



**Kobia v Director of Public Prosecutions (Criminal Appeal
E053 of 2022) [2024] KEHC 2861 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E053 OF 2022
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

PHINEUS KOBIA APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

Background

1. Phineus Kobia (Appellant) was charged with gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 (the Act). Appellant denied the offence and the matter proceeded to full trial

Trial

2. Complainant stated that on 13th April, 2021, she was planting beans in her farm when at about 11.00 am she took a rest under a tree. That it was while there that three boys s did not know that were herding goats came by her. That they engaged her in small talks after which one of them went away with the goats and two remained who then set upon her and raped her in turns after which they ran away.
3. Edwin Mutembei stated he had left Appellant talking to a lady that was sitted on a tree and went to herd goats. Later in the evening of the same day, he was arrested together with the Appellant but he was subsequently released and made a prosecution witness whereas Appellant was charged.
4. Geoffrey M'Imati M'Turanie found complainant crying and upon being shown the direction that the boys that had raped her took followed them and arrested Appellant.
5. Upon examination by a clinical officer on 15th April, 2021 which was two days from the material date, complainant who was pregnant was found with a soft tissue injury on the left leg and an old scar of the hymen and foul-smelling discharge and on that basis a conclusion was made that she had been raped.



6. Appellant denied the offence and stated he was framed because of a land dispute between his parents and complainant.
7. At the close of the trial, the learned trial magistrate by a judgment dated 31st January, 2022 found the prosecution case proved. Appellant was sentenced to serve 25 years imprisonment.

The Appeal

8. Dissatisfied with the conviction and sentence, Appellant lodged the instant Appeal mainly challenging the conviction and sentence on grounds that:
 - i. Penetration was not proved
 - ii. The sentence was harsh

Analysis and determination

9. I have considered the appeal in the light of the evidence on record and the amended grounds and submissions filed by the Appellant on 16th February, 2024. I have also considered the oral submission made on behalf of the DPP by Ms. Rita, prosecution counsel. Counsel reiterated that the case against the Appellant had been proved and that the sentence on him was lawful.
10. I have considered the appeal and I shall deal with each of the grounds of appeal as hereunder.

Whether penetration was proved

11. Upon examination two days after the alleged offence was committed, the clinical officer found an old scar on complainant's hymen with foul smelling discharge and a soft tissue injury on the leg on the basis of which he concluded that complainant was raped.
12. Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”
13. Complainant was pregnant at the time of the incident and the old hymenal scar must have been from a previous sexual encounter. I have considered the conclusion by the clinical officer and I find that he failed to explain the basis on which he concluded complainant had been raped whereas vaginal evidence examination did not reveal evidence of such recent penetration.
14. The standard of proof in criminal case such as this one must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on Article 50(2) (a) of *the Constitution* which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.
15. English case law is also replete with decisions which elucidated this standard of proof in a criminal case. Lord Denning in the case of *Miller vs. Minister of Pensions (1942) A.C.* stated as follows: -

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which



can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

16. The degree of proof in criminal cases was properly established in *Bakare vs. State* 1985 2NWLR, where Lord Oputa of the Supreme Court of Nigeria stated as follows at page 465: -

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.

17. Penetration is an essential fact which the clinical officer’s evidence failed to establish. From the foregoing, I find that the conclusion that complainant had been raped was not proved beyond any reasonable doubt and the benefit of doubt ought to have been given to the Appellant.
18. Section 10 of the Act provides that Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.
19. Had the appeal not succeeded, I would have had no reason to upset the sentence for the reason that it would have been lawful under that Act.
20. From the foregoing analysis, I find that the conviction and sentence imposed on Appellant were unsafe.
21. In the end, this appeal succeeds and it is hereby ordered:
1. The conviction is hereby quashed
 2. The sentence is set aside
 3. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty.

DELIVERED AT MERU THIS 14th DAY OF March 2024

WAMAE. T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Kinoti/Munene

Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

