



**JCM v Republic (Criminal Appeal E071 of 2022)
[2024] KEHC 8910 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E071 OF 2022**

JM OMIDO, J

JULY 25, 2024

BETWEEN

JCM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement, conviction and sentence of Hon.
I. Gichobi, Principal Magistrate delivered on 15th November, 2022)*

JUDGMENT

1. This judgement is predicated on the appeal against the judgement, conviction and sentence of Hon. I. Gichobi, Principal Magistrate delivered on 15th November, 2022 in Kangema Sexual Offence Case No. E041 of 2021, Republic v JCM.
2. JCM (hereinafter referred to as “the Appellant”) was in the lower court charged with the offence of rape contrary to Section 3(b) of the *Sexual Offences Act* Cap 63A Laws of Kenya (erstwhile *Act No. 3 of 2006*). It was stated in the particulars of the offence that on 13th December, 2021 at around 1500hrs within Murang’a County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of PWK (name withheld, hereinafter referred to as “the survivor”), a 76-year-old woman without her consent.
3. In the alternative charge, the Appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act*, Cap 63A Laws of Kenya. The prosecution stated in the particulars of the offence that on 13th December, 2021 at around 1500hrs within Murang’a County, the Appellant intentionally touched the vagina of PWK (name withheld, hereinafter referred to as “the survivor”), a 76-year-old woman, with his penis without her will (sic).



4. The Appellant denied both the principal and the alternative counts which then paved way for a trial. The prosecution called six witnesses. Upon closure of the prosecution case, the Appellant gave a sworn testimony. On conclusion of the trial, the Appellant was found guilty and convicted on the principal charge of rape and was subsequently sentenced by the trial court to serve thirty (30) years imprisonment.
5. The Appellant now appeals to this court against his conviction and sentence vide a Petition of Appeal dated 16th November, 2022 proffering the following grounds of appeal:
 - a. That the Honourable trial Magistrate erred in law and in fact in convicting and sentencing the Appellant when the evidence adduced was scanty and/or insufficient thereby arriving at a wrong and improper decision.
 - b. That the Honourable trial Magistrate erred in law and in fact in convicting and sentencing the Appellant when the evidence adduced was actually contradictory, misplaced and unjust thereby arriving at an improper, unjust and uninformed decision and judgement.
 - c. That the Honourable trial Magistrate erred in law and in fact in arriving at an improper, unlawful and illegal decision on facts and information that did not support comprehensively the evidence to necessitate a conviction upon the Appellant thus fully improper and wrongful and in decision making (sic).
 - d. That the Honourable trial Magistrate erred in law and in fact in disregarding pertinent information of facts and evidence which were not appropriately adduced for corroboration and disregarding then Appellant's facts and statements.
 - e. That the Honourable trial Magistrate erred in law and in fact in admitting and entertaining exaggerated and extraneous unjust information and evidence which was not exhibited appropriately in support through key documents necessitating miscarriage of justice.
 - f. That the Honourable trial Magistrate erred in fact in sentencing me (sic) to the minimum mandatory sentence without appreciating the decisions of Odunga J. in petition No. 15 and 16 of 2015 and Mativo J. in Constitutional and Judicial Review Petition No. 97 of 2021.
6. It was accordingly the prayer of the Appellant that this court allows the instant appeal and quashes the conviction and sets aside or reduces the sentence of 30 years imprisonment, as the case may be.
7. The court directed that the appeal proceeds by way of written submissions and both the Appellant and the Respondent filed their respective submissions.
8. I have perused the petition of appeal, the submissions by the two sides and the record in its entirety.
9. It is thus this court's duty to reconsider and reevaluate the evidence and reach its own conclusions, bearing in mind that it did not see or hear the witnesses when they testified. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“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. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence.

The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 findings and conclusions; 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.”

10. At the trial before the lower court, the first prosecution witness (PW1) was INI (name withheld). The witness told the trial court that she lived with the 76-year-old survivor who was her mother in law and who suffered epileptic fits.
11. The witness told the trial court that on 13th December, 2021, her aunt BWM (name withheld) sent her child AB (name withheld) to PW1 to ask her to immediately go and see BWM. PW1 took time to heed the call which prompted BWM to send PW1's son GK (name withheld) to ask her to immediately go and see BWM. GK then informed PW1 that the survivor had been raped by one Charagu.
12. PW1 immediately proceeded to her home where she found the survivor standing by the roadside. PW1 noticed that the survivor's clothes were bloodstained on the right side and that she was bleeding from her mouth.
13. On querying the survivor to tell her what had transpired, the survivor narrated to PW1 that she had met Charagu at a shop nearby and that Charagu beckoned her. That he then held her by the hand and led her into his house where he hit her with fists on the head and mouth and told her to remain silent following which he lifted her legs and raped her while holding her mouth to subdue her screams.
14. PW1 further stated that the survivor told her that Charagu ejected her from his house after raping her and that her key was left in his house. That he then locked his house and walked towards a nearby river. That the survivor then met one Mama K (name withheld) who, upon learning of what had happened, advised the survivor to inform JMK (name withheld), which she did after walking with difficulty to JMK's place.
15. PW1 told the court that she called JMK on phone to follow up on the matter and that the latter informed PW1 that she had called the Assistant Chief Githige Sublocation and advised PW1 to follow the matter with the administrator. They called the Assistant Chief on phone and she joined them and advised the three to take the survivor to hospital which they did. At Muriranja Hospital, they were advised to first report the matter to the police and a report was made at Wanjengi Police Post.
16. The survivor was examined and treated following the police report. Her P3 form was completed at Kangema Subcounty Hospital. The witness and others recorded their statements.
17. Upon being cross-examined by the Appellant, PW1 stated that it is the survivor who told her that it is the Appellant who raped her and that the survivor took JMK to the house where the incident had happened.
18. The trial court examined and declared the survivor to be a vulnerable witness and directed that she testifies through an intermediary. The testimony of the survivor, through the intermediary was that she was 50 years old and a mother of two.
19. She testified and stated that on 13th December, 2021, she was beaten on her mouth and face by the Appellant who then lifted her legs and penetrated her vagina with his penis which the survivor described as being very huge. After he was done, he egressed her from his house, leaving her keys behind,



- and locked it. The survivor then went and informed JMK of what had transpired and took her back to the house where she had been raped but they did not find the Appellant as the house was locked.
20. The survivor stated that she was taken to Kangema Subcounty Hospital where she was examined and treated. She identified her treatment notes and P3 form.
 21. The survivor stated that she did not know the assailant but pointed out the Appellant (then the accused person) before the trial as the one who violated her.
 22. On being cross-examined by the Appellant, the survivor told the trial court that she was walking to her home after having lunch at JMK's house when she encountered the Appellant, who then led her into his house where he violated her. She stated that she screamed for help but her assailant subdued her. She denied framing the Appellant and stated that she was not aware if JMK was indebted to the Appellant.
 23. JMK testified as the third prosecution witness (PW3) and told the trial Magistrate that the survivor was her aunt and that PW1 was the survivor's daughter-in-law. She recalled the events of 13th December, 2021 and stated that she had lunch with the survivor at her (PW3's) house. The survivor then left for her house which was 20-30 minutes' walk away.
 24. PW3 explained that about 2 hours later, the survivor returned to her house. She was bleeding from her mouth and her clothes were bloodstained at the back. She was crying. The survivor told PW3 that a man had held her hand and had taken her to his house where he raped her. She told PW2 that her attacker was the man who ordinarily picked coffee at PW3's farm.
 25. PW3 told the trial court that the survivor led her to the house where she had been raped, which PW3 knew belonged to the Appellant, whom she had known since her childhood. The Appellant was not there and the house was locked. She stated that the survivor told her that her keys had remained in the Appellant's house. PW3 stated that the Appellant had been to her home earlier that morning. The witness then advised the survivor to inform BWM what had happened.
 26. The witness was cross-examined by the Appellant and told the trial court that there were no other houses close to the Appellant's house. She added that it is the Appellant who would pick coffee at her farm and that he would be paid for his work. PW3 denied owing the Appellant any dues.
 27. The prosecution called BWM as the fourth witness. The witness told the trial court that on 13th December, 2021, she was unwell. She received a phone call from PW3, who was her sister in law, who asked the witness to accompany her to take the survivor, whom she said had been raped and beaten up by the Appellant, to hospital for treatment and to the Assistant Chief's office in Gitige to make a report.
 28. PW3 and PW4 took the survivor to Gitige Police Camp where a report was made. She later learnt that the Appellant had been arrested. The survivor was taken to Kangema Subcounty Hospital where she was attended to.
 29. The Appellant cross-examined the witness who told her that the survivor's mouth and face were swollen and that she was bleeding from her mouth. Her clothes were also blood stained at the back.
 30. Jediel Muturia Joseph (PW5), a clinical officer attached to Kangema Subcounty Hospital was the fifth prosecution witness before the trial court. The witness told the trial court that he examined and treated the survivor and subsequently completed her P3 form on 14th December, 2021. The patient presented a history of having been raped on 13th December, 2021.
 31. The witness stated that at the time of examination, the survivor, who was 76 years old, had a dress that was bloodstained.



32. Upon examination, the survivor had a cut on the upper lip which was about 20 hours old. Her genitalia was normal and had no lacerations, bruises, swelling or tenderness. She had an old broken hymen. There was perivaginal whitish discharge. Vaginal swab did not show any spermatozoa. HIV and syphilis tests returned negative results. Urinalysis test showed the presence of red blood cells. The witness produced the survivor's treatment notes and P3 form as PExh1 and PExh2 respectively.
33. On being cross examined by the Appellant, PW5 told the court that he did not know the source of the blood in the survivor's clothes. He clarified that the absence of lacerations and bruises in her genitalia did not necessarily mean that she was not raped and could not rule that out as she had previously engaged in sex. He stated that she was past the age of menstruation.
34. The last witness that the prosecution called was the investigating officer, Police Constable Abdi Ali (PW6) of Kirogo Police Station.
35. In his testimony before the trial court, PW6 told the court that on 13th December, 2021, he was informed by the Chief Wanjengi Location that a report had been made that a mentally disabled woman had been raped by a person known to her and that the suspect had been apprehended by members of the public.
36. PW6 proceeded to re-arrest the Appellant at Wanjengi Shopping Centre and placed him in police custody. The officer recorded the report and issued a P3 form to the survivor. The Appellant was transferred to Kirogo Police Station. The officer visited the scene, led by the survivor and caused the Appellant to be charged when investigations were concluded.
37. In the trial court's considered ruling rendered on 14th September, 2022, a finding was reached that the prosecution had established a prima facie case against the Appellant and he was placed on his defence.
38. In his sworn defence, the Appellant stated that he worked for PW1 as a casual worker and would pick coffee in her farm.
39. The Appellant stated that he knew the survivor as she habitually visited PW1 on a daily basis. He also knew that the survivor was epileptic and would at times suffer feets.
40. The Appellant told the trial court that he went to PW1's home on 13th December, 2021 to ask for money that PW1 owed him. He stated that he did not work at PW1's farm on that day.
41. In his further defence, the Appellant told the trial court that he was arrested in a bar in Gituto later that day at about 3.00pm and taken into custody and later charged.
42. The Appellant stated that he was framed because PW3 owed her Ksh.1,800/-. He denied ever committing the offence that he was charged with in the lower court.
43. The Appellant did not call any witness and the defence case in the lower court was closed at that stage.
44. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court's record in its entirety, I will deduce the issues that I am now tasked to determine which culminate in the question whether the Appellant's conviction and sentence were safe and proper as follows:
 - a. Whether the ingredients of the offence of rape were proved against the Appellant beyond reasonable doubt.
 - b. Whether the sentence meted on the Appellant was lawful and appropriate.



- c. Subject to (a) and (b) above, whether this court should interfere with the trial court's findings on conviction and sentence.
45. Regarding the first issue above, I will look at the definition of the offence of rape as is provided for under the *Sexual Offences Act*. The statutory definition of rape is found in Section 3 (1) of the *Act*. Let us read it;
- 3(1). A person commits the offence termed rape if—
- i. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - ii. the other person does not consent to the penetration; or
 - iii. the consent is obtained by force or by means of threats or intimidation of any kind.
46. The main ingredients of the offence of rape created in the above Section of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one adult person by another, coupled with the absence of consent or with consent that is obtained by force or by means of threats or intimidation of any kind.
47. In the case of *Republic v. Oyier* [1985] KLR 353 the Court of Appeal held as follows:
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.
48. The first issue identified for determination above is whether the ingredients of the offence of rape were proved against the Appellant beyond reasonable doubt. Appurtenant thereto are the following:
- a. Whether penetration was proved.
 - b. Whether the complainant consented to the act.
 - c. Whether the Appellant was positively identified.
49. The first issue I will address is whether there was an intentional and unlawful commission of an act which caused penetration of the assailant's genital organ into the survivor's genital organ. On this, the survivor vividly explained that the assailant took her into his house, attacked her by assaulting her on her face and mouth with fists before subduing her and raping her by penetrating his penis into her vagina.
50. As per the evidence of the clinical officer, upon examination, the survivor had no bruises, tenderness, swelling or lacerations. He however stated that the absence of injuries did not rule out the possibility of the survivor having been raped. He stated that it was possible that she would have been raped as it was not unusual for a person who had in the past engaged in sexual intercourse not to have such injuries after being raped.



51. The clinical officer stated in the treatment notes that the survivor had injuries to her face and mouth, which was consistent with the survivor's narration that her attacker hit her with fists on her face and mouth. The clinical officer's evidence therefore corroborated that the survivor was attacked with fists to her face and mouth.
52. It was PW1's evidence that she met the survivor shortly after the harrowing episode and that the former was crying and had injuries which she stated had been occasioned by her attacker. PW3 also saw the injuries that the survivor had suffered. As per the testimonies of the two witnesses, the survivor narrated to them that she had been raped after being hit with fists.
53. In my considered view, the evidence of the injuries corroborates the narration of the survivor that she was attacked and assaulted by the assailant, which made part of the transaction preceding the act of being sexually violated by the assailant. The injuries formed part of the same transaction (*res gestae*) that led to the survivor being raped. The injuries that she sustained supported the consistency of the survivor's evidence, which was in continuum and are relevant in proving the offence of rape.
54. Putting the evidence together, I reach the considered conclusion that the survivor was raped by the assailant and that there is sufficient proof to that as there was penetration of his penis into the survivor's vagina.
55. The next issue for this court to determine is whether the survivor consented to the sexual act. On this, the clear evidence that was placed before the court was that the survivor physically resisted the sexual act by the assailant and that the assailant forcefully and violently penetrated his penis into her vagina. No doubt, there was no consent by the survivor to have sexual intercourse with the assailant.
56. I will then address the third issue, which is that of identification of the assailant. On this issue, the evidence available was that of the survivor, PW1, PW3 and PW4. The survivor told the court that although she did not know the assailant well, she knew him physically and knew the house in which the assailant had violated her. She took PW3 to that house but it was locked and the assailant was not there. PW3 knew that house to belong to the Appellant. At the time, the survivor had visible injuries and was bleeding from her mouth.
57. The survivor pointed out the Appellant before the trial court as the man who raped her – the one that she physically knew.
58. On her part, PW1 told the trial court that she met the survivor who told her that she had been attacked and raped. PW1 informed PW3 of what had transpired.
59. In her testimony, PW3 stated that the survivor told her that she had been raped by a man who worked for her (PW3) as a coffee picker. PW3 told the trial court that it is the Appellant who worked for her as a coffee picker.
60. In his defence testimony, the Appellant admitted that he worked as a coffee picker for PW3 and that she had seen the survivor at the PW3's home severally, where the Appellant stated the survivor visited daily.
61. It is clear that the man that attacked and raped the survivor was one she knew worked as a coffee picker for PW3 and one she could recognize. The survivor recognized and pointed out the Appellant as that



man before the trial court. In the case of *Anjononi & Others v Republic* [1980] KLR 59 the Court of Appeal held that;

“...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”

62. The survivor took PW2 to the house where she was attacked and PW2 knew that house as belonging to the Appellant. PW3 confirmed in her evidence that the Appellant is the one who worked for her as a coffee picker, a fact as I have said above, the Appellant himself admitted in his defence testimony. All these put together, and guided by the above authority of *Anjononi* there is no doubt, in my view that the Appellant was properly identified by recognition without any possibility of fault, as the assailant.
63. The Appellant’s defence was that he was framed because PW3 owed him money. He alluded to collusion between the survivor and PW3. In view of the consistent evidence of the witnesses, the defence by the accused person is clearly an afterthought. I will proceed to dismiss it.
64. On sentence, the Appellant complained that in sentencing him to 15 years imprisonment, the trial Magistrate did not appreciate recent court pronouncements that the mandatory nature of minimum sentences is unconstitutional and therefore meted a sentence that was manifestly excessive.
65. The record of the lower court bears it that the trial magistrate considered both the Appellant’s mitigation and the Prosecution’s statement of aggravating circumstances. It is trite law that sentencing is in the discretion of the trial court and an appellate court cannot interfere with that discretion unless it is demonstrated that the sentence was manifestly excessive or the court applied wrong principles of law or wrongfully exercised its discretion.
66. Under Section 3(3) of the *Sexual Offences Act*, a person guilty of the offence of rape 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. Considering that the survivor was an elderly person of 76 years who had speech impairment, was epileptic and unable to defend herself, my view is that the sentence of 15 years was appropriate and the learned trial Magistrate properly exercised his discretion in sentencing. The learned trial Magistrate did not state in the sentencing proceedings that he was impeded by the mandatory minimum sentence under Section 3(3) of the *Act*. The fact that he sentenced the Appellant to 15 years imprisonment, which is above the minimum under the Act clearly shows that he was not impeded and properly exercised his discretion.
67. However, I note that the Appellant was in custody throughout his trial. Under Section 333(2) of the *Criminal Procedure Code*, the court was under an obligation to consider and take into account the period during which the Appellant remained in custody when sentencing him. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] held that: -

““Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody...”

68. According to *The Judiciary Sentencing Policy Guidelines*:

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may



result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

69. For the reasons stated above, I proceed to dismiss the appeal on conviction. I am however, guided by the authorities above, inclined to allow the appeal on sentence, only to the extent that I now order that the sentence of fifteen years imprisonment shall run from 16th December, 2021, being the date that he took plea and was remanded in custody.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

Prosecution Counsel: Ms. Gakumu.

Court Assistant: Ms. Njoroge.

