant had held her by force, taken her to a neighbour’s farm and raped her. That he told her not to tell anyone. Despite that warning from the accused, she informed one Susan of what had happened. Susan in turn told the mother who then went to hear what the complainant was saying. That the complainant knew the appellant well. That the clothes the complainant had on that day were taken to the police station.
24. PW 3 was the Investigating Officer. He narrated how the complainant and the mother went to report this offence. They had with them clothes worn by the victim, which he produced as exhibits. The witness stated further that he visited the scene. That the complainant’s clothes had no signs of blood, but were dirty with sand.
25. PW4 was the clinician. He found that the complainant’s clothes were dirty. The stocking and clothes were torn. There were bruises on the vaginal opening. There was a blood stain noted on her genitalia.



There were numerous epithelial cells which got into the vagina as a result of friction. The hymen was broken and had a small abrasion

26. On cross examination the witness said that the complainant was not wearing any sanitary pads. She had a discharge but no spermatozoa. The hymen wasn't recently broken, and he couldn't determine whether it was her first time to have sex. That the absence of spermatozoa does not mean there was no penetration. He also affirmed that bruises and bleeding on the vaginal wall means that there was forced penetration.
27. PW5 was the assistant chief of the area. He stated that on the material day, he received a report that a girl with special needs had been defiled. He told the mother to take her to hospital. He then went to the appellant's home. His wife told him that he had gone to pay school fees. On his way he met the appellant, arrested him and took him to the police station.
28. The appellant testified as DW1. He stated that on the material day, he woke up at 6:30 am to give his animals fodder. He then saw the complainant in their home at 9:30 am as he passed by on his way to Mama Gatwiri's home where he took tea. He went to pick some materials from 1pm to 2pm when he went to pay school fees for his child. As he came from paying school fees he was arrested.
29. The appellant further stated that due to her mental challenges, the complainant can lie. He alleged that she had even pinned the case on another teacher who went to the chief.
30. DW2 was Grace Kinya, a neighbor to the appellant. Her evidence was that on the material day, at 9:00 am the appellant went to her home to pick books for his child. They then went with him from 1:00 pm to 2:00 pm to pick hardcore materials for construction. He left at 2:00 pm after he was paid. That the complainant also went to her home at 10:00 am. Her home is 50 meters away. On cross examination she said that did not go to the police with this evidence.
31. DW3 was Joseph Mutura. He stated that on the material date, he was constructing a house for DW2. He saw the appellant go to the scene at 10:00 am. DW2 then took an oxcart and they went with the appellant to pick hardcore material. They came late at 1:30 pm. Later he heard that the appellant had raped someone. He confirmed having seen the complainant pass on the road at 2:00 pm.
32. On cross examination he said that he appellant left them to go for an oxcart at his home 200 meters away and stayed away for around 15 minutes.
33. The offence of rape is set out under Section 3 of the *Sexual Offences Act* as follows; -
  - 3.(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.
34. Therefore the prosecution has to prove:-The elements of penetrationThe identity of the perpetratorThe lack of consent by the complainant.



35. The appellant alleged that there was no proof of penetration. Penetration is defined under Section 2 of the Act as follows;

“A partial or complete insertion of the genital/organ of a person into the genital organ of another person”.

36. Penetration in law does not connote brute force. Even the gentlest or slightest contact between the genital/organs would constitute penetration.

37. The complainant was categorical on what the appellant did to her. Her competence to testifying was attacked by the appellant on the ground that the report by the doctor dated 14<sup>th</sup> July, 2022 found her unfit to testify. That may be so, but the same report also found that she had good communication skills. That she was also able to perform chores under supervision. That her speech was said to be coherent. That her thought process was linear, organized and goal oriented. She was oriented in time place and person. From the above, the doctor found her to suffer from a mental disorder.

38. In my opinion, the complainant’s mental illness did not render her incompetent to testify. She indeed testified at length, but through an intermediary.

39. It is apparent that the trial court found the complainant to be a vulnerable witness.

40. The law and procedure on how to deal with a vulnerable witness is set out under Sections 31- 32 of the *Sexual Offences Act*, which provide as follows:-

31.

(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -

- (a) the alleged victim in the proceedings pending before the court;
- (b) a child; or
- (c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of -

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;



- (i) the relationship of the witness to any party to the proceedings;
  - (j) the nature of the subject matter of the evidence; or
  - (k) any other factor the court considers relevant.
- (3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.
- (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -
- (a) allowing such witness to give evidence under the protective cover of a witness protection box;
  - (b) directing that the witness shall give evidence through an intermediary;
  - (c) directing that the proceedings may not take place in open court;
  - (d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
  - (e) any other measure which the court deems just and appropriate.
- (5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.
- (6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.
- (7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -
- (a) convey the general purport of any question to the relevant witness;
  - (b) inform the court at any time that the witness is fatigued or stressed; and
  - (c) request the court for a recess.
- (8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -
- (a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;
  - (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;



- (c) the need to protect the witness's dignity and safety and protect the witness from trauma; and
  - (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.
- (9) The court may, on its own initiative or upon the request of the prosecution, at anytime revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.
- (10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.
- (13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

32.

- (1) The prosecution shall inform a witness who is to give evidence in criminal proceedings in which a person is charged with the alleged commission of a sexual offence, or if such witness is a child, such child, his or her parent or guardian or a person in loco parentis, of the possibility that he or she may be declared a vulnerable witness in terms of section 31 and of the protective measures listed in paragraphs (a) to (e) of section 31(4) prior to such witness commencing his or her testimony at any stage of the proceedings.
- (2) The court shall, prior to hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as contemplated in this section and the court shall note the witness's response on the record of the proceedings, and if the witness indicates that he or she has not been so informed, the court shall ensure that the witness is so informed.

41. I find that, although the trial court did not specifically state so, it correctly applied the law as set out, and in such circumstances, through an intermediary, the complainant was competent to testify.
42. The evidence of the complainant on penetration was duly supported by the medical evidence on record. Thus the element of penetration was proven.
43. The complainant was also to identify the appellant. The offence took place during the day. She gave clear details of what the appellant did to her. Just like the trial court, I find her evidence on identification of the appellant to be credible. She was able to inform her mother the identity of the person who raped her.
44. The law is that the prosecution ought to call the crucial witnesses to prove the case, and in default thereof, an adverse inference ought to be drawn that their evidence would be adverse to the prosecution. That said, the crucial witness is said to be the uncle of the complainant. The complainant stated that the uncle found her when the appellant had already left. It is thus clear that the failure to call that uncle does not really render a blow to the prosecution case.
45. On the question of consent, Section 42 – 43 of the Act provides as follows:-



42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.
- 43.
- (1) An act is intentional and unlawful if it is committed -
    - (a) in any coercive circumstance;
    - (b) under false pretences or by fraudulent means; or
    - (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
  - (2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is -
    - (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
    - (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
    - (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.
  - (3) False pretences or fraudulent means, referred to in subsection (1)(b), include circumstances where a person -
    - (a) in respect of whom an act is being committed, is led to believe that he or she is committing such an act with a particular person who is in fact a different person;
    - (b) in respect of whom an act is being committed, is led to believe that such an act is something other than that act; or
    - (c) intentionally fails to disclose to the person in respect of whom an act is being committed, that he or she is infected by HIV or any other life-threatening sexually transmissible disease.
  - (4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act -
    - (a) asleep;
    - (b) unconscious;
    - (c) in an altered state of consciousness;
    - (d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;
    - (e) mentally impaired; or
    - (f) a child.



37. In Republic versus Oyier (2008 ) eKLR, cited by the trial court, the Court of Appeal underscored the importance of proving lack of concentration of the part of the victim. It held as follows:

“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.

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.

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.”

46. The complainant herein was suffering from a mental illness, thus unable to give consent.

47. Section 44 of the Act provides as follows on presumption of consent. It states as follows;

44.

- (1) If in proceedings for an offence under this Act, it is proved-
  - (a) that any of the circumstances specified in subsection (2) existed; and
  - (b) that the accused person knew that those circumstances existed, the complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.
- (2) The circumstances are that-
  - (a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;
  - (b) any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;
  - (c) the complainant was, and the accused was not, unlawfully detained at the time of the commission of the act;
  - (d) the complainant was asleep or otherwise unconscious at the time of the commission of the act;
  - (e) because of the complainant’s disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;
  - (f) any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the



complainant to be stupefied or overpowered at the time of the commission of the act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the act is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

48. From the above provisions, it follows that any sexual activity with her would amount to rape, by operation of the law.
49. The appellant also submitted that his defence was not considered. From the court record, it is clear that the trial court duly considered the same, and it arrived at a conclusion that the times raised by the appellant to have been with the defence witnesses still left a window period for him to have had the opportunity to commit the act, which occurred near where he said he was. That is not speculations as alleged.
50. Having considered the evidence, I am satisfied that the case against the appellant was sufficiently proven and, I dismiss the appeal on his conviction.
51. The appellant did not appeal against the sentence so I choose not to address the same.
52. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 10<sup>TH</sup> DAY OF JULY 2025.**

**H. M. NYAGA,  
JUDGE.**

