



**TBM v Republic (Criminal Appeal E065 of 2025)
[2025] KEHC 11495 (KLR) (8 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11495 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL APPEAL E065 OF 2025**

**J WAKIAGA, J
JULY 8, 2025**

BETWEEN

TBM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal
Case No 1369 of 2018 of the Chief Magistrates Court at Makadara)*

JUDGMENT

1. In this appeal, the fact that the appellant and the complainant had known each other, shared their intimate parts and produced a child therefrom, is not in dispute. That this relationship did not last longer than the parties expected is also not disputed going by the evidence on record and as confirmed by the fact that the complainant had obtained , to his disappointment and displeasure child maintenance order in addition to restraining order against the appellant.
2. The disputed facts and which forms the basis of this appeal as well as the trial before the lower court is as to whether notwithstanding the restraining order, the appellant set out on a mission to assault the complainant and in the process raped her or whether this was an action by the complainant to set up the appellant for what reason best left to the imagination of those who shall read this judgment and those who have read the judgement of the lower court , noting that the complainant as they say had an upper hand against the appellant,
3. The appellant was charged with the offence of rape contrary to section 3(1)(a)(c) of the *Sexual Offences Act* no 3 of 2006 , the particulars of which were that on 18th day of February 2017 at Huruma in Mathare with Nairobi County caused his penis to penetrate the vagina of LM by force. He faced an alternative charge of committing an indecent act contrary to section 11(A) of the Act , the particular



of which were that he intentionally and unlawfully touched the vagina of LM with his penis against her will.

4. He was also charged with the second charge of assault causing actual bodily harm contrary to section 251 of the *Penal Code*, the particulars of which were that on the 18th February 2017 he unlawfully assaulted LM thereby causing her actual bodily harm.
5. He pleaded not guilty, was tried and convicted on the two counts of rape and assault and was sentenced to serve five years imprisonment on each count to run concurrently less the period he had been in remand custody.
6. Being aggrieved by the said conviction and sentence, he lodged this appeal at the criminal registry at Milimani and raised the following paraphrased grounds :
 - a. The prosecution case was based on contradictory and uncorroborated evidence which was insufficient to sustain a conviction.
 - b. The trial court shifted the burden of proof to the appellant by alleging that his defence was an afterthought for claiming an alibi defence.
 - c. The court erred by convicting the appellant based on the reason that the trial and the arrest was affected more than one year after the actual date of the incidence
 - d. The trial court disregarded the actual circumstances of the alleged rape including the duration thereof for more than six hours which was inconsonance with the medical report.
 - e. The trial court did not take into account the favourable pre-sentencing report.
 - f. The trial courts judgement was not reasoned on the elements proved.

Submissions

7. Directions were issued on the disposal of this appeal by way of written submissions and on behalf of the appellant, it was submitted that the matter first began as assault only to be amended to include the charge of rape. It was contended that the case was full of inconsistencies and that the trial court convicted the appellant based on the demeanour of the complainant, which she only observed when she was recalled for further cross examination.
8. It was submitted that all the four medical witnesses concurred that there were no injuries or bruises on the complainant's vaginal area. The complainant is was contended only made a report of assault to both PW2 and PW3 and wilfully omitted to tell the first responders that she was raped. It was stated further that the medical reports corroborated the complainant claim of assault.
9. On the defence, it was submitted that in rejecting the alibi defence as an afterthought, the trial court shifted the burden to the appellant and that the prosecution had to prove its case beyond reasonable doubt with any evidential gap raised being in favour of the accused as was stated in *Pius Arap Maina v Republic* [2013] eKLR.
10. On proof of penetration, it was contended that it was only asserted by the complainant and the court and that there was no any other evidence which corroborated the complainant's account as required under section 124 of the *Evidence Act* in support of which the case of *Gordon Omondi Ochieng v R* [2021] KEHC 9392 (KLR) was tendered in which the Court of Appeal stated that "it is true that the court can convict on the basis of a single witness testimony in a sexual offences, if it believes that the victim is telling the truth. That cannot however be the case where there is no conclusive medical or other evidence that there had been penetration"



11. It was contended that the case should have been looked at against the complainant's testimony of the bad blood between her and the appellant as regards breach of promise to marry and the child maintenance dispute and case. It was stated that there was no conclusive evidence that the appellant was at the scene taking account of the evidence of PW4 and the complainants. It was stated that the appellant should have been accorded the benefit of doubt as was stated in *Philip Muiruri Ndirangu v Republic* [2016] eKLR.
12. On sentence, it was contended that the appellant was sentenced to the maximum sentence on count 2 contrary to the holding in *Christopher Ochieng v R* [2018] eKLR.
13. On behalf of the respondent, it was stated that penetration was proved through the testimony of the Complainant Pw1 and that whereas PW5, PW6 and PW8 stated that she had no tears and lacerations, she gave history of sexual assault which was corroborated by PW3 that she found the complainant half dressed lying on bed and could not move. It was stated that for an adult woman the fact of penetration does not necessarily lead to any noticeable lacerations or injuries as was stated in *Dominic Kitema Maluki v Republic* [2015] e KLR and *Kasim Ali v Republic* [2021] eKLR where it was held that the absence of medical report to support the fact of rape is not decisive as the fact that rape cannot be proved by oral evidence of the victim and circumstantial evidence.
14. On identification, it was submitted that PW1 testified that she saw the appellant on the road and she told him to come for a talk during day time. PW4 saw the appellant enter the house of PW1 and that the complainant did not consent to sex having obtained a restraining order against the appellant.
15. On assault, it was submitted that the same was proved by the testimony of PW1 that the appellant hit her with Maasai club which injuries were confirmed by PW5, PW6 and PW8.
16. It was contended that the appellant alibi defence was not raised at the earliest opportunity to afford the prosecution chance to investigate as was stated in *Athumani Salim Athumani v Republic* [2026] e KLR and that DW2 did not corroborate the defence as he was only with the appellant from 1900 to 2000 hours and could not account for other hours. DW3 the appellant's official wife whose testimony was that she was with the appellant throughout the night, under cross examination stated that she could do anything to prevent his imprisonment.

Proceedings

17. This being a first appeal, the appellant is entitled to re-evaluation of the evidence tendered before the trial court by this court, while giving allowance that unlike the trial court, it did not have the advantage of seeing and hearing witnesses see *Okeno v Republic*
18. PW1 stated that she cohabited with the appellant from 2008 to 2015 as a wife and husband and in 2009 a child was born out of the union. On 18th February 2017 she was coming from school at about 9.00pm when she saw the appellant with whom she then had a bad relationship, having obtained a restraining order, blocked his number and filed a child maintenance case which he wanted withdrawn. The appellant then stated that he wanted them to talk but she told him to look for her during day time. It was her evidence that while she was on phone, the appellant followed her and entered with her into her single room house with her. He pushed a clothe inside her mouth and tied her hand using pieces of clothes.
19. The appellant put the radio on high volume, pushed her on bed, removed her trouser, removed his clothes and raped her the whole night and when he was done, he untied her and started beating her with a Maasai rungu on the neck and head, he then removed the clothe in her mouth wiped her vagina, put on her panty and trouser and wrapped her with beddings and left the house.



20. she the shouted for help and a lady responded whom she told that the appellant had hurt her , she requested her to get her house help who came and she was taken to hospital where she was admitted for two weeks. In support thereof, she produced the discharge summery.
21. In cross examination she stated that she was attacked by the appellant at 9.10 pm and confirmed that they had a lot of issues as regard the responsibility toward the child born out of their relationship and that she had obtained a restraining order against the appellant from accessing her house and that report to the police was made on her behalf by her brother. It was her evidence that she had made several complaints against the appellant due to threats from 2015 and in 2016 when he allegedly stole her money from the house.
22. PW2 Robert Muthui Mengi was the watchman on night duty whose evidence was that he saw the appellant live the court at 3 am carrying two bags and shortly thereafter Esther Mueni who was residing at the same plot asked him to call for a taxi to take the complainant to hospital which took them to hospital where she was admitted for one month upon her return she informed him that the appellant had assaulted and raped her. It was his evidence that the appellant was personally known to his as he used to open the gate for him and the complainant.
23. In cross examination he stated that he had worked at the estate for ten years and had mastered the identities of the residents , he confirmed that he was not present when the complainant and the appellant entered into the court that night and that the complainant was carried to the taxi by Mueni and a Mama Fundi. The appellant was known to him as the husband of the complainant.
24. PW3 Esther Mueni Ngotho was working for the complainant but living in her own house within the estate. She was called by a Mama penny who informed her that the complainant was sick and when she went into her house, she found her door open with lights off , she noticed that her neck was swollen, there were tablets scattered on the floor , a jug containing poison and bottle with drugs were on the wet floor, the complainant could not speak. With assistance of a neighbour she took her to the taxi which took her to the hospital where she was admitted for one month and one week.
25. When she inquired for PW1 what had happened, she told her that she did not know what the fight was all about. It was her evidence that the appellant and the complainant used to fight a lot and the appellant eventually moved out. In cross examination, she stated that the appellant was known to her as the husband of PW1 and that she did not find him in the house when she was called but the house was smelling of chemicals and that when she later asked PW1 what had happened to her , she told her that the appellant had assaulted her .
26. PW4 Pauline Mukia Kavuva stated that she used to see the appellant visit the complainant. On the material night, she saw the complainant enter her house whole on phone , the appellant then arrived and shortly she heard a loud volume of the radio until 3.00 am when she heard the complainant calling her for help and when she respondent she found her on bed with things scattered everywhere, her pair of trouser were down to her knee level and the lights were off. She was in pain, weak and neck bent on one side. She assisted in taking her to the hospital and when she visited her the following day, she told her that the appellant had assaulted her.
27. In cross examination she stated that her house was opposite the complainant's. The complainant returned to her house at 9.00pm and the appellant followed her inside and that she heard a loud noise from the complainant's house for the first time that night but did not find the appellant inside. It was her evidence that the complainant could speak and she called PW2 at 4.00pm .
28. PW5 Joseph Kimutai a clinical officer produced a discharge summery confirming that the complainant was admitted on 19th February and discharged on 21st from Murura Nursing Hospital with scalp



hematoma and sprained neck with a history that she was assaulted physically and sexually by her spouse. She was in semi-conscious state , with a swollen neck with no cut or lesions. Vaginal examination showed no tears or lacerations.

29. PW7 (sic) Denis Owino Onyango an analyst examined the exhibits recovered from the scene confirmed that they contained chemical called diazinon and in cross examination confirmed that it is easily available for killing coach roaches. PW 8 (sic) Dr Kamau Mariga produced the p3 form on the complainant who gave a history of assault and rape. She had a cervical collar and the injuries classified as harm. Her genitalia were normal with no tear.
30. PW 9 PC Manara Mu Samosi received a report on the compliant of assault and rape by a former husband. He recorded her statement and visited her house and since the appellant was a military officer , he wrote a letter to DOD headquarters requesting that he present himself to the police station .
31. When put on his defence he stated that he was based at Manda Airbase and that on 17th February 2017 he came to Nairobi from Laikipia and went to Moi airbase where his family lived at 1830 hrs. The following day at 1030 hours he went to Kilgoris classic Matatu Sacco to meet a friend whom he missed, he returned home and stayed indoors until 1900hrs together with Sgt Ogolla until 8 pm. He went to bed at 2145 hours and the following day went to Laikipia base. He confirmed having known the complainant since 2007 but denied going to her house and that they had a child together and when he asked for his birth certificate so as to put him in his medical cover, she refused.
32. It was his evidence that in the year 2016, the complainant went to the children court without notice to him and was ordered to pay kshs 115,000 in child support and that his name was not indicated in the child birth certificate as the father which made him realise that she was dishonest. He stated that he became angry when the complainant got his salary deducted and that he was aware that she had obtained restraining orders against him.
33. DW 2 Ogola Otieno Fredrick stated that on 18th February 2017 he joined the appellant at 700pm at the tap to fetch water unto 2000 hours when they parted way , DW3 Rose Nyabate Birundu stated that she was with the appellant and went to bed at 9.45 pm until morning at 6 am when he left for work. In cross examination she stated that she did not want the appellant to go to jail.
34. DW4 Dr Magare Gikenyi stated that if one was hit with a Maasai rungu on the occipital area it would cause fracture and that epithelial cells are always found wherever there is sexual intercourse and that there must always be bruises and the absence thereof means that there was no rape

Determination

35. From the petition of appeal, submissions and the record thereof , I have identified the following issues for determination in this appeal :
 - A. Whether the prosecution case was proved beyond reasonable doubt.
 - B. Whether the appellant was positively identified
 - C. Whether the burden of proof was shifted to the appellant
 - D. Whether the sentence was harsh
 - E. What appropriate order should the court give.
36. The two charges of assault and rape have different ingredients . For the prosecution to succeed on the charge of rape, the prosecution must prove that the appellant penetrated unlawfully the complainant without her consent or that the said consent was obtained by force or threat or intimidation.



37. In this cause, the fact that the complainant did not consent can be drawn from the fact that she had obtained a restraining order against the appellant from going into her house and from her evidence on record that when she met the appellant and the same suggested that they meet for a talk, she advised him to look for her during the day and therefore the fact that the appellant found himself into her house as confirmed by pw2 who saw him leave the house at 3 am , the fact that they were in a previous sexual relationship notwithstanding/
38. On the identification of the appellant, the same was known to the complainant , they had shared their good times together before the bad times set in , PW 4 put the appellant and the complainant together in her house, she knew the appellant who used to live with the complainant and she had been their neighbour , PW2 identified the appellant having seen him leave the house at 3am .
39. The appellant I response raised an alibi defence to the effect that he was at home throughout the night which the court dismissed based on the evidence of PW4 which placed him at the house of the complainant and having looked at the evidence of his two witnesses, I find no fault with the trial courts holding on the issue of identification of the appellant, which was by recognition and find that it was safe and free from error.
40. On the issue of penetration, the complainant gave a graphic and harrowing account of what she underwent in the hands of the appellant , she gave the history of sexual assault to the doctors who saw her as confirmed by PW 5 , PW6 and PW8 all confirmed that she gave a history of physical and sexual assault and in dismissing the appellants contention that there were no visible lacerations seen in her vagina , the court relied on the case of *Domnic Kitema Maluki* (supre) where the court rightly held that for an adult woman, the fact of penetration does not necessarily lead to noticeable lacerations or injuries in the genital organ.
41. I therefore find no fault with the trial courts holding that penetration was proved beyond reasonable doubt and dismiss the appellants submissions thereon.
42. The appellant raised the issue of the issue of the bad blood between the appellant and the complainant which must have led to the same being framed up as she was disappointed with the same having wasted her prime eight years , however this was not raised by the appellant during trial either by way of cross examination and or in his evidence in chief in which he only contended that he found the complainant to be dishonest and that it is him who became angry when the complainant had money deducted from the payslip.
43. I take the view that the appellant was a cash cow to the appellant and that she would not have made any false accusation to get him out of the way for she had succeeded in having his salary attached for the maintenance of a child allegedly born out of their romantic escapades and further to his disappointment obtained restraining orders against him. The question which the trial court did not answer was whether the appellant was on a revenge mission or the same was behaving as an investor who thought that since his salary was being deducted to go toward the complainant, he was entitle to sex in return?
44. Was the fact that the appellant was arrested one year after the incidence fatal to the prosecution case? The court answered this in the following terms “ the incidence occurred on 18th February 2017 but the accused was arrested on 26th June 2018, over a year later. It would appear that the accused was being shielded from any action against him and was operating in impunity. It took the intervention of the Gender Commission and Human Right commission to have him arrested “



45. I find this line of submission by the appellant to be very unfortunate, as it was the complainant's evidence that she made a report and no action was taken forcing her to make the complainant to the two Commissions. The late prosecution of the appellant was not fatal to the case.
46. From what I have stated herein I find and hold that the conviction of the appellant on the first count of rape was safe and free from error and therefore dismiss this ground of appeal and affirm the trial court finding thereon.
47. On the charge of assault the trial court relied on the medical evidence tendered before her and dismissed the counter evidence by Dr. Magare on the basis that he did not see the complainant. In light of the medical reports thereon I find no fault in the trial courts finding herein and dismiss the appellants contention that being a military man by training if he hit the complainant with a rungu as stated then the injuries would not have been minor as mere speculation.
48. I therefore find and hold that the second count was proved beyond reasonable doubt by affirming the trial courts finding thereon.
49. On the issue of sentence , it is trite law that the same remains at the discretion of the trial court and will only be interfered with by the appellate court if and only if the court acted on wrong principles and or if the same is too harsh and excessive. The appellants contention is that the court based its decision on the mandatory nature of the sentences which based on the Muruatetu 1 jurisprudence is unconstitutional, however the Supreme Court has reinstated the Constitutionality of those sentences and I will not interferer with the same .
50. In the final analysis I find no merit on the appeal herein both on sentence and conviction which I hereby dismiss. The appellant is entitled to right of appeal.

DATED SIGNED AND DELIVERED THIS 8th DAY OF JULY 2025

J. WAKIAGA

JUDGE

In the presence of;

Ms. Kariuki – Prosecutor

Irene – Court Assistant

Ms. Biyaki – Counsel for the appellant

