



REPUBLIC OF KENYA



**Mutala v Republic (Criminal Appeal E066 of 2022)  
[2024] KEHC 36 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 36 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E066 OF 2022  
GMA DULU, J  
JANUARY 11, 2024**

**BETWEEN**

**STEPHEN MUTUA MUTALA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From conviction and sentence in Sexual Offence Case No. E039 of 2021 at  
Kilungu Law Court delivered on 11th March 2022 by Hon. E. M. Muiru (PM))*

**JUDGMENT**

1. The appellant was charged with three (3) counts. Count I was for attempted rape contrary to Section 4 of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 17<sup>th</sup> November 2021 at [Particulars [particulars withheld] village Kikoko [particulars withheld] in Kilungu Sub-county within Makueni County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of E.M.M without her consent.
2. In the alternative to Count I, he was charged with committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same place intentionally touched the breasts of E.M.M with his hands against her will.
3. Under Count II, he was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of offence were that on the same date and at the same place assaulted EMM and thereby occasioning her actual bodily harm.
4. County III was for entering a dwelling house with intent to commit a felony contrary to Section 305(2) of the *Penal Code*, the particulars of which being that on the same date and place at around 0115hours entered in the dwelling house of EMM with intent to commit a felony therein.



5. He denied all the charges. After a full trial, he was acquitted of all other counts and convicted of count I for attempted rape, and sentenced to five (5) years imprisonment.
6. Dissatisfied with the decision of the trial court the appellant has come to this court on appeal, and relied on the following grounds of appeal:-
  1. The identification which was given by the prosecution was not proved beyond any reasonable doubts.
  2. The items of exhibits used by the prosecution were not brought before court.
  3. The crime was fabricated by the complainant.
  4. That he humbly prays for any other option from the court.
  5. That he would appreciate any option (court) deems fit for this case.
7. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by both the appellant and the Director of Public Prosecutions.
8. This is a first appeal. As a first appellate court, I am required to evaluate all the evidence on record, and come to my own independent conclusions and inferences – see *Okeno = Versus = Republic* (1972) EA 32.
9. I have evaluated the evidence on record. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses.
10. This appeal will succeed. The first reason is that the evidence of PW1 the complainant, does not support the charge of attempted rape, but an attempt to take away from her funds given to the elderly. In this regard, PW1 did not testify to any attempt by the assailant to remove her clothes or to remove his clothes. In addition PW1 stated that the assailant wanted the funds given to the elderly.
11. In my view therefore, the mere fact of wrestling a woman, and lying on top of her during the struggle is not sufficient to prove an attempt to rape. For there to be an attempt to rape, there should be an explicit act showing an intention to penetrate the victim sexually, which was not the case herein.
12. The second reason why the appeal will succeed is with regard to identification. From the evidence on record, neither the appellant nor his cap and shoes and alcohol container, were identified by PW1 as belonging to the appellant.
13. The witnesses who later identified the cap, shoes and alcohol container left in that house as belonging to the appellant, were all close relatives of PW1, and no independent witness confirmed that identity. Thus, I find that the identity of the appellant as the culprit was based on evidence that was tainted with reasonable doubt.
14. Even if I am wrong on the identity of the appellant as the culprit, this court cannot still convict on the offence of assault causing actual bodily harm, as the trial court found that charge to be defective.
15. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JANUARY 2024 AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of:-



Nusura – Court Assistant

Appellant

Ms. Omolo for State

