



**Malele v Republic (Criminal Appeal 152 of 2023)  
[2024] KEHC 6780 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6780 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 152 OF 2023**

**DR KAVEDZA, J  
JUNE 11, 2024**

**BETWEEN**

**EMMANUEL MATEKA MALELE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence delivered by Hon. E. Boke, SPM on 26th April 2023 in Kibera Magistrate's Criminal Sexual Offence Case No.051 of 2021 Republic vs Emmanuel Mateka Malele)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of rape contrary to section 3(1)(c) as read with 3 of the [Sexual Offences Act](#), No. 3 of 2006 and sentenced to serve 30 years imprisonment on 26<sup>th</sup> April 2023. The particulars of the offence were that on the 19<sup>th</sup> of April 2021 at around 1730hours within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LAM without her consent. Being aggrieved, the appellant filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that section 77 (1) of the [Evidence Act](#) was not complied with. He also argued that the sentence was harsh and excessive.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.



4. The prosecution called four (4) witnesses in support of their case. The complainant LAM (name withheld) testified that her friend LKM had informed her about a lady seeking a house help and provided her with the contact number of an intermediary. On 19<sup>th</sup> April 2021, the said intermediary called her (PW1) and arranged a meeting to escort her to the prospective employer's home. Upon meeting, PW1 found that the intermediary was the appellant herein, whom she did not. The Appellant took her round and led her into a forest, explaining that white people and Asians lived in forests. As they walked, they reached a river, and the appellant suggested that they resting, but PW1 wanted to return as it was already 8:00 PM. At this point, two young men appeared. They slapped PW1 and presented her from escaping. The appellant then ordered PW1 to undress and when she refused, he threatened her with a knife indicating that he would kill her, and it is then that PW1 complied.
5. PW1 testified that the appellant then had sex with her and when he was done, he ordered her to tell him his MPesa pin but found there was no money in her MPesa. The appellant stayed in the forest with PW1 until morning. Afterward, PW1 called her friend LKM to recount the events. LKM advised her to go to the hospital first, which she did. When the appellant was arrested, PW1 went to the police station and identified him as the perpetrator. She also visited the scene with the police and the appellant.
6. During cross-examination, PW1 confirmed that she met the appellant the same day LKM introduced them. She denied any prior relationship with him. She explained that the appellant had called her to meet at Huruma Number 10, where he was supposed to take her to her new workplace. Instead, he took her on a roundabout route and suggested she sleep at her new employer's place since she didn't bring any clothes, retrieving them the next day.
7. PW1 further stated that both LKM and Melvin introduced her to the appellant and admitted that the appellant escorted her out of the forest because she couldn't find her way out alone. She mentioned that her clothes were at the police station, but the appellant kept her underwear. Additionally, she said the appellant threatened her, saying it would be embarrassing if she told anyone because she attended church with LKM . PW1 confirmed attending church with LKM but maintained she didn't know the appellant before. She also testified that the appellant took Kshs.300 from her.
8. During re-examination, she stated that she followed the appellant into the forest, believing he was taking her to work. She denied any suggestion that LKM and Melvin conspired against the appellant and maintained she had no reason to frame him.
9. LKM (PW2) worked at a (particulars Withheld) in Pangani and knew the appellant as a regular customer. On April 18, 2021, the appellant asked PW2 if she knew someone looking for a job. PW2 contacted her friend Linet (PW1), who was seeking employment. The next day, PW2 gave the appellant PW1's phone number and informed PW1 to meet him at Airbase on Juja Road. Later, PW1 called PW2 to confirm she had met the appellant and would update her after securing the job. At 5:00 AM the following morning, PW2 saw a missed call from PW1, who then informed her that the appellant had attacked and raped her near the cemetery.
10. PW2 reported the incident to her boss, Saida, who advised her to change her phone number and lure the appellant by pretending to need a job. PW2 arranged a meeting with the appellant and informed the police. She met the appellant at Guru Nanak, disguised with a mask and headscarf. The appellant led her towards City Park, where police intervened and arrested him. PW2 and the appellant were taken to Pangani Police Station. PW2 later learned that PW1 had already reported the incident at Parklands Police Station and was receiving hospital treatment. During cross-examination, PW2 stated that PW1 stayed at her place after reporting to the police.



11. PC Elizabeth Wamboi (PW3), the investigating officer from Parklands Police Station, took on the case on April 21, 2021, after it was reported on April 20, 2021. PW1 narrated the incident to PW3. They visited the scene but couldn't access the exact location due to red ants. PW3 recorded statements and charged the appellant.
12. PW4 Selina Nyambu, a clinical officer from M.S.F. Hospital, produced medical reports as exhibits. The documents, prepared by a colleague, indicated that PW1 had fresh abrasions on her genitalia, spermatozoa presence, and a torn hymen with old tears. On cross-examination by the appellant's counsel, she stated that according to her history and the findings, she could conclude that there was penetration and that the same was forced having observed fresh abrasions at the entry of the victim's vagina.
13. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence.
14. DW1, Emmanuel Mateka, the appellant herein, tendered sworn evidence and stated that he lived in Kangemi as a hawker. On 19 April 2021, the date of the alleged rape, he claimed he was working, buying watches and shoes in town and hawking them in Wangige, Kiambu, until 4:00 PM. While returning to Kangemi, three people approached him in town, took him to Parklands Police Station without explanation, and did not testify in court. He further testified that while at the police station, was handed over to the investigating officer and did not see the complainant until when he was brought to court. He stated that he was not taken to the hospital for examination, although his saliva was taken as a sample. He denied knowing PW2 (Lena) or ever speaking with PW1. During cross-examination by the prosecution, he maintained his innocence, suggesting a possible mix-up with someone else.
15. The trial court found him guilty of the offence charged and convicted him accordingly.
16. I have considered the grounds of appeal and the submissions by parties and I find that the main issues for consideration are whether the prosecution proved its case beyond reasonable doubt and whether the sentence was harsh and excessive in the circumstances.
17. The main ingredients of the offence of rape created in section 3 (1) of the Sexual Offences Act include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent in the case of *Republic vs. Oyier* [1985] KLR 353 the Court of Appeal held that;
  - “ 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
  2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
  3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”



18. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
19. As regards penetration, PW1 gave a detailed account of how the appellant led her into the forest, falsely claiming that white people and Asians lived there, under the pretence of getting her a job. However, when PW1 indicated that she wanted to leave as it was late, two men appeared and slapped her, and walked towards where they had come from to prevent her from escaping. The appellant then ordered PW1 to undress and when she refused, he unveiled a knife and threatened her. Fearing for her life, PW1 complied, and the appellant proceeded to have sex with her.
20. PW1's evidence was also corroborated by the medical evidence tendered by PW4 who produced the same on behalf of a colleague. She indicated that from the medical documents, it had been observed that PW1 had fresh abrasions on her genitalia and presence of spermatozoa as well as a torn hymen with old tears. According to PW4, the old tears were understandable considering the age of PW1. However, it was her conclusion that the presence of injuries and spermatozoa on PW1's genitalia proved there was penetration.
21. As regards the issue of consent, it is trite law that where a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will, nor is it any excuse that she consented after the fact. In the present case, I find nothing to show that the sexual encounter was consensual. PW1 testified that it is only after the appellant threatened her with a knife that she consented to having sex with him for fear of her life. The same was corroborated by the evidence of PW3 who testified that from the medical documents, it has been observed there were fresh abrasions at the entry of the PW1's vagina indicative that the sexual encounter was forced.
22. On the issue of identification, PW1 testified that the appellant, unknown to her before, contacted her with the pretence of offering her a job. PW2 corroborated this, stating that she connected PW1 with the appellant on the material date upon his request for a house help. PW1's testimony further revealed that the appellant led her into the forest where he raped her and stayed with her (PW1) until morning. The appellant's denial of the offence does not hold, as it contradicts the consistent testimonies of PW1 and PW2. Additionally, the appellant during plea admitted that he was with PW1 on the material date and that he committed the offence except that the two people referred to by PW1 were not present. From the totality of the evidence presented, I find that there was proper identification of the appellant refuting any claims of mistaken identity.
23. The appellant contended that the trial court failed to comply with section 77(1) as read with (3) of the *Evidence Act*. He submitted that Selina Nyambu PW4 was not the maker of the PRC Form produced as a prosecution exhibit and should not have produced it. Section 77 of the *Evidence Act* provides,

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- (1) in criminal proceedings any document purporting to be a report under the hand of Government analyst; medical practitioner or of any ballistic expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.



- (2) The court may presume that the signature to any such document is genuine and then the person signing it held the office and qualification which he processed to hold at the time he signed it”.
- (3) When any report is so used the court may if it thinks fit summon the analyst ballistic expert document examiner, medical practitioner of geologist as the case may be, and examine him as to the subject matter thereon.
24. The aforesaid provision allows public documents made by experts including medical practitioners to be admissible in evidence. In the present case, there is evidence that Barbara Salano was not available to testify since she at the time holding an administrative position. PW4 produced the PRC Form on her behalf. He testified that he was conversant with Salano’s signature and handwriting and that the PRC form was filled by her. This was in compliance with section 33(b) and section 77 of the Evidence Act. I do not therefore find that the production of the PRC form by a person other than the maker was unlawful.
25. The upshot is that I find that the prosecution adduced evidence beyond reasonable doubt to prove all the elements of rape against the appellant herein as charged. In the circumstances, this appeal against conviction fails and is dismissed.
26. On the issue as to whether the sentence of 30 years was harsh and excessive, section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence of rape as follows;
- “ A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”
27. Sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court, in this case, was lawful but considering that the appellant was a first offender, he needs rehabilitation. I am satisfied that the sentence was harsh and manifestly excessive.
28. The upshot is that the sentence of thirty (30) years imposed by the trial magistrate is hereby set aside and substituted with a sentence of fifteen (15) years imprisonment from the date of the appellant’s arrest 20<sup>th</sup> April 2021 having spent the entirety of the trial in remand custody.

It is so ordered.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF JUNE 2024.**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Ms. Tumaini Wafula for the State

Joy Court Assistant

