



**Makeba v Republic (Criminal Appeal E021 of 2019)  
[2024] KEHC 2327 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2327 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E021 OF 2019  
SM GITHINJI, J  
MARCH 7, 2024**

**BETWEEN**

**KAHINDI KARISA MAKEBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in Criminal Case  
No.2 of 2018 of the Senior Principal Magistrate’s Court at Garsen  
Before Hon E.Kadima – SRM delivered on 18th December, 2018)*

**JUDGMENT**

- 1 Kahindi Karisa Makeba was charged in the lower court with the offence of Rape, contrary to section 3 (1) (a), b (3) of the [Sexual Offences Act](#) No.3 of 2006.
- 2 The particulars of this offence being that on the 22<sup>nd</sup> day of December, 2017 at (particulars withheld) in (particulars withheld) Sub-County within Tana River County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of Sm without her consent.
- 3 The appellant as well faced an alternative count of committing an indecent Act with an adult, contrary to section 11 (A) of the [Sexual Offences Act](#) No.3 of 2006.
- 4 The particulars of this offence are that on the 2<sup>nd</sup> day of December, 2017 at (particulars withheld) in (particulars withheld) Sub-County within Tana River County, the appellant intentionally touched the vagina of SM with his penis against her will.
- 5 The prosecution case is that at the time of the alleged offence, that is on 22/12/2017, the complainant in this case who was born deaf and dumb, was aged 21 years. She was living with her parents and other siblings at (particulars withheld) in (particulars withheld) Sub – County. Given her challenge, she did not attend school. She could however communicate using basic sign language.



- 6 On 22/12/2017 PW-1 who is the mother to the complainant left her at home with other siblings in the morning. She went to work in the farm where she was employed. While she was away, the appellant went to her home on a motor cycle. PW-2 a sister to the complainant was at home and saw him. She knew him as she referred to him by name as Kahindi. He stopped and urged the complainant to board the motor cycle. The complainant boarded and it's alleged they went to Msurugani. When PW-1 returned home the complainant had not. She asked PW-2 where the complainant was. PW-2 reported that she had gone to make her hair at about 10.00am. She never got home that day. She returned the following day at around 10.00am. PW-2 asked her what transpired and she said Kahindi Makeba had sex with her. He had dropped her by the road side to walk home alone. According to PW-1, when the complainant returned she had bruises on her thighs and a swollen red left eye. PW-2 on cross-examination indicated she also had a bleeding right shoulder joint. She was in a blue skirt and orange T-shirt.
- 7 The complainant told her mother that a boda boda man called Karisa, went for her and took her away to where he had sex with her. The mother reported the incident at Hurara Police Station. PW-7 investigated the case. They arrested three suspects, inclusive of the appellant herein. As they placed them in the vehicle, the complainant and her mother arrived. The complainant made persistent noise pointing at the appellant till she was restrained. On 26/12/2017 PW-5 examined the complainant. The medical report shows that she was not pregnant. High vagina swab was done and spermatozoa were noted and epithelial cells. Her clothes were examined. They were not torn but had dry stain on the inner part. The clinical officer concluded that it was highly likely that the complainant had taken part in a sexual activity.
- 8 Before closure of their case, the prosecution applied to have the complainant declared a vulnerable witness in accordance to provisions of section 31 (4) of the *Sexual Offences Act*. The court allowed the application and dispensed with her attendance.
- 9 The appellant in his defence stated that he is a boda boda rider. On 22/12/2017 he woke up early to look for passengers in [Particulars Withheld]. He found two passengers and ferried them to vibao viwili. He was called to take charcoal from [Particulars Withheld] but postponed the job to the following day. He went home and as he was having dinner, he was called by Mzee wa Mbaao. It was alleged he had gone with a neighbouring child. On 24/12/2017 Mzee wa Mtaa called him on the very same issue but urged him to go on with his work.
- 10 On 28/12/2018 he was arrested while on the way to deliver alcohol to a client. He was taken to Hurara Police Station. Later a woman and a girl appeared. The woman claimed the appellant is the one who went with her daughter and raped her in the bush and later in his house. The appellant was called to resolve the issue out of court but he declined as allegations were serious. He denied the offence.
- 11 The appellant called his wife as a witness who said on 22/12/2017 they had dinner together and later the appellant was called by Mzee wa Mtaa to whom he responded that he had no fuel.
- 12 The trial court evaluated the evidence and found the main charge proved against the appellant beyond reasonable doubt. He was convicted of it and sentenced to serve 15 years in prison.
- 13 The appellant dissatisfied with the said conviction and sentence appealed to this court on the following grounds; -
  1. The age of the complainant was not proved.
  2. Prosecution case is marred with contradictions and invariances.
  3. Prosecution failed to prove the offence beyond reasonable doubt.



4. His defence was not properly weighed against the prosecution case.
- 14 I have re-evaluated the charge, evidence adduced, judgment and sentence meted, grounds of the appeal and submissions filed.
- 15 Section 3 (1) of the *Sexual Offences Act* indicates that 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.
- 16 It therefore follows as it was rightly held in Criminal Appeal No.E013 of 2021 of *Nicholas Kiprotich Rono- v-Republic*[2022]eklr that in a charge of rape the prosecution need establish the following beyond reasonable doubt.
1. The accused intentionally and unlawfully penetrated with his genital organs the genital organs of the victim.
  2. The victim did not consent to the act or did consent out of threats or intimidation.
  3. The accused is the real culprit.
- 17 The offence of rape involves a victim who is an adult, that is over 18 years. The apparent age of the victim in this case is given as 21 years. Her medical documents read so and the issue was not disputed during trial. If anything it is to the advantage of an accused where the victim is held as an adult rather than a child as defilement carries stiffer sentences, and a possible defence of consent is absent. In this case I therefore conclude that the victim was an adult.
- 18 The complainant given her challenge, that she is deaf and dumb, was declared a vulnerable witness and did not offer evidence. No intermediary was appointed to assist her give evidence and her mother simply gave her own evidence. The evidence of PW-2 shows that it's the appellant who picked the victim and went away with her. The victim was away overnight and when she returned the following day there was physical evidence that she had been forced into having sex. She had injuries on her thighs, a swollen, red left eye and her entire body was tender. PW-2 also disclosed that her right shoulder joint was bleeding. The evidence of PW-5 and the medical reports produced shows that she had been penetrated. High vaginal swab done revealed presence of spermatozoa and epithelial cells. This is evidence enough that her genital organs were penetrated by genital organs of a male.
- 19 The appellant is the one who went with her. He did not get her back and in his defence he just denied it. He does not account for the entire period he was with her. The evidence of PW-1, PW2 and PW-7 shows the victim was able to point at the appellant as the real culprit.
20. The appellant's defence is of mere denial. The witnesses had no cause to fix him. The defence offers no challenge at all on the truth and the credibility of the prosecution case. It was therefore rightly dismissed. Having found so, I do conclude that the conviction in this case was proper.
21. On sentence, the 15 years' imprisonment is lawful. The appellant took advantage of the condition of the victim to commit a serious offence against her violently and for many hours. He endangered her by having unprotected sex. He deserves no lesser sentence.
22. The bottom line is that the appeal lacks merit and is hereby dismissed.



**DATED, SIGNED AND DELIVERED virtually AT MALINDI THIS 7<sup>TH</sup> DAY OF MARCH, 2024**

.....

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

1. Ms Mkongo for the State
2. Appellant present virtually

