



REPUBLIC OF KENYA



**Director of Public Prosecution v Murunga (Criminal Appeal
E031 of 2023) [2024] KEHC 7244 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 7244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E031 OF 2023**

REA OUGO, J

MAY 23, 2024

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPELLANT

AND

WYCLIFFE MURUNGA RESPONDENT

*(Being an appeal from the conviction and sentence arising from the judgment delivered
by Principal Magistrate P.Y Kulecho on 11th May 2023 at Webuye Law Courts.)*

JUDGMENT

1. This appeal by the prosecution was filed following the acquittal of Wycliffe Murunga, the respondent herein. The respondent at the subordinate court faced 2 charges:

Count I: Rape Contrary to section 3 (1) (a) (b) (3) of the [Sexual Offences Act](#) No. 3 of 2006.

Particulars of the offence: The respondent on the 27th day of July 2019 in Bungoma East sub-county within Bungoma County, intentionally and unlawfully caused his penis to penetrate into the vagina of SA, without her consent.

Alternative charge: Committing indecent act contrary to section 11 (1) of the [Sexual Offences Act](#) No 3 of 2006

Particulars of the offence: The respondent on the 27th day of July 2019 in Bungoma East sub-county within Bungoma County, unlawfully rubbed his penis against the vagina of SA.

Count II: Assault causing actual bodily harm contrary to section 251 of the [Penal Code](#)

Particulars of the offence: The respondent on the 27th day of July 2019 in Bungoma East sub-county within Bungoma County, unlawfully assaulted SA thereby occasioning her actual bodily harm.



2. The prosecution relied on the evidence of 4 witnesses and the respondent called 2 witnesses.
3. The trial magistrate upon considering the evidence on record, acquitted the respondent of all charges. The appellant's appeal dated 24th May 2023 is premised on the following grounds:
 1. The learned trial magistrate erred in law in coming to the conclusion that the prosecution had not proved their case against the respondent beyond any reasonable doubt.
 2. The learned trial magistrate fell into an error of law when she based her acquittal of the accused on the fact that there was no proper identification of the accused when indeed the accused had been properly identified by the prosecution witnesses by voice and by facial recognition.
 3. The learned trial magistrate erred in law when she held that there was no lighting and that it was dark outside when to the contrary the prosecution witnesses testified that there was proper lighting.
 4. The learned trial magistrate erred in law by failing to properly analyze the evidence and come to the only logical conclusion under the circumstances and convict the respondent of all the charges that he faced.
 5. The learned trial magistrate erred in law and in fact in failing to hold that the complainant was raped when there was overwhelming evidence in support of the charge of rape.
 6. The learned trial magistrate erred in law and fact by failing to convict the respondent on the charge of assault when there was overwhelming evidence that proved the respondent assaulted the complainant.
 7. The learned trial magistrate erred in law and fact by failing to hold that the evidence by the prosecution was not shaken by the respondent's evidence that was full of contradiction.
 8. The learned trial magistrate erred in law and fact by failing to hold that the respondent was well known to the complainant and were very close neighbours when there was overwhelming evidence to the contrary.
 9. The learned trial magistrate erred in law and fact when she held that there were inconsistencies in the testimony of the complainant when there were no inconsistencies and if there were any inconsistencies, the same were minor as to affect the overwhelming evidence that was there against the respondent.
 10. The learned trial magistrate erred in law and fact when she failed to hold that the accused never called crucial witnesses to corroborate his testimony.
 11. The learned trial magistrate was generally biased against the appellant.
4. My duty, as the first appellate court, is to examine, analyze and evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In *Okeno v. Republic* [1972] EA 32, the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was



some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post* [1958] E.A 424."

5. SNA (PW1) testified that on 27/7/2019 she was from the toilet at 8:00 p.m. and saw the respondent who was his neighbor. She testified that there were security lights. The respondent suddenly grabbed her by holding her mouth and neck, wrestled her, and swept her to the ground. He then removed a rungu and hit her causing her to lose consciousness. PW1 testified that when she regained consciousness, she found all her clothes torn. She recalled that when the respondent wrestled her, her son JO (PW2) came out of the house but the respondent threatened him and he went back to the house. On cross-examination, she testified that when she regained consciousness, she did not find the respondent, went to the back to her house showered and slept. She testified that the respondent wanted to sexually abuse her.
6. PW1 was later recalled, she testified that after the respondent hit her with a rungu she lost consciousness. When she regained consciousness, she found the respondent on top of her attempting to have intercourse with her. The respondent was lying on top of her and her clothes were torn. The respondent's trouser was lowered to the knee and he had intercourse with her. When PW1 saw the respondent, he stood and fled. On cross-examination, PW1 was referred to her witness statement and conceded that she did not mention that the respondent was lying on top of her.
7. JO (PW2) testified that on the material night, she was the respondent with the help of the electricity light beating PW1 using a short rungu. He got out and asked the respondent 'unafanya nini?' but the respondent threatened him and he went back to the house. After 10 minutes PW1 came back to the house with torn clothes. PW2 was also recalled and on cross-examination, he testified that he took a torch and went to check what was happening. He testified that he used the torchlight to see.
8. No. 67934 PC Fred Okuro (PW3) testified that he is from Webuye police station and took over the investigations from Corporal Otwane. The complainant reported that she was raped by a person known to her. The investigating officer handed the victim's clothes. She was issued with a P3 form and the suspect was charged. Initially, the respondent was charged with assault which was subsequently amended to rape, and the alternative charge of committing an indecent act with an adult. PW3 established that the victim and the suspect were neighbours and the offence was committed in the victim's home.
9. Dr. E DWard Vilembwa (PW4) was the clinical officer. He testified that he had the records of PW1 which were filled by his colleague C.O Chebet who has since been transferred. PW4 testified that he was familiar with the handwriting of colleague C.O. Chebet. He testified that PW1 was assaulted and raped by a person known to her. PW1's brown skirt was soiled in blood. She claimed that the assailant beat her and bore a blunt head injury, bruises on the neck, and tenderness on the back and upper limbs. The patient was seen after 5 days and was treated using antibiotics and PEP. The degree of injury was assessed as harm. It was noted that the hymen was absent and laboratory tests revealed that she had pus cells and gonorrhoea. On cross-examination, PW4 testified that a high vaginal swab was done and no spermatozoa were detected.
10. When the respondent was placed on his defence, he gave sworn testimony testifying as DW1. He testified that on the material day, he went to work and got home at 6:30 p.m. He heard screams as his neighbour was beating his wife. DW1 went to his house. He received summons asking him to go to



the police station and proceeded to the station on 29/7/2019. He was informed that he was suspected of raping and assaulting PW1.

11. He explained that he was staying in Nairobi until 26/6/2019. He then went back home. On 14/7/2019 his mother harvested beans and he stayed up to watch out for beans. He then caught PW1 stealing a sack of beans and reported the incident to the village elder. Simon Omondi (DW2) testified that he is the village elder of Kwaaviya village. He recalled that on 14/7/2019 the respondent woke him up at night to report that he caught PW1 stealing beans from his kitchen. DW1 was willing to pardon PW1 and DW2 let them go.

Analysis And Determination

12. I have considered the rival submissions by the parties and the judgment of the subordinate court. The main issue raised in the appeal is whether the evidence on record was sufficient and could lead to the conclusion that the appellant proved its case beyond reasonable doubt.
13. The offence took place at night, at 8:00 p.m. and identification of the respondent was crucial to the prosecution case. In *R v Turnbull & Others* (1976) 3 ALL ER 549 the court in that case stated as follows:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

14. Since the incident happened at night when visual identification was difficult, the prosecution should have established the source of light through evidence. However, the first contradiction in the testimony of the prosecution witnesses was the source of light used to identify the respondent. The trial magistrate found that the prosecution case was marred with inconsistencies and that PW1 was lacking in candour and her word could not be taken for the truth in the absence of corroboration.
15. The appellant contends that the inconsistencies in PW1’s testimony were minor. In *Richard Munene v Republic* (2018) eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.



16. PW1 and PW2 testified that they saw the respondent because the security lights were on. However, when PW2 was recalled, his testimony paints a different picture. PW2 testified that he heard PW1 scream after she went to the toilet. He then took a torch to check what was happening and used a torch to see. It is not clear why PW1 recanted his earlier testimony that the source of light was the security light. It is therefore not clear whether it was dark and the source of light was the torch, whether it was the security light or whether there was any source of light at all. It is not clear how PW1 and PW2 saw the appellant given that they were not consistent in their testimony regarding the source of light.
17. The trial magistrate further considered that the prosecution could not rely on identification by recognition as PW1 testified that the respondent would occasionally visit as he used to stay in Nairobi. The appellant in its submissions has urged the court to consider the testimony of the respondent who testified on cross-examination that he had known PW1 for 3 years. The respondent was not a prosecution witness. In any event, while the respondent may have known PW1 since 2017, PW1 was clear in her testimony that she had known the respondent for 6 months and that he lived in Nairobi and would occasionally visit back home. In the circumstances, considering the totality of the prosecution evidence on identification, I find no fault in the magistrate's finding that the identification of the respondent was shaky.
18. The second contradiction of the prosecution case concerns the testimony of PW1 on the offence of rape. PW1 testified that she was assaulted lost consciousness and woke up to find her clothes torn. She testified that upon regaining consciousness, she did not see the respondent. However, when she was recalled, she testified in detail that after she regained consciousness, she saw the respondent with his trousers lowered to his knees having sex with her. On cross-examination, when referring to her statement, she conceded that she did not mention that the respondent was lying on top of her. The credibility of PW1 as a witness is questionable.
19. The prosecution has argued that the trial magistrate disregarded the doctor's evidence. However, that argument is not accurate. The P3 form notes that PW1 had no hymen. The trial magistrate observed that it was not unusual for the hymen to be absent as PW1 was a married woman with children. The opinion formed in the P3 form was therefore based on the history of PW1 which was a narration by PW1 to the doctor on what happened. The P3 indicates that a woman was raped by a person who is her neighbour while her husband was away on duty. Having found that PW1's testimony was marred with contradictions, discrepancies and inconsistencies, her evidence was unreliable and could not have been the basis of the opinion in the P3 form.
20. Additionally, the respondent adduced evidence indicating that, two weeks before the incident, he caught the PW1 stealing their beans and reported the matter to the village elder, DW2. Consequently, it remains uncertain whether the identification of the respondent as the perpetrator was influenced by other underlying factors such as the report on the theft.
21. According to the P3 form there was evidence that PW1 was assaulted. She sustained blunt injury on the head, and bruises on the neck and thigh, and the back and upper limbs were tender. The P3 form indicates that the injuries were caused by a blunt object and the nature of the injury sustained was assessed as harm. While it is clear that PW1 was assaulted the prosecution did not lead evidence beyond reasonable doubt that the perpetrator was the respondent. After carefully re-evaluating the evidence on record, I find that the prosecution's evidence on the source of light available was shaky and the identification of the respondent as the perpetrator questionable. The finding of the trial magistrate to acquit the respondent cannot be faulted.
22. Consequently, I find that the appeal lacks merit and is hereby dismissed.



DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF MAY 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Matere For the Appellant

Wycliffe Murunga/ Respondent – Present in person

Mr. Elungat - For the Respondent

Wilkister/ Diana -C/A

