Obara v Republic (Criminal Appeal E036 of 2024)
[2025] KEHC 10096 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10096 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E036 OF 2024

DK KEMEI, J

JULY 11, 2025

BETWEEN

WALTER OCHIENG OBARA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. J. A. Ayieta (RM) in Madiany PM's Court Criminal Case No. E022 of 2023 dated 15/7/2024)

JUDGMENT

1. The appeal arises from the conviction and sentence of Hon. J. A. Ayieta (RM) in Madiany PM's Criminal Case No. E022/2023 dated 15/7/2024 wherein the Appellant herein Walter Ochieng Obara was sentenced to serve fifteen years' imprisonment for the offence of rape contrary to Section 3 (a) (b) as read with section 3 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 27th day of August 2023 at around 1400 hours at [particulars withheld] Village, Lieta Sub location in Rarieda Sub County within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of L.A without her consent. The Appellant was also charged with an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No. 3 of 2006 in that on the said date at the same place and time, he intentionally caused his penis to touch the vagina of L.A with his penis against her will.

2. Aggrieved by the said conviction and sentence, the Appellant filed his memorandum of appeal dated 23/7/2024 wherein he raised the following grounds of appeal:

    i. The learned trial magistrate erred in fact and in law by setting out and relying on an incomplete set of ingredient of what in her, respectful view, constituted the offence of rape contrary to the provisions of Section 3(1) (a) (b) as read with (3) of the *Sexual Offences Act* No. 3 of 2006, under which the Appellant was charged, and proceeded to convict and ultimately sentenced

the Appellant for the said offence on that erroneous basis, without regard to the other crucial ingredient of proof of intentional and unlawful penetration by the Appellant or anyone else, or otherwise proof of "lack of consent to penetration or such consent was obtained by force or by means of threats or intimidation of any kind and that the appellant was the perpetrator of the act, as set out in Section 3(1) (a) (b) and (c) as read with (3) of the *Sexual Offences Act* No. 3 of 2006 with the result that he reached an erroneous finding that the charge was proved.

ii. The learned trial magistrate erred in fact and in law by failing to appreciate that the evidence of the alleged rape by the Complainant, was a mere unsubstantiated hearsay allegation in whose testimony, both in chief and in cross examination alleged that she had gone to the accused's shop which is 300 metres from their home to buy soap where she found the accused seated outside his house. She further avers that the accused informed her that the soap was in his house and that she went and stood by the door and that the accused pulled her inside and locked the door and did not inform anyone of what transpired that the soap was in his house and that she went and stood by the door and that the accused pulled her inside and locked the door and proceeded to rape her after which the complainant went home and did not inform anyone of what transpired. Being that the accused lived with people some of which were his customers, no person came forward to have seen the two together nor heard any commotion or screams, and yet no such person or customer was either identified or called to testify nor did see the accused persons pull her into the house, nor otherwise was any evidence led in court to show any evidence of rape in court to demonstrate the alleged offence, and in addition neither the Complainant nor the other witnesses including investigating officer, PW4, could account for how the said alleged rape occurred.

iii. The learned trial magistrate erred in law and in fact by convicting the Appellant on the basis of the above state of evidence, without appreciating or otherwise realizing that unless there is proof of penetration, the issue of who could have caused the penetration or whether the sexual act was consensual within the meaning of Section 3(1) (a) (b) and (c) as read with section 3 of the *Sexual Offences Act* No. 3 of 2006 for purposes of establishing the offence of rape did not arise as no such evidence could arise if there was nothing proved to show the offence of rape which could be implied on anyone to have committed it.

iv. That the learned magistrate erred in fact and in law by relying on the mere unsubstantiated hearsay allegation by PW1, especially after the Complainant got sick and was taken to hospital where she tested positive and accused the Appellant to have raped her. There was possibility that the Complainant could have had intimacy with another different person prior to or after the date she alleged to have been raped by the accused person. It is true that the accused tested positive for pregnancy on 27/9/2023. However, there is no evidence linking the accused to the pregnancy as no such evidence was availed in court. That she did not take the clothing that she had worn on the date of the alleged incident and the Exhibit PMFI 3 further indicate that the complainant was presented for examination two months after the incident which by itself is a long time, and which alone cannot prove the ingredients of rape, and the court erred in reaching a wrongdoing on the part of Appellant linking him to the alleged offence.

v. That the learned magistrate erred in law and in fact, by reaching a conviction against the Appellant for the offence charged on the basis of unsubstantiated hearsay allegations by PW1, without any evidence to back those allegations, with the result that he reached the conviction on the basis of proof on a balance of probability rather than beyond reasonable doubt, as required by law, and in the process the case the burden of proof on the Appellant to prove that he had not intentionally and unlawfully penetrated the vagina of the complainant without her

consent, yet the evidence on record on the part of the prosecution was in such a deplorable state in which not even the allegations by the Complainant were never corroborated nor was there any evidence of DNA or forensic test done on the clothes or the unborn baby to prove that the accused was the one responsible for the pregnancy, in the first place. The evidential burden had not shifted at all in the circumstances.

vi. That the learned trial magistrate erred in fact and in law by placing the Appellant to his defence at the close of the prosecution's case when there was no valid or otherwise any legitimate basis for doing so, in the face of unsubstantiated hearsay allegations, of a nature which could not have supported a conviction of the offence should the Appellant have opted to remain silent in defence, thus rendering the entire trial a contravention of the Appellant's constitutional right to a fair trial.

vii. The learned trial magistrate erred in fact by reaching a conviction of guilt against the Appellant in circumstances where the evidence was against the weight of the evidence on record.

Reasons wherefore the Appellant prays that the appeal be allowed and the whole judgement, conviction and sentence imposed on the Appellant be set aside and substituted with an order of acquittal.

3. This being a first appeal, the duty of this court is well spelt out namely to re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusions as to whether or not to uphold the decision of the trial court. See Okeno vs R [1972] EA 32.

4. YAN (PW1) was the complainant. She stated that on the material date she had gone to the Appellant's shop to buy soap but that the Appellant who was then seated outside his house directed her to go to to his house and fetch the soap and that on reaching there, he pulled her into the house and raped her. That she later went home and prepared to proceed to school without informing her parents as she was scared of them. That on 27/9/2023 she got sick and had to visit the hospital where a pregnancy test was conducted which turned positive and it was then that she implicated the Appellant herein as the person who had impregnated her. She identified the treatment notes (Pmfi-1) and P3 form (Pmfi-2), PRC form (Pmfi-3) and Laboratory request form (Pmfi-4). She later left home and went to stay with her aunt in Nakuru. That while in Nakuru, she got sick and miscarried the unborn child.

On cross-examination, she stated inter alia; that she hid the issue of the incident from her sister and mother; that she did not resist when the Appellant pulled her into his house; that she did not scream during the ordeal; that the Appellant once informed her that she was pretty and could marry her; that she did not avail treatment notes from Nakuru after being hospitalized and where she miscarried; that she had to tell her parents what had happened after she tested positive for pregnancy; that the Appellant forced her to have sex with him.

5. ANA (PW2) testified that on the material date, she had gone to church and came back but did not find the complainant as she had gone back to school. That on 27/9/2023, she received a call from the complainant's school that she was sick. That she went and picked her up and took her to hospital where she was tested and found to be pregnant. That she confronted her and who claimed that the Appellant herein had raped her when she had gone to his house to buy soap. That she arranged for the complainant to go and stay with her aunt in Nakuru where she got sick and hospitalized after she bled and miscarried.

6. Wambia Winnie (PW3) testified that she is a clinical officer based at Madiany sub County Hospital. That she examined the complainant on 2/10/2023 and noted that the hymen was not intact and a pregnancy test was positive and that a high vaginal swab revealed epithelial cells. That the patient

was advised to continue with treatment and ante-natal clinic. She produced the P3 form, PRC form, treatment notes and Lab report as exhibits.

On cross-examination, she stated inter alia; that the complainant tested for pregnancy; that she could not tell whether the victim delivered the baby; that the victim was born on 2/5/2005.

7. No. 12XX54 Pc Joan Serem (PW4) testified that she interrogated the complainant and who claimed that she had been raped by the Appellant on 27/8/2023 when she had gone to buy soap from his house. That she recorded statements after it had been established that the complainant had been impregnated. That the complainant was then aged 18 years at the time of the alleged rape. That she later learnt that the complainant miscarried and lost the pregnancy.

   On cross-examination, she stated inter alia; that the matter was reported after the complainant got sick on 27/9/2023; that it was the mother of the complainant who lodged the report; that the complainant identified the Appellant as the person who had raped her.

8. The trial court later established that a prima facie case had been made out against the Appellant who was thus placed on his defence. The Appellant opted to tender a sworn testimony.

9. Walter Ochieng Obara (DW1) testified that he knows the complainant as they hail from the same village. That on the 23/8/2023 the complainant visited his shop and bought soap and went away. That he interacted with her for about 2-3 minutes. That he did not rape the complainant as alleged. That his relationship with the complainant was good. That they are villagers and is not aware of any dispute.

   On cross-examination, he stated inter alia; that he knows the complainant and her parents quite well as they are neighbours; that the complainant knocked at his shop; that he gave her service as a shopkeeper; that his three children were at home; that he does not have any grudge with the parents of the complainant; that he does not know the reasons as to why the complainant has accused him; that he has not brought his children to testify as to his whereabouts on the material date.

10. The appeal was canvassed by way of written submissions. It is only counsel for the Appellant who complied.

11. Mr Ojwang Agina, learned counsel for the Appellant, submitted that the Respondent did not prove the essential ingredients of the offence of rape. It was submitted that the complainant's pregnancy could not be attributed to the Appellant as the complainant could have had sex with other persons. It was submitted that no tests were carried out on the foetus of the unborn child and the Appellant so as to connect him with the alleged pregnancy. It was also submitted that the complainant should not be believed as she ought to have even screamed upon being held by the Appellant or even report to her parents soon thereafter. Learned counsel further submitted that the sentence imposed was harsh and excessive.

12. I have considered the evidence tendered before the trial court and the submissions filed. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.

13. Section 3(1)(a)(b) of the Sexual Offences No. 3 of 2006 provides as follows:

   (1) A person commits the offence termed rape if-

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

(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.

14. From the foregoing, the Respondent was therefore under obligation to prove the essential ingredients of the offence namely, penetration, absence of consent and identity of the perpetrator.

15. As regards the aspect of penetration, the complainant testified that the Appellant penetrated her vagina using his penis. The complainant gave a vivid description of how the penetration took place. She stated that the Appellant removed her skirt and underwear and pulled her skirt upwards then inserted his penis into her vagina while fondling her breasts and buttocks and that after he was through, she dressed up and went home. The complainant was later examined at Mama Ann Odede's clinic and then at Madiany Sub-county Hospital. The clinical officer (PW3) testified that the complainant was examined on 2/10/2023 with complaints of abdominal pains for one week. That the hymen was not intact and that a pregnancy test turned positive while a high vaginal swab revealed epithelial cells. That the complainant was advised to continue with medication and ante-natal clinic. That the P3 form, PRC form, treatment notes and Lab request form were produced as exhibits. The said clinical officer further added that the only investigation being conducted was pregnancy which was positive and that no spermatozoa could be seen as the examination was conducted after a month and that she was not sure whether the complainant delivered a baby afterwards. I find the testimonies of the complainant and the clinical officer established that indeed penetration took place. It is instructive that in instances of offences of defilement and rape, the general rule is that such offences can be proved by the oral evidence of a victim of such offences. Further, this position was held by the Court of Appeal in the case of Martin Nyongesa Wanyonyi Vs Republic Criminal Appeal No. 661 of 2010 (Eldoret) when it held 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. The complainant was quite categorical that the Appellant penetrated her vagina and later went to school only later to fall sick and then test positive for pregnancy. Iam satisfied that the Respondent proved the ingredient of penetration beyond any reasonable doubt.

16. As regards the aspect of absence of consent, it was the complainant's evidence that she had been pulled by the Appellant into his house where he raped her. Section 42 of the *Sexual Offences Act* defines consent as '' a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice.'' In the case of Republic Vs Oyier [1965] eKLR the Court of Appeal 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 of 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."

Again in the case of Peter Wanjala Wanyonyi Vs Republic [2021] eKLR, it was held that a woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants.

It was the testimony of the complainant that the Appellant pulled her into his house and held her by the neck and carried her to the bedroom and that she had resisted but that he had overpowered her and subdued her and thus she was unable to scream. However, the evidence of the complainant seemed to

suggest otherwise when she stated that once the Appellant was done, she dressed up and picked the soap and went home and found her father and elder sister but that she did not inform them of what had happened. She also did not inform her mother when she arrived home later in the day. That she went to school the same day without uttering any word to anyone at home about her ordeal in the hands of the Appellant. Iam satisfied that the complainant did give her consent during the alleged sexual intercourse with the Appellant and hence the reason that she did not even raise any alarm or inform her parents about the incident. The matter seem to have gone out of control when the complainant later after a month fell sick and upon being taken to hospital, she tested positive for pregnancy. It was the complainant's mother who lodged the report to the police and hence the case. Iam satisfied that had the pregnancy test turned negative, the case could not have been brought up against the Appellant herein. It is instructive that the complainant admitted that the Appellant had earlier informed her that she was pretty and wished to marry her. This therefore indicates that the two had been secret lovers and thus the reason that the complainant did not raise any complaint immediately upon leaving the Appellant's house on the material date. Iam satisfied that there was consent to the sexual intercourse and that the complainant willingly participated in it. The complainant was pushed by her parents to testify against the Appellant. It is also instructive that the parents of the complainant sent her away to live in Nakuru where she later miscarried the pregnancy. I find that the Respondent did not prove this ingredient beyond any reasonable doubt.

17. As regards the identity of the Appellant as the perpetrator, it is instructive that the Appellant was well known by the complainant and her parents as he used to run a water kiosk in the neighbourhood. Indeed, the Appellant in his defence confirmed that he had known the complainant and her family and that they had no disputes. I find that there was no doubt about the identity of the Appellant by the complainant. In the case of Anjononi & Others Vs Republic [1980] KLR 59 the Court of Appeal held that recognition of an assailant is more satisfactory, more reassuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. Iam satisfied that the Respondent proved this ingredient beyond any reasonable doubt.

18. An analysis of the entire evidence shows that the complainant's conduct right from leaving the Appellant's house left a lot to be desired. During her cross-examination, she stated inter alia; that she went home at 2.45 Pm and that her sister enquired as to why she was late and that she did not answer her; that she did not do anything when the Appellant pulled her; that she did not scream during the rape ordeal; that the Appellant had once informed her that she was pretty and that he could marry her; that after she tested positive for pregnancy, she had to inform her parents of what had transpired. The evidence of the complainant therefore left a lot of doubts regarding her truthfulness and that the trial court should have given the benefit of doubt to the Appellant as it became clear that the complainant could have consented to the sexual intercourse and had put it under wraps only for her to become pregnant one month while in school. The complainant confirmed that upon the pregnancy test turning positive, she had to spill the beans to her parents. It is obvious that Complainant was aware of what she had done with the Appellant in his house and kept it to herself. Her failure to report the incident to her father and sister who were present at the time at home and her mother who came in the evening, left no doubt that she was economical with the truth and therefore was not a truthful witness. Her dalliance with the Appellant over a secret love affair came in the open after the pregnancy test turned positive. The trial court should therefore have held that the Complainant had consented to the sexual intercourse and which therefore negated the charge of rape. Hence, it is my finding that the conviction arrived at by the trial court was unsafe and must be interfered with.

19. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT SIAYA THIS 11TH DAY OF JULY 2025.

D.KEMEI

JUDGE

In the presence of :

Walter Ochieng Obara.......Appellant

Ojwang Ogina....for Appellant

M/s Kerubo........for Respondent

Okumu..........Court Assistant