



**Murithi v Director of Public Prosecutions (Criminal Appeal
E203 of 2022) [2024] KEHC 6253 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E203 OF 2022
TW CHERERE, J
MAY 16, 2024**

BETWEEN

ZACHARY MURITHI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

*(Appeal against conviction and sentence in Tigania S. O Criminal Case
No. E009 of 2022 by Hon. P.M.Wechuli (SRM) on 15th November,2022)*

JUDGMENT

The Trial

1. Zachary Murithi (Appellant) was charged and convicted of rape contrary to section 4 of the [Sexual Offences Act](#) No. 3 of 2006 (the Act). He also faced a second count of assault contrary to section 251 of the [Penal Code](#) Cap 63 LOK.

Prosecution case

2. Complainant stated that on 29th April, 2022 at about 08.00 pm, she was attacked at her gate by someone that threatened to rape her and attempted to pull down her skirt. That the man hit her with fists on the mouth and pressed her throat and bit her back. That she managed free herself but he managed to shine her torch on the man and identified him as Muriithi because he used to see him at the market.
3. Complainant's neighbor who answer her distress call stated that complainant's clothes were muddy and she had a bite on the shoulder. That she said she could identify her assailant if she saw him during the day.



4. Upon examination by a clinical officer, complainant was found with broken right molar tooth, tenderness on neck, lacerated bite marks on chest and left shoulder, which were assessed as harm as evidenced by the P3 form PEXH. 1.
5. Appellant was subsequently arrested and charged. Appellant offered to remain silent when he was put on his defence.
6. The trial magistrate after hearing the prosecution case found it proved convicted Appellant to serve 10 years and 3 years in the first and 2nd count respectively.

The Appeal

7. Appellant has appealed mainly on the ground that the evidence of identification was not sufficient.
8. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See *Okeno v Republic* (1972) E.A. 32).

Analysis and Determination

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant and for the DPP. The DPP relied mainly on the evidence as adduced by complainant who was the sole witness who stated that he saw the Appellant on the material night using a torch light.
10. I will start by considering whether the 1st count was proved. Section 4 of the [Sexual Offences Act](#) under which Appellant was charged, convicted and sentenced provides that: -

Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

11. A plain reading of the offence of attempted rape requires the prosecution to prove that an attempt was made to commit an act which causes penetration with genital organs which was unsuccessful.
12. In supporting the finding that count 1 had been proved, the trial magistrate relied on [Moses Kabue Karuoya v Republic](#) Nyeri High Court Criminal Appeal No 88 of 2015 [2016] eKLR and [Abraham Orieno V Republic](#) [2011] eKLR where the courts reiterated that in every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly attempt to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded”.
13. Complainant stated that the attacker threatened to rape her and tried to pull down her skirt and I therefore find that the trial magistrate rightly found that an attempt was made to rape the her.



14. The struggle that ensued between the complainant and her attacker caused her a broken right molar tooth, tenderness on neck, lacerated bite marks on chest and left shoulder. The injuries were occasioned in the cause of the attempted rape and ought not to have been framed as a separate count.
15. Concerning identification, it is trite that evidence of visual identification should always be approached with great care and caution (see *Waitbaka Chege v R* {1979} KLR 271). Greater care should be exercised where the conditions for favourable identification are poor. (*Gikonyo Karume & Another v R* {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See *Abdalla bin Wendo & Another v R*, {195} 20 EACA 166; *Wamunga v R*, {1989} KLR 42; and *Maitanyi v R*, 1986 KLR 198).
16. The Court of Appeal in the case of *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.
17. In this case, complainant stated he had struggled with her attacker for about 20 minutes and it is at the tail end that she allegedly directed her torch at him and identified him as Muriithi whom he used to see at the market. Immediately thereafter, complainant was rescued by her neighbor whom he informed she could only identify her attacker during the day.
18. After weighing the evidence by the complainant, I find that if she indeed knew and identified Appellant on the material night, nothing stopped her from telling her neighbor who went to her rescue immediately after the incident that she had been attacked by Muriithi. That she told her neighbour she could only identify her attacker during the day creates a doubt as to the identity of her attacker.
19. The arresting officer did not make it any better for he failed to explain the circumstances under which Appellant was identified as the one that attacked the complainant that night.
20. From the foregoing, I find that the burden to prove that the offences committed against the complainant were committed by Appellant and not any other person was not discharged beyond any reasonable doubt.
21. Consequently, and for the reasons set out hereinabove, I find that the evidence by the victim, which was uncorroborated was doubtful and unsafe to found a conviction. I accordingly find that this appeal has merit.
22. In the end, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that Appellant shall be set at liberty forthwith.

DELIVERED AT MERU THIS 16TH DAY OF MAY 2024

WAMAE. T. W. CHERERE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances



Court Assistants - Kinoti/Munene

Accused - Present in person

For DPP - Ms. Rotich (PC-1)

